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[Weekly Reporter, Oct. 24, 1891.]

THE

WEEKLY REPORTER,

1890-91

(THIRTY-NINTH YEAR),

CONTAINING

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE

WITH

APPEALS TO THE HOUSE OF LORDS AND THE PRIVY COUNCIL,

FROM THE 24TH OF OCTOBER, 1890, TO THE 12TH OF AUGUST, 1891.

TOGETHER ALSO WITH SOME CASES DECIDED PREVIOUSLY TO THAT PERIOD.

TO WHICH ARE ADDED

DIGESTED INDEX AND A TABLE OF THE NAMES OF ALL CASES

REPORTED DURING THAT PERIOD,

WITH

REFERENCES TO CONTEMPORANEOUS REPORTS AND PUBLICATIONS.

VOL. XXXIX.

EDITED BY

MARTIN JOSEPH BLAKE,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

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UNIVERSITY OF CALIFORNIA

PREFACE.

In the thirty-ninth volume of the WEEKLY REPORTER the characteristics of the publication will be found unaltered. Every endeavour has been made to render the reports succinct and accurate, and they have been published as soon as possible after the decisions have been pronounced. It is believed that the cases in this volume may be cited with the confidence which the Profession has always placed in the WEEKLY REPORTER.

The Annual Digest contains, as usual, a summary of all the cases published during the past year in the WEEKLY REPORTER and in the Law Reports, the Law Journal Reports, and the Law Times Reports, besides those given in the Irish Law Reports.

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FROM THE 24TH OF OCTOBER, 1890, TO THE 12TH OF AUGUST, 1891.

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1890—91.

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COURT OF APPEAL (No. II.)		MARTIN JOSEPH BLAKE, RALPH HAWTREY DEANE, HUGH MARTIN CHARTERS MACPHERSON, WILLIAM HENRY QUARRELL, WILLIAM ANDREW WOODS, and WILLIAM SHALLCROSS GODDARD, Barristers-at-Law.
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	Mr. Justice Chitty	VILLIERS DE SAUSSURE FOWKE and GILBERT ROWLAND ALSTON, Barristers-at-Law.
	Mr. Justice North	GEORGE ERNEST JEFFERY, JAMES TRUSTRAM, FRANCIS THEODORE DUKA, ARTHUR LAWRENCE, and CHARLES FREDERICK DUNCAN, Barristers-at-Law.
	Mr. Justice Stirling	WALTER IVIMEY COOK, LEONARD S. BRISTOWE, HUGH MARTIN CHARTERS MACPHERSON, WILLIAM HENRY QUARRELL, WILLIAM ANDREW WOODS, and WILLIAM SHALLCROSS GODDARD, Barristers-at-Law.
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" (CASES IN BANKRUPTCY)		CHARLES FRANCIS MORRELL, Barrister-at-Law.
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CROWN CASES RESERVED		RUDOLPH EYRE MELSHEIMER and THOMAS REGINALD COLQUHOUN DILL, Barristers-at-Law.

A TABLE

OF

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WITH REFERENCES TO THE CONTEMPORANEOUS REPORTS.

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Whitelegg, Urmston v
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Wing, Birchin v
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WEEKLY REPORTER,

1890-91.

Court of Appeal.

From Q. B. Div. June 16; July 29.

MILLS *v.* CHARLESWORTH. (*a.*)

Bill of sale—Pledge—Transference of property, but not of possession—Document regulating terms of holding.

The goods of A. having been seized by the sheriff under a fi. fa., the defendant agreed to pay out the sheriff and to hold the goods as a security for the advance, and that the sheriff's officer should remain in possession of the goods on his behalf. This agreement was reduced into writing and signed by the defendant. The sheriff acquiesced in the terms, and his officer remained in possession of the goods. A. having subsequently executed a bill of sale of the same goods to the plaintiff,

Held, by Lindley *and* Lopes, L.JJ. (Lord Esher, M.R., *dissenting*), *that the agreement, being essential for the proof of the defendant's title to the goods, was a bill of sale, and therefore void for want of registration.*

Appeal from the decision of Day, J.

The following statement of the facts is taken from the judgment of Lindley, L.J.

One Wilson was the owner of goods which were seized by the sheriff under a *fi. fa.* The bailiff in possession was a man named Bristowe. Dickinson was the person who acted for the sheriff, and who gave instructions to Bristowe. On Friday, the 9th of December, 1887, Wilson applied to Charlesworth, an auctioneer, to pay the sheriff out, and Charlesworth agreed to do so, provided that the goods seized were worth the money to be advanced, and provided that Charlesworth had possession of the goods. Charlesworth, having satisfied himself as to the value of the goods, paid Dickinson the amount claimed by the sheriff, and it was agreed between Wilson, Dickinson, and Charlesworth that Bristowe should continue in possession for Charlesworth. Dickinson signed and gave Charlesworth a receipt for £62 15s. 1d., and Wilson signed and gave Charlesworth a letter, which was as follows:—

"December 9, 1887.

"Mr. Charlesworth, Auctioneer, Hull.

"Sir,—In consideration of your paying the sheriff's officer the amount on Townsend's writ and expenses, viz., £62 15s. 1d., I hereby authorize and request you to hold possession of all my furniture and effects now on the premises, No. 2, Pendrill-street, Hull, and to sell the whole by auction as soon as convenient, and, after deducting the above amount and your charges, pay over the balance, if any, to me.—Yours truly,

"A. P. WILSON."

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

All this was done at one time on the evening of the 9th of December. On the 10th of December Bristowe, who had been told on the 9th by Charlesworth that he was going to pay the sheriff out, was instructed to remain in possession for Charlesworth, and he did remain in possession accordingly for some days. Wilson continued to reside with his family in the house where Bristowe and the goods in his charge were, and, owing to the illness of one of Wilson's children, the goods remained undisturbed for a fortnight or so. On the 10th of December Wilson executed a bill of sale to the plaintiff, who knew nothing of the seizure by the sheriff, nor of the arrangement with Charlesworth, nor of the fact that Bristowe had charge of the goods. The plaintiff's bill of sale was duly registered, and on Charlesworth discovering its existence he moved and sold the goods. The plaintiff thereupon brought this action against him to recover their value, and Day, J., who tried the case without a jury, decided that the goods passed to the plaintiff under his bill of sale, and gave judgment for him accordingly.

From this decision the defendant appealed.

Henn Collins, Q.C., Cyril Dodd, Q.C., and *H. T. Kemp,* for the appellant.—The goods passed to Charlesworth as a pledge by oral agreement: *Reeves* v. *Capper,* 5 Bing. N. C. 136. The possession had already passed when the document was drawn up, and therefore it is not a bill of sale, and does not require registration: *Ex parte Hubbard,* 35 W. R. 2 17 Q. B. D 690.

Tindal Atkinson, Q.C., and *Arnold Statham,* for the respondent.—The case falls within *Ex parte Parsons,* 34 W R. 329, 16 Q. B. D. 532, and not within *Ex parte Hubbard.*

Henn Collins, Q.C., replied.

Cur. adv. vult.

July 29.—Lord ESHER, M.R.—In this case the plaintiff had obtained a bill of sale, and the defendant contended that the goods mentioned in the bill of sale were already his, and, therefore, that the bill of sale was of no effect. The sole question was whether the defendant had really before the execution of that bill of sale got the property in the goods. Wilson's goods were seized by the sheriff's officer under an execution. He wished to get the sheriff out, and applied to the defendant, who was an auctioneer, to advance him money for this purpose. The defendant agreed to do this, and, after examining the goods and thinking them sufficient, it was agreed that the defendant should advance the money on the condition that the sheriff's officer, who was then in possession of Wilson's goods, should remain in possession of them, not for the sheriff, but for Charlesworth. The sheriff's officer agreed to this, and accordingly the sheriff was

paid out, and the document in question was drawn up. The sheriff's officer remained in possession of the goods, and Wilson also remained in the house because he had a sick child there. It is plain that there was no joint possession, because the possession of this bailiff and the possession of Wilson were adverse. I think Wilson was not in possession at all, but that the sheriff's officer was in possession on behalf of the defendant. At the trial Day, J., took that for granted.

The question, therefore, is whether the document which was signed at the same time that the money was lent and the possession of the goods was given, was a bill of sale within the Bills of Sale Acts. If the transaction was one of pledge, *Ex parte Hubbard* shows that it does not fall within those Acts. Was it a pledge, then? A pledge in the ordinary sense of the term is when money is advanced on goods or chattels which are given into the possession of the person who advances money on them.

A bill of sale in its ordinary meaning is the document which is given where the legal property in goods passes to the person who lends money on them, but the possession does not pass.

But then comes in the interpretation clause of the Bills of Sale Acts, and says that a document which is a licence to take possession of personal chattels as security for any debt is to be considered a bill of sale. But if the document only regulates what is to be done as regards a pledged object after it has been pledged, as in the case of a pawn-ticket, then *Ex parte Hubbard* shows that it is not a bill of sale. If, however, the document creates a right to take possession, and it was given before the possession was taken, then it is a bill of sale within the case of *Ex parte Parsons*. These two cases determine the limits of what is and what is not a bill of sale, and I think that we ought to stand by them. Applying those limits to the present case, I think that, on the facts, this was not a licence to take possession, but was a document relating to possession already taken, and, therefore, that it was not a bill of sale. In my opinion the judgment of Day, J., was wrong, and this appeal ought to be allowed.

The following judgment was read by:—

Lindley, L.J. (after stating the facts as above).—The main ground of the appeal was that what took place between Wilson, Charlesworth, and Dickinson on the 9th of December amounted to a pledge of the goods by Wilson to Charlesworth, and that the pledge could be proved without having recourse to Wilson's letter of December 9, and that the form of that letter and the non-registration under the Bills of Sale Act did not invalidate such pledge. In support of this contention reliance was placed on the decision of this court in *Ex parte Hubbard*. It is, however, to be observed that in that case there was a physical change of possession of the goods; and the court held that the pledge there effected could be proved without reference to any written document; and that the pledge so proved was not invalidated by the non-registration of a contemporaneous document, which was viewed by the court as at most a record of what had taken place, and as regulating the rights of the pledgee under a pledge created and proved by parol.

In this case, however, there was no physical change of possession of the goods. In point of law, possession of goods may be changed by agreement without any physical change in their position, or in the position of the person who actually guards them. The right to possession may be transferred by agreement, and the character in which the custodian holds them may be changed by attornment. This was established by *Reeves* v. *Capper*, *Meyerstein* v. *Barber*, 18 W. R. 1041, L. R. 4 H. L. 317, and *Hilton* v. *Tucker*, 36 W. R. 762, 39 Ch. D. 669, and, in my opinion, that which took place on the 9th did amount in point of law to a change of possession of the goods; and that whereas before the agreement for the change Bristowe held for the sheriff, after that agreement Bristowe held for Charlesworth. But the agreement by which this change in possession was effected was reduced into writing, and cannot be proved apart from the writing. Without the writing Charlesworth cannot prove his right to possess as against Wilson, the owner of the goods. This at once makes the letter essential to the proof of Charlesworth's title, and brings the letter within the definition of a bill of sale. The reasoning of the court in *Newlove* v. *Shrewsbury*, 36 W. R. 835, 21 Q. B. D. 41, is applicable to this case. Charlesworth's title would, I think, have prevailed at common law; but his title is rendered invalid by the Bills of Sale Act.

The expression "to hold" in the letter is appropriate having regard to the fact that the sheriff had already seized the goods, and that no fresh taking was necessary. To hold for the lender is equivalent to giving up possession to the borrower and retaking for the lender.

If the decision in *Ex parte Hubbard* is extended to cases of pledges created by agreement, and without any physical change in the custody of the goods, the Bills of Sale Act will become of little if any use. Nothing will be easier than to evade it. I cannot construe the Act so as to make it inapplicable to such a transaction as this, or, in other words, to such an agreement in writing as the court has to deal with in the present case.

I am therefore of opinion that the appeal ought to be dismissed.

Lopes, L.J.—I agree with the judgment of my brother Lindley, and am unable to agree with that of the Master of the Rolls. I think this case is altogether distinguishable from that of *Ex parte Hubbard*. In that case it was held that where goods are pledged as security for a loan and delivered to the pledgee, a document that merely records the transaction and regulates the rights of the pledgee is not a bill of sale. The document is merely a record of the transaction. Here the document is an essential part of the transaction, which could not be proved by parol without reference to it. *Ex parte Hubbard* is therefore distinguishable, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *Cotton & Son*, for *J. H. Green*, Hull.

Solicitor for the defendant, *Pritchard & Sons*, for *Locking & Holditch*, Hull.

From Q. B. Div. July 24.

Decroix, Verley, et Cie. v. Meyer & Co. (Limited). (a.)

Bill of exchange—Acceptance—Qualified or general—Negotiability of bill—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 19.

A bill of exchange was drawn by one Flipo payable to himself and directed to the defendants as drawees. The

(a.) Reported by W. F. Barry, Esq., Barrister-at-Law.

defendants accepted the bill as follows :—"In favour of Flipo only. Accepted payable at Alliance Bank, London." The words "In favour of Flipo only" were in writing, and underneath them the rest of the acceptance was impressed with an ordinary stamp.

Held, that the acceptance was a general, and not a qualified, one, and did not restrict the negotiability of the bill.

Appeal from the judgment of the Queen's Bench Division (Cave and A. L. Smith, JJ.), in favour of the defendants upon a special case.

The action was brought by bankers in France, as indorsees of a bill of exchange against the defendants, who carried on business in London, as acceptors. The defence was that the bill was on its face not negotiable, and that the plaintiffs were, therefore, not entitled to recover. The bill was drawn by one Flipo, a merchant in France, upon the defendants as follows :—"On the 31st of October after date pay to order, Mr. L. Delobbel Flipo, £778 4s. 2d." The defendants struck out the word "order," and accepted the bill as follows :—"In favour of Mr. L. Delobbel Flipo only. Accepted payable at Alliance Bank, London, for H. Meyer & Co., Limited; B. Manning, Arthur Manning, directors; Arthur Manning, secretary." The words "In favour of L. Delobbel Flipo only," were in writing, and underneath these words the rest of the acceptance, except the signatures of the directors and secretary, was impressed with a stamp. After the acceptance Flipo indorsed the bill to plaintiffs to be discounted, and the plaintiffs, not noticing that the acceptance was in any unusual form, discounted it, and placed the amount to the credit of Flipo. The bill upon presentation was dishonoured upon instructions from the defendants.

The Divisional Court held that the acceptance was a qualified acceptance rendering the bill not negotiable, and gave judgment for the defendants.

The plaintiffs appealed.

Finlay, Q.C., and *R. M. Bray*, for the plaintiffs.—This acceptance did not make the bill not negotiable. The words "in favour of Flipo only" are surplusage. Every acceptance is in favour of the payee. The words mean payable to Flipo or order. The acceptance was not a qualified one within section 19 of the Bills of Exchange Act, 1882.

They referred to the Bills of Exchange Act, 1882, ss. 8 (sub-sections 1, 4, 5), 17, 19, 36; *Steele* v. *McKinlay*, 29 W. R. 17, 5 App. Cas. 754.

Horne Payne, Q.C., and *G. S. Bower*, for the defendants.—Either this is no acceptance in the proper sense at all, or it is an acceptance prohibiting negotiation of the bill. It is a qualified acceptance within section 19 of the Bills of Exchange Act, 1882. Before that Act a bill drawn in favour of a specified person without the word "order" or "bearer" was not negotiable, but was valid as between the original parties, Byles on Bills, 9th ed., 80. Hence, though that Act rendered the insertion of the word "order" immaterial, still the word "order" being struck out by the acceptors showed that they intended to restrict the negotiability of the bill. The acceptance "in favour of Flipo only" clearly shows that the bill was not to be negotiable. A bill may be indorsed "pay A. only," when, under section 35, sub-section 1, of the Act, it would not be negotiable. This acceptance has the same effect.

They referred to *Rowe* v. *Young*, 2 Brod. & Bing. 165.

Finlay, Q.C., replied.

Lord ESHER, M.R.—This instrument was drawn by a foreigner in France upon merchants in London. The bill was drawn since the Bills of Exchange Act, 1882, and therefore that Act applies. The defendants, when the bill was presented to them for acceptance, wrote their names across it. When a person to whom a bill is presented for acceptance writes his name across it he has *primâ facie* accepted it according to its legal tenour and effect. He is entitled, however, to qualify his acceptance. What was the legal tenour and effect of this bill? It seems to me that even without the assistance of the Bills of Exchange Act, 1882, the bill was payable to Flipo or order. But, however that may be, it is clear that since that Act, by section 8, sub-section 4, the bill must be read as if the word "order" was in it. In either case the bill is drawn payable to Flipo or order. The defendants accepted that bill. It may be that they intended to make their acceptance a qualified one. The question, however, is whether they have effectually done so. It was said that striking out the word "order" in the bill showed the intention of the defendants to qualify their acceptance. It seems to me that the striking out of that word was an improper act. An acceptor has no right to alter the bill. He must accept it or refuse to accept it as it is drawn. If he wishes to qualify his acceptance he must do so by the acceptance. I should be inclined to think that by the mercantile law the improper erasure of the word "order" would have no effect upon the bill, and that unless the acceptance itself is a qualified one the acceptor must be taken to have accepted the bill as drawn. But, however that may be under the Bills of Exchange Act, 1882, the erasure of the word "order" does not affect the negotiability of the bill, though it may be a fact to be taken into consideration in seeing what the intention of the acceptor is. We must therefore look at the acceptance to see whether it is a qualified one or not. *Primâ facie*, a person must be taken to have accepted a bill generally. If he desires to make his acceptance restrictive, he must do so in clear and express terms. If he leaves the matter in doubt he must be taken to have accepted generally. The acceptance in the present case is "in favour of Flipo only." What is the meaning in mercantile language of the words "in favour of" in a bill of exchange? If a person says that he has drawn a bill in your favour, he means that he has drawn a bill to your order, you being named as the payee. The addition of the word "only" means that you are the only payee. That being so, the meaning of those words in an acceptance is that the acceptor has accepted the bill in which you are the only payee. The words, therefore, do not restrict the acceptance. They have no effect upon the bill as drawn. If they were held to qualify the acceptance, they would be a trap to catch innocent indorsees. Reading the acceptance in that way, it is obvious that the defendants have not carried out in appropriate language their intention of making a qualified acceptance. The bill, in its origin, was negotiable, and the acceptance has not restricted its negotiability. The bill was complete without the acceptance, as is seen from the definition of a bill given in the Act, and therefore the acceptance is no part of the bill. Section 19 gives instances of qualified acceptances, which are not exhaustive, but are only instances; but any qualification of an acceptance must be made in express terms. I do not think that the defendants have by this acceptance altered the effect of the bill, and therefore this acceptance must be taken to be a general one. The appeal must accordingly be allowed.

LINDLEY, L.J.—This case seems to me to be one of some difficulty. The principle stated by the Master of the Rolls seems to me to be a sound one, that an acceptance must be taken most strongly against the

acceptor. The defendants have used ambiguous words, and not words clearly qualifying their acceptance. They ought not to have used words that might be a trap for unwary indorsees. The true view to take in this case is that the defendants have not qualified the acceptance in clear terms, and on that ground I am of opinion that the plaintiffs are entitled to recover.

Bowen, L.J.—I am of the same opinion. It is of the highest importance in mercantile business that qualifications of acceptances should be construed strongly against the acceptors. It is clear that this was meant to be an acceptance. If a merchant does not wish to accept a bill having a certain tenour and effect, why does he write his name across it? If he wishes to qualify his acceptance he ought to qualify it in clear terms, so that he who runs may read. If any authority were needed for that proposition plenty can be found, and in particular I would refer to the case of *Smith* v. *Vertue*, 9 W. R. 146, 30 L. J. C. P. 56. Is, then, this a qualified acceptance? If it is it is most misleading. The drawer is a foreigner in France, and the bill is sent back to him with the words "in favour of Flipo only" written at the top of the acceptance, and the ordinary acceptance stamped on the bill below those words. That would be a most misleading thing to do if the bill were intended to be not negotiable. Why should the bill be accepted payable at a particular bank if it was intended to be payable only to a particular person and not to be negotiable? How unintelligible such language would be if that was the intention. But, further, if a qualified acceptance was intended, the proper and ordinary place to insert the qualification would be in the stamped part of the acceptance. Instead of doing so, the defendants write above the stamped acceptance the words "in favour of Flipo only." A person into whose hands the bill might come would have to construe those words to see what they meant. I do not attach much importance to the erasure of the word "order" in the body of the bill, as the effect of the Bills of Exchange Act, 1882, is to re-insert that word in the bill. To my mind those words mean, payable to Flipo or order. The addition of the word "only" does not render that meaning different. It does not restrict the negotiability of the bill. It may perhaps be that if the words used had been "payable to Flipo only," the case would have been different. The acceptors have overshot their mark, and I cannot be sorry that they are held bound by the ambiguous language they have used, inserted, as it is, in an ambiguous place. The defendants, therefore, have not properly qualified their acceptance, and if we came to any other conclusion I feel convinced that we should be running counter to what any business man in the City of London would say was the right construction of the document.

Appeal allowed.

Solicitors for the plaintiffs, *Hill, Son, & Rickards.*

Solicitors for the defendants, *William Webb & Co.*

High Court of Justice.

Chan. Div. Kay, J. — Aug. 6.

In re Hemingway.
James *v.* Dawson. (*a.*)

Will — Construction — Annuity — Gift over on death without "leaving" child.

A testator gave to L. an annuity during her life, payable out of the rents of leaseholds, and directed that after L.'s death the annuity should be payable to and among such of L.'s children as, being sons, should attain twenty-one, or, being daughters, should attain that age or marry; and, in the event of the death of L. "without leaving" any such child, then over. L. survived the testator, and had one child only, who attained twenty-one and died in L.'s lifetime.

Held, that the gift over took effect, the annuity being a personal provision for the annuitant and her children.

Adjourned summons.

A testator, who died in 1872, gave to his daughter Lucy an annuity during her life, payable half-yearly out of the rents of leasehold property held for an unexpired term of about sixty years, and directed that after the death of his said daughter the annuity should be payable half-yearly to and among such of her children as, being sons, should attain twenty-one, or, being daughters, should attain that age or marry, and if there should be but one such child, should be payable to such only child, and in the event of the death of his said daughter "without leaving" any such child the testator gave the annuity which should fail by such death unto and among the survivors of the testator's children and grandchildren. Lucy survived the testator, and had one child only, who attained twenty-one, but died in her lifetime. The question was whether on the decease of Lucy the gift of the annuity took effect in favour of her child, or whether the annuity passed under the gift over.

Theobald, for the representative of the child of Lucy.—The annuitant died without leaving a child; "leaving" must be construed "having had" according to the rule of *Howgrave* v. *Cartier*, 3 V. & B. 79; *Traharne* v. *Layton*, 23 W. R. 799, L. R. 10 Q. B. 459.

W. H. Gover, for persons interested under the ultimate gift.—The direction that the annuity shall be payable by half-yearly instalments to and among the children is not a direct gift to them; the children did not take vested interests, and the rule of *Howgrave* v. *Cartier* does not apply: *In re Hamlet, Stephen* v. *Cunningham*, 37 W. R. 245, 39 Ch. D. 426; *In re Jackson's Will*, 28 W. R. 209, 13 Ch. D. 189.

Kay, J.—The question is whether the court can in this case depart from the natural meaning of the words of this will and construe "leaving" as "having had." This has been done when there was a previous vested interest given, which the words of the will strictly construed would defeat. No authority has been adduced to show that a gift of an annuity is governed by the same rule; an annuity, *ex vi termini*, has the character of a personal provision, and differs considerably from a gift of a lump sum.

This annuity is charged upon leasehold property which the testator directs shall not be sold. There is no gift in words to the children of Lucy, but her annuity is to be payable half-yearly to and among her children. These words, coupled with the fact that the

(*a.*) Reported by James H. Bakewell, Esq., Barrister-at-Law.

bequest is an annuity which cannot be anticipated, show that the testator intended to make a personal provision for his daughter Lucy for her life and for her children after her death. Since the only child of Lucy which attained twenty-one died in Lucy's lifetime, there was no child to whom the annuity could be paid; the annuity therefore failed upon Lucy's death, because there was no child to receive it. In my opinion that is what the testator intended, and, therefore, the representative of Lucy's child will take nothing.

Solicitors, *Cunliffes & Davenport*, for *C. A. Heitzman*, Cardiff; *Williamson, Hill, & Co.*, for *H. Heard*, Cardiff.

Ch. Div. North, J. } July 12.

In re WEYMOUTH AND CHANNEL ISLANDS STEAM PACKET CO (*a.*)

Company—Winding up—Fully-paid shares—Shares issued at a discount—Distribution of surplus assets.

In the distribution of the surplus assets of a company between the holders of fully-paid shares and the holders of shares issued at a discount, the fully-paid shareholders must first be repaid the amount paid on their shares in excess of the amount paid on the shares issued at a discount, and the balance of the surplus assets will then be distributed between all the shareholders equally.

In re Hodge's Distillery Co., 19 *W. R.* 113, *L. R.* 6 *Ch.* 51, *followed.*

Petition.

This was a petition by the liquidator in the voluntary winding up of the above company for the decision of the court as to the distribution of the surplus assets of the company amongst the shareholders after payment of the debts of the company.

The company was registered in 1857 as a limited company under the Joint-Stock Companies Act, 1856, with a capital of £40,000, the shares being of the value of £10 each. 2,917 of the shares issued were fully paid up. By special resolutions passed in 1861 to increase the capital by the creation of 2,016 additional shares of the nominal value of £10, and as an inducement to subscribe this additional capital, the directorate was authorized to issue these shares as fully paid up in consideration of the sum of £3 per share.

For a certain number of years the new shareholders were to receive certain guaranteed interest, and they were also to share dividends with the other shareholders equally. 1,631 shares were issued on these terms, and the shares had been for years treated in every way as on the same footing as the original shares, and there was nothing on the certificate or otherwise to show any distinction between the shares. The surplus assets distributable among the shareholders was £25,000.

Chadwyck Healey, for the liquidator.

Napier Higgins, Q.C., and *Mulligan*, for the fully-paid shareholders.—The issue of shares at a discount is illegal: *In re Almado and Tirito Co.*, 36 W. R. 593, 38 Ch. D. 415. The new shareholders must be treated as only having paid £3 per share. The surplus assets must be applied in repaying the fully-paid shareholders the sum of £7 per share, and the balance should be then divided between all the shareholders equally: *In re Hodge's Distillery Co.*, 19 W. R. 113, L. R. 6 Ch. 51.

They also cited *In re Railway Time Tables Publishing Co.*, 37 W. R. 531, 42 Ch. D 98; *In re London Celluloid Co.*, 36 W. R. 673 39 Ch. D. 190; *In re Newtownards Gas Co.*, 15 L. R. Ir. 51, 33 W. R. Dig. 39; *In re Vulcan Ironworks Co.*, W. N., 1885, p. 120.

Hardy, Q.C., and *W. B. Heath*, for the discount shareholders.—The issue of shares at a discount may be illegal and void as regards creditors, but the question here is what was the agreement between the contributories. The original shareholders have received the benefit of the contract, by the use of the new capital brought in, and it must be assumed that they had acquiesced in the arrangement. The surplus should be distributed between all the shareholders equally: *In re Bangor and Portmadoc Slate and Slab Co.*, 23 W. R. 785, L. R. 20 Eq. 59.

Higgins, Q.C., in reply.

NORTH, J.—I have no doubt that in this case the holders of the discount shares cannot, after the lapse of time that has taken place, repudiate their position as shareholders. They applied for shares and agreed with the company that in consideration of £3 per share they should receive a fully paid-up £10 share. Now it has been held, after remaining in doubt for a considerable time, that such a contract is illegal, and the case of *In re Almado and Tirito Co.*, which has been cited in the argument, is an authority to that effect. In my opinion the shares must be treated as having only £3 paid up. Mr. Hardy says that though the issue of the shares at a discount is illegal as between shareholders and creditors of the company, there is nothing to make it illegal as between the shareholders themselves. I cannot however see how every shareholder could be held to have assented to the issue of the shares at a discount, and though some might be bound by acquiescence, I cannot hold that the whole class is bound. I am bound by the authority of the case of *In re Hodge's Distillery Co.*, which has been frequently followed, and the authority of which has been recognized in the House of Lords in *Birch* v. *Cropper*, 38 W. R. 401, 14 App. Cas. 525, and on the principle there laid down I direct that the surplus assets should be applied first in repaying to each of the original shareholders the sum of £7 on each share, levelling them down to what has been paid by the discount shareholders, and then the balance must be divided equally between all the shareholders alike.

Solicitors, *Pattison, Wigg, & King*; *A. B. Chubb.*

Ch. Div. Fry, L.J. } Aug. 4, 5.

DE FRANCESCO *v.* BARNUM. (*a.*)

Infant—Apprenticeship deed—Covenant to serve—Negative covenant—Validity of deed.

A deed of apprenticeship, whereby an infant apprentice is bound for a term not to accept employment except from the master or with his consent, and which contains no co-relative covenant by the master to provide employment for the apprentice, and which may be terminated by the master only, is invalid, as being unreasonable and not for the benefit of the infant.

Witness action.

The principal question in this action was the validity of certain indentures of apprenticeship entered into by two of the defendants, Ada and Helen Maude

(*a.*) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

(*a.*) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

Q. B. Div. (Pollock, B., and Grantham, J.) Aug 8.

ALDEN v. BECKLEY & CO. (a.)

Practice—Writ—Partnership—Service on manager of firm—Subsequent service on partner—Judgment signed against firm before expiration of eight days from service on partner—Right of partner to set aside such judgment—R. S. C., 1883, *ord.* 42, *r.* 10.

If a writ of summons be served on a partner in a firm after having been served on the manager of the firm, judgment ought not to be signed against the firm until after the expiration of eight days from the last service, and if judgment be signed against the firm before the expiration of eight days from the service on the partner, though after the expiration of eight days from the service on the firm, such judgment is premature, and will, on the application of the partner, be set aside.

Application to set aside a judgment.

Appeal from an order made by Day, J., at chambers, affirming an order of a master setting aside a judgment which had been entered against the firm of H. Beckley & Co.

The plaintiff brought an action on certain bills of exchange against the firm of H. Beckley & Co.

Service of the writ of summons in the action was effected on the firm on the 29th of May, 1890, by serving the manager of the firm on that day. H. Beckley & Co. did not enter any defence.

On the 3rd of June service of the writ was also effected on one H. J. Denison, who was alleged to be a partner in the firm of H. Beckley & Co., and who was served as a partner, though he denied that he was a partner.

After the expiration of eight days from the service on the firm on the 29th of May, judgment was signed on the 6th of June against the firm of H. Beckley & Co., and it was this judgment which it was now sought to set aside.

Execution having issued on the 9th of June, Denison entered an appearance as follows—"Enter an appearance for H. J. Denison"—without stating whether he was or was not a partner.

Judgment having thus been signed against the firm on the 6th of June, Denison, who had been served with the writ on the 3rd of June, took out a summons at chambers to set aside the judgment signed against the firm of H. Beckley & Co., on the ground that it was prematurely signed, as, by ord. 42, r. 10, such judgment might affect him by execution issuing against his goods as an alleged partner, whereas he contended that no judgment to affect him personally could be be signed until the expiration of eight days from the date of the service on him on the 3rd of June.

On this ground the master made an order setting aside the judgment signed on the 6th of June against the firm of H. Beckley & Co., and on appeal Day, J., upheld the master's order, being of opinion that the plaintiff, having served the alleged partner, Denison, as well as the manager of the firm, could not sign judgment against the firm until the expiration of eight days after the last service.

The plaintiff appealed.

A. Powell, for the plaintiff.—The judgment signed on the 6th of June against the firm of H. Beckley & Co. was properly and regularly signed, as it was not signed until the expiration of eight days from the service on the firm; it was, therefore, not prematurely signed. The plaintiff had a right to sign that judgment, as he had a right to serve the manager of the firm, and he did not sign the judgment for eight days after the service on the manager. The judgment against the firm being regularly and properly signed, the subsequent service on Denison on the 3rd of June does not invalidate the judgment.

Gore, for the defendant Denison, was stopped.

POLLOCK, B.—It seems to me that the view taken in this case by my brother Day was correct, and I think that this appeal must be dismissed, with costs.

GRANTHAM, J.—I am of the same opinion.

Appeal dismissed, with costs.

Solicitor for the plaintiff, *Herbert Toomer.*

Solicitors for the defendant Denison, *Snell, Son, & Greenip.*

(a.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

Q. B. Div. (Pollock, B., and Grantham, J.) Aug. 7.

REG. v. SOUTTER. (a.)

*Local government—Vestry—*Quo warranto*—Election of vestryman—Right to question election by* quo warranto *—Qualification—Occupation of club premises as secretary—Sufficiency of Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 6.

The procedure by quo warranto *is applicable to question the validity of the election of a vestryman elected under the provisions of the Metropolis Local Management Act*, 1855.

The qualification of a candidate for the office of a vestryman was that he was rated in respect of the house which he occupied at £19 a year, and he was jointly rated with another person in respect of certain club premises at £55 a year, he being the secretary of the club, and occupying for his own business the ground and first floors of the club from 8 a.m. to 6 p.m.

Held, that he was a mere licensee, and was not an occupier, and was not rated in respect of the club premises so as to bring up his qualification to the £25 per annum required by section 6 of the Metropolis Local Management Act, 1855; *that his qualification was insufficient; and that, therefore, he was not duly elected.*

Rule calling on Francis William Soutter to show cause why an information in the nature of a *quo warranto* should not be exhibited against him, to show by what authority he claims to exercise the office or franchise of a vestyman for Ward No. 4 in the parish of St. Mary Magdalene, Bermondsey, in the County of Surrey.

The ground of the rule was that the said Francis William Soutter is not qualified to act as a vestryman for the said ward, as he is not rated or assessed to the relief of the poor of the said parish upon a rental of not less than £25 per annum of premises of which he is the *bonâ fide* occupier.

Section 6 of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), lays down the qualification for a vestryman in parishes coming within its operation as the being rated or assessed to the relief of the poor upon a rental (in the case of the present parish) exceeding £25 per annum in respect of the occupation of a house, lands, tenements, or hereditaments within such parish, and the section provides that a joint rating and a joint occupation of any such premises shall be sufficient to qualify each joint occupier in case the amount of rental on which all such occupiers are jointly rated will, when divided

(a.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

by the number of occupiers, give for each such occupier a sum not less than the sum hereinbefore required.

On the 14th of May, 1890, an election took place to fill three vacancies in the vestry. There were six candidates, and Mr. Soutter and Mr. Shand were two of the candidates. As the result of the polling Mr. Soutter was at the head of the poll, and Mr. Shand was the fourth on the list, and was the first unsuccessful candidate.

Mr. Shand now said that Mr. Soutter was not qualified to be a vestryman, by reason of insufficient rating, that, therefore, he was not properly elected and he (Mr. Shand) claimed the seat, and it was at his instance that the above rule was obtained.

The question now, therefore, was whether Mr. Soutter was rented or assessed in respect of a house, lands, &c., within the parish to the requisite amount of £25 per annum. The qualification of Mr. Soutter as to rating and assessment was, that he was rated at £19 per annum in respect of the house which he occupied, and where he resided; that he was also rated and assessed jointly with one other person in respect of certain club premises, the rateable value of which was £55 per annum. The question arose as to this latter rating in respect of the club premises.

The entry in the rate book, as to these club premises, was that the name of the occupier was put down as "The Southwark Club, by its nominees, H. Quelch and Francis William Soutter"; the premises were described as a club, and the rateable value as £55 per annum.

It appeared by the affidavit of Mr. Soutter that he was the secretary of the club; that he was the *bonâ fide* occupier of part of the club premises, which he occupied for the purpose of carrying on his business of a coal merchant; that he actually did carry on his business there, having an office there for the purpose of that business; that he had from 8 a.m. to 6 p.m. the exclusive use of the ground floor and first floor of the club premises; that he was entitled to use the whole of this part of the premises for the purposes of his business, paying rent for the same to the club; that his tenancy of that part of the club premises was a yearly tenancy, and could only be determined by a resolution of the club and a six months' notice to quit; that the members of the club were not entitled to use that part of the premises before 6 p.m.

He also said that he was jointly responsible for the payment of the rates levied or assessed in respect of the club, and that he had personally given a written undertaking to pay such rates, and, if such rates were not paid, and if there were no sufficient distress on the premises, he was liable to be imprisoned for failing to pay them; that by virtue of this qualification in respect of these club premises he had for some years voted at parliamentary, school board, and vestry elections; and that his two predecessors, in respect of the same qualification of the same premises, had for some years been vestrymen of the parish.

The inspectors of votes were equally divided as to whether Mr. Soutter was qualified, and the umpire was of opinion that he was qualified, though he (the umpire) did not, until it was too late, sign the required declaration that Mr. Soutter was duly elected.

Mr. Soutter took his seat, and acted and voted as a vestryman.

The present rule was obtained on behalf of Mr. Shand to test the validity of the election.

Cluer, showed cause.—There is a preliminary objection that *quo warranto* will not lie to question the election of a vestryman, or, if it will, it is a matter within the discretion of the court, and ought not to be granted in this case. The rule as to *quo warranto* is laid down in *Darley* v. *The Queen*, 12 Cl. & F. 520. Since the earliest times there has been no application of this kind with regard to a vestryman. The remedy here was not by *quo warranto*, but under section 54 of the Act for penalties.

Lynden Bell, in support of the rule.—I have not been able to find any case in which *quo warranto* has been held to apply to a vestryman, but my contention is that it does apply, as a vestry is a public body, and the office is a public office. A vestry is now, whatever it may have been formerly, a creature of statute, and therefore *quo warranto* applies. [GRANTHAM, J.—It has been held that a town councillor is subject to *quo warranto*.]

Cluer replied.

GRANTHAM, J.—I think very strongly that this is a case where *quo warranto* applies.

POLLOCK, B.—I think so too, and I think it the most convenient form to raise the question.

Objection overruled.

The case was then heard as to the sufficiency of the rating.

Cluer.—The rating here is sufficient, as there is a rating of £19 a year in respect of the house and a joint rating in respect of the club premises of £55 a a year. The rental may be made up of tenements separately held, so that if there be two distinct qualifications each under £25 you can add the two together to form the qualification: *The King* v. *The Churchwardens of St. Pancras*, 1 A. & E. 80; *Reg.* v. *Kirby*, 10 W. R. 13. It is not necessary to have exclusive occupation to be rated: *Goodhew* v. *Williams*, 26 W. R. 107, 3 C. P. D. 382. Mr. Soutter is occupier for one place, and he is rated or assessed in respect of another place, and that is sufficient.

Lynden Bell referred to *Inman* v. *Assessment Committee of West Derby Union*, 22 W. R. 330, L. R. 9 Q. B. 180, and *Mogg* v. *Clark*, 34 W. R. 66, 16 Q. B. D. 79, but was not called upon.

POLLOCK, B.—This proceeding is by *quo warranto*, calling on Mr. Soutter to show by what authority he claims to exercise the office of a vestryman.

Now there has been a preliminary point taken of some importance, that this is the first time that a *quo warranto* has ever been raised in the case of a vestryman. Upon that point it seems to me quite clear that the present vestry, which is elected under the Metropolis Local Management Act (18 & 19 Vict. c. 120) is a different body from the old common-law vestry. This Act for the first time created a new body, with new duties, and, therefore, this is a case where *quo warranto* applies.

Now, coming to the merits of the case, I may observe that section 6 of the Act lays down the qualification for a vestryman.

In accordance with all the known laws as to rating, Mr. Soutter does not occupy, and is not rated as occupier, in respect of these club premises at all. His occupation is of a duplex character; he occupies as secretary of the club; the premises are used entirely by the club, and in so far as he occupies at all it is not his occupation. The distinction always observed in these cases is this, does he occupy by himself, or merely as a servant, as a coachman occupies his master's stable, or as a gamekeeper occupies a lodge. In all these cases the occupation is for the purpose of performing his duties, and in those cases there is no occupation at all. Here, Mr. Soutter was allowed to occupy a part of the premises from 8 a.m. to 6 p.m., and with regard to those premises he was not an occupier, he was a mere licensee. It seems to me that, with

regard to that occupation, he does not come within the section, and I think this rule should be made absolute.

GRANTHAM, J.—I am of the same opinion. It is quite clear that the occupation was an occupation as secretary of the club, and not an occupation for himself. Mr. Soutter is not an occupier, and not rated to a sufficient amount, and, therefore, this rule must be made absolute.

Rule absolute.

Solicitor against the rule, *Henry N. Philcox.*

Solicitor in support of the rule, *R. H. Ward.*

Q. B. Div. (Pollock, B., and A. L. Smith, J.) July 10.

REG. *v.* VESTRY OF ST. MARY, ISLINGTON. (*a.*)

Burial ground — Maintenance and repair — Churchwardens — Right to be repaid costs and expenses— Certificate—Burial Act, 1855 (18 & 19 *Vict. c.* 128), *s.* 18.

By section 18 *of the Burial Act,* 1855, *which provides for the maintenance and repair of disused burial grounds by the burial board or churchwardens, it is enacted that "the costs and expenses shall be repaid by the overseers upon the certificate of the burial board or churchwardens, as the case may be, out of the rate made for the relief of the poor of the parish." A churchwarden had, with the authority of the vestry, received tenders for repairs to the wall of a burial ground, but had not actually paid any sum of money in respect thereof.*

Held, that his written request for payment was a sufficient certificate within the section, and that he was entitled to a mandamus *ordering the vestry to pay him on account, a sum which was within the estimated cost of the repairs.*

In this case the vestry showed cause against a rule *nisi* obtained by G. S. Elliot, the senior churchwarden of the parish, for a writ of *mandamus* directed to the vestry commanding them to pay to the said G. S. Elliot the sum of £500, being the amount of a precept made on the 1st of February, 1890, upon the accounts committee of the vestry, in respect of expenses incurred by the churchwardens by virtue of their office, and, if necessary, to make and levy a rate for that purpose.

The churchyard of St. Mary, Islington, and the burial ground of the Chapel of Ease were closed by an Order in Council under the provisions of the Burial Acts, 1852 to 1881. The churchwardens were, by virtue of the Burial Act, 1855 (18 & 19 Vict. c. 128), s. 18, bound to do the necessary repair of the walls and other fences; that section also provides that "the costs and expenses shall be repaid by the overseers upon the certificate of the burial board or churchwardens, as the case may be, out of the rate made for the relief of the poor of the parish."

At a meeting of the vestry held on the 30th of October, 1874, it was resolved (*b*) that the churchwardens maintain the closed churchyards or burial grounds of the parish in decent order and do the necessary repairs of the walls and other fences thereof, and that the expenses incurred by them be paid by this vestry through the accounts committee on their requisition and charged to the poor rate, and (*c*) as to the recreation ground at the Chapel of Ease, that the amount necessary to meet the expense of keeping the same up be paid by the accounts committee periodically to the senior churchwarden upon his requisition and receipt.

At an extraordinary meeting of the vestry, held on the 15th of January, 1890, the vestry adopted a recommendation of their committee, which was as follows:—"That the senior churchwarden be asked to invite tenders for taking down the wall at present surrounding the Chapel of Ease ground, erecting new iron railings in lieu thereof, and carrying out such other works in connection therewith as may be necessary." The cost of these works was estimated by the committee at £580. Mr. Elliot, the senior churchwarden, thereupon invited tenders, and in the month of March signed contracts with two firms for carrying out the works. Prior to the signing of the contracts Mr. Elliot wrote to the accounts committee of the vestry the following letter, which was the precept referred to in the rule:—

"Gentlemen,—On behalf of my churchwardens I request you to pay me the sum of (500£) five hundred pounds pursuant to the several resolutions of the vestry.

"Dated 30th October, 1874.

"Signed, G. S. ELLIOT,

"£500 0 0." "Senior Churchwarden.

The vestry declined to pay the £500 as requested, and Mr. Elliot obtained this rule.

Henn Collins, Q.C., and *J. V. Austin,* for the vestry, showed cause.—The word used in section 18 is "repaid." In the present case the churchwarden has not paid anything, and the vestry is not bound to pay him until he has spent money upon the works. His precept is not a sufficient certificate within the section.

Sir R. E. Webster, A.G. (*R. A. McCall* with him), supported the rule.

POLLOCK, B.—In this case the court is called upon to make absolute a rule *nisi* for a writ of *mandamus* commanding the Vestry of St. Mary, Islington, to pay to the senior churchwarden of the parish a sum of £500 to meet the expenses of certain repairs done to the wall surrounding the Chapel of Ease in that parish. Mr. Elliot has no doubt become liable in respect of these repairs for a considerable sum.

On the 1st of February, before the contracts had been signed, Mr. Elliot, in accordance with the practice which had obtained for some time in this vestry, sent in his precept. [His lordship read the letter above set out, and continued:—] The Act says that a certificate from the churchwardens is necessary. When we come to consider what is meant by the word "certificate" we must take it in a reasonable sense. Section 18 casts upon the churchwardens the duty of maintaining the burial ground and of doing the necessary repair of the walls and other fences, and the expenses are to be repaid by the overseers upon the certificate of the churchwardens. The first objection taken was that the word is "*re*-paid," and that, therefore, it is a condition precedent to the money being paid to the churchwarden that he has paid it away himself. There is something to be said for that view, but, taking the subject-matter into consideration, it seems to me to be reasonable to hold that expenses to be repaid include expenses for which the churchwarden is liable, although he has not yet paid them. Then it is said there must be a certificate. But now that I have heard the whole case, and appreciate the subject-matter in respect of which the certificate is to be given, I think that the provision of the Act as to the certificate is amply satisfied by the precept of the churchwarden. I think, therefore, that the *mandamus* should go.

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

A. L. SMITH, J.—This is an application by Mr. Elliot, the senior churchwarden of the parish of St. Mary, Islington, that the vestry should be ordered to honour his request to them to pay him a certain sum of money. The facts are very short. Mr. Elliot was appointed churchwarden and took over a sum of £8 1s. 9d. from his predecessor; a question arose as to whether the wall of this burial ground, which has been turned into a recreation ground, should be rebuilt or whether an alteration should be made and part of it turned into a railing. The vestry duly sanctioned the making of the alteration, and clearly authorized Mr. Elliot to receive tenders for the work. On the faith of the resolutions of the vestry Mr. Elliot entered into contracts, and before the work was executed he asked the vestry for £500 on account. That sum was well within the mark of what he lawfully made himself liable for. He sent in his application and it was not met. He therefore comes to this court for a *mandamus*. It is said that upon the true construction of the Act no *mandamus* can go unless the churchwarden has actually paid out of his pocket the sum for which he asks. If we were to construe the section in that way, what a heavy responsibility we should cast upon the churchwarden; he would be obliged to incur all sorts of expenses before he could ask the vestry to pay him. I agree that the custom of a vestry cannot alter an Act of Parliament, but it may be that the custom is reasonable and agrees with the statute. [His lordship then read section 18, and continued:—] Do the words "costs and expenses" mean sums actually expended? I think they mean costs and expenses which have to be paid—that is the reasonable and business-like construction. Then it is said a certificate is required. I think that an allegation in writing, a precept in writing, a request to pay in writing satisfy that word, and I think that the requirement is met by this document of the 1st of February. Such a document had always been honoured by this vestry before; in fact, two similar precepts sent by Mr. Elliot himself had been met. The points taken by the vestry will not avail them. Assuming that Mr. Elliot were to misappropriate this money when he gets it, he would be surcharged when he goes out of office, and the amount would be carried over to his successor. I think that this application is improperly resisted by the vestry; they have no morals on their side and no law.

Rule absolute.

Solicitors for the vestry, *W. Lewis & Sons.*

Solicitors for the applicant, *Samuel Price & Sons.*

Q. B. Div. (Lord Coleridge, C.J., and Wills, J.) June 20, 23.

REG. *v.* JUSTICES OF LONDON.
Ex parte FULHAM VESTRY. (*a.*)

Justices—Appeal—Dismissal of complaint by magistrate—Right of appeal by complainant against acquittal—Party "aggrieved"—Highway Act, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 105.

There is no right of appeal against the dismissal of a complaint under the Highway Act, 1835, *for obstructing a highway, as the words of section* 105 *of that Act, which give a right of appeal to the quarter sessions to any person who shall think himself aggrieved by any order, conviction, or judgment, or determination made, or by any matter or thing done by a justice of the peace in pursuance of the Act, apply only to the case of a conviction, and do not give any right of appeal in case of an acquittal.*

Rule calling on the justices of London to show cause why a writ of *mandamus* should not issue, directed to them, commanding them to hear and determine a certain appeal at the instance of the Vestry of Fulham, upon the appeal of the vestry against the judgment or determination of A. C. Plowden, metropolitan police magistrate, upon the hearing of an information or complaint preferred by the vestry against one Cockerell, for unlawfully and wilfully obstructing the free passage of a certain highway, called Vereker-road, by erecting a fence across the highway. Vereker-road was a road used from time to time by the vestry for the purpose of carting materials from one part of the parish to another for repairing roads; and if it were closed the vestry would be put to additional expense by having to cart their materials by a longer route. For that reason the vestry desired to keep up their right to the road as a highway.

Cockerell, as agent for the owners, put up a fence across the road, to obstruct the road, and to prevent its becoming a highway.

Thereupon the vestry took proceedings against Cockerell, by a summons before a police magistrate, under the Highway Act, 1835 (5 & 6 Will. c. 50), for unlawfully and wilfully obstructing the highway.

The magistrate dismissed the complaint, as he was not satisfied that the road was a public highway, and the vestry were ordered to pay three guineas costs.

The vestry then appealed to the quarter sessions against this acquittal, but the court of quarter sessions refused to hear the appeal, holding that there was no appeal from such acquittal.

Thereupon the vestry, the complainants in the case, obtained the present rule for a *mandamus* to the justices of London to compel them to hear and determine the appeal.

The question now argued was whether, under section 105 of the Highway Act, 1835, there is an appeal against a dismissal of the complaint, as well as against a conviction.

Section 105 enacts:—"If any person shall think himself aggrieved by any rate made under or in pursuance of this Act, or by any order, conviction, judgment, or determination made, or by any matter or thing done, by any justice or other person in pursuance of this Act, and for which no particular method of relief hath been already appointed, such person may appeal to the justices at the next general or quarter sessions of the peace to be held for the county, division, riding, or place wherein the cause of complaint shall arise."

Candy, Q.C., and *Meates*, showed cause.—There can be no appeal by a complainant against a dismissal of a complaint by a magistrate. The section only gives an appeal to a person "aggrieved," and a complainant whose complaint is dismissed is not a person "aggrieved" within the meaning of the section. Moreover, such a case does not come within the section, as it is not an order, or a conviction, or a judgment, or determination made by a justice. Therefore the section gives no right of appeal. No case can be cited where it has been held that there can be an appeal in case of an acquittal.

Lumley Smith, Q.C., and *Macaskie*, in support of the rule.—There is a right of appeal in such cases, as the words of the section are wide enough to include appeals against acquittals as well as appeals against convictions. The words, "determin[illegible]

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

the section include a dismissal of a complaint as well as a conviction, and a person whose complaint is dismissed is a person "aggrieved" by a "determination made" by a magistrate, and he therefore comes within the section, and is entitled to bring an appeal against such dismissal.

Lord COLERIDGE, C.J.—I am not aware of any case which distinctly decides the question before us; but it is to be observed that this is the year 1890, and we ought also to observe that we are now asked to decide this point for the first time on the Act of 1835, an Act which has been in operation from 1835 down to the present time, and there is no case of a similar kind under that statute which can be pointed out to us. There must have been thousands of acquittals under that Act, which must have annoyed the persons affected by them, and yet there is no case during all that time of such an appeal as the present. I agree that this is a "determination made," and I do not know that it is not "a thing done by a justice in pursuance of the Act," but I do not think that is the way to look at a section of this sort. Generally, the principle of law is that if a man is acquitted, he is not to be tried a second time. Looked at broadly and looked at reasonably, this section does not give an appeal unless in case of conviction. Is a person who fails to get a conviction a person "aggrieved"? Is he, in the ordinary sense of the word, aggrieved because somebody has been held not to have done something wrong?

It appears to me that this section does not give an appeal unless when something has been done, some order made against a person. This rule, therefore, must be discharged.

WILLS, J.—I am of the same opinion. I should like to add that, in my judgment, this is distinctly a criminal matter. I think that is so within the decision of the Court of Appeal and the principles laid down by the judges of that court. In form it is a fine, and imprisonment may follow, and therefore it is a criminal matter. I should like to add that this legislation took place in 1835, but analogous words have been found in very much earlier Acts than this, many scores of years before 1835, and yet there is no instance in the books in which, under similar words, an appeal has been successfully prosecuted on an acquittal. The appellant is generally a person who has been convicted, or something analogous to that. I cannot find a trace of any case under the Highway Acts where there has been an appeal in case of an acquittal, although there have, undoubtedly, been such cases under other Acts.

Rule discharged.

Solicitors against the rule, *Lane, Monro, & Soutter.*

Solicitor in support of the rule, *T. Blanco White.*

Q. B. Div. (Charles and Vaughan Williams, JJ.) June 7.

COLTMAN *v.* CHAMBERLAIN. (*a.*)

Mortgage of fishing boat—"Ship and appurtenances"—Articles included in mortgage—Articles put on board subsequently to mortgage—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *ss.* 66, 70, 469, 484.

Under the word "ship" in the mortgage of "a ship, with its appurtenances," in the statutory form under the provisions of the Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *all articles and materials, whether stored or in use, necessary for the accomplishment of its voyage, and on board at the date of the mortgage, will pass to the mortgagee; and all articles and materials substituted for such articles and materials subsequently to the date of the mortgage will also pass.*

The construction of the word "ship" in section 1 *of* 53 *Geo.* 3, *c.* 159, *as laid down in* Gale *v.* Laurie, 5 *B. & C.* 156, *is applicable to the same word in the present statutory form of mortgage.*

Interpleader issue referred by Lawrance, J., at chambers on appeal from an order of Master Johnson.

In this case the claimant, Woodger, claimed certain goods on a ship under a mortgage to him by the defendant, of a ship, *The Freedom*, and its appurtenances, registered under the Merchant Shipping Act, 1854.

At the instance of the plaintiff, as execution creditor, the sheriff had seized all the goods upon the ship. Some of the goods seized, were on board as stores at the date of the mortgage, while others had been substituted since for goods and appurtenances originally upon the ship at that date.

The material clause of the mortgage, which was in the statutory form, ran as follows:—"And for the purpose of better securing to the said mortgagee the payment of such sums as aforesaid, I, the said mortgagor, do hereby mortgage to the said mortgagee the 64 shares of which I (the mortgagor) am the owner in the ship above described, and in her boats, guns, ammunition, small arms, and appurtenances."

The ship *Freedom* was a trawler trading as a fishing smack, for the trade of which Woodger was agent and fish salesman. The articles seized, and now claimed as having passed under the words, "the ship and its appurtenances," were admitted to be as follows:—"A trawl beam and halyard mainsail (new in November, 1888, but not used until 1889), mizen-sail, maintop and stay-sails, big fore-sail, four jibs, one jib (new), mizen and stay-sails (stored in forecastle, other sails being in use on vessel), wire trawl warp, 180 fathoms of tackle, rope, twine balls, boat, two tea kettles, one kettle, one saucepan, three main-sails replaced, two mizen replaced, clock, lamp, lantern halyards, two compasses, one chart, baking tin, two coppers, side-lights, two masthead lights, and sundries (including a small steam-engine for raising nets)."

The following of the above articles had been admittedly supplied to and put on board *The Freedom* since the date of the claimant's mortgage:—"New main-sail, one stay-sail, one new jib, one mizen-sail, trawling warp, rope, twine, boat, tea kettles, kettle, saucepan, clock, lamp, lanterns, chart, baking tin, plates, and sundries."

"The above sails, trawling warp, boat, and other articles specified (except the chart, which the plaintiff claimed to except, but to which exception the claimant demurred) had all been supplied since the said date in the place of similar sails, warp, boat, and other articles which had worn out or been removed, lost, or destroyed."

Montague Lush and *O'Neill*, for the plaintiff, the execution creditor.—Articles added or substituted since the date of the mortgage cannot be deemed to pass under it, in default of any provisions respecting after-acquired articles to be put on board. If all loose articles on board ship were intended to be secured, the document must be held to be a security on chattels requiring to be registered as a bill of sale. The appurtenances ought to have been enumerated in a schedule. Many of these articles cannot be classed as appurtenances—*i.e.*, necessaries of a ship;

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

Lano v. *Neale*, 2 Starkie, 105; *Salmon* v. *Wood*, *Ex parte Gould*, 2 Morrell's Bank. Cas. 137.

Aspinall, for the claimant, the mortgagee.—Anything on board ship for the purpose of an ordinary voyage passes under this mortgage, as also anything coming under that description substituted for any article on board at the date of the mortgage. All utensils and necessary outfit for a voyage are included. The word "ship" covers everything on board for the purposes of the trade in which the ship is engaged: *Gale* v. *Laurie*, 5 B. & C. 156; *Woods* v. *Russell*, 5 B. & Ald. 942. Many of these articles on ship board are analogous to trade fixtures: *Batchelor* v. *Yates*, 36 W. R. 563, 38 Ch. D. 112; *Climie* v. *Wood*, L. R. 3 Ex. 257, 16 W. R C. L. Dig. 72.

Grantham, for the sheriff, was not called upon.

O'Neill replied.

CHARLES, J.—This case results out of a contest between an execution creditor and the executor of a mortgagee of a ship. The question is, whether certain articles admittedly on board a ship called *Freedom* passed to the mortgagee under the mortgage or were liable to be seized by the sheriff at the instance of the execution creditor? The articles are of two classes Those on board the ship at the date of the mortgage and those put on board since the mortgage. As to the articles on board at the time of the mortgage, including, amongst other things, certain mizen-sails stowed away, and not in actual use, two compasses, lights, and steam-engine for the purpose of lifting the fishing gear when in use, the first question as to these things is, did they pass? and, if so, under what denomination? The mortgage purports to convey the sixty-four shares of the ship *Freedom*, of which the mortgagor was owner, together with guns, &c., "and apputenances." The ship was a trawler fishing-smack. It is clear that the masts and rigging would pass under the mortgage within the term "ship," and I am of opinion that all the first class of articles on board at the time of the mortgage would pass under that term, and, having regard to the authorities, not under the word "appurtenances." That I take to be the effect of *Gale* v. *Laurie*. It is true that decision turns on section 1 of 53 Geo. 3, c. 159; but it was held that the words "the value of a ship" in that statute was meant the tackle and apparel of the ship. A writ of prohibition was moved for against the Court of Admiralty entertaining a claim over the ship *Dundee*, because the claim included her fishing tackle and apparel. Lord Tenterden, then Chief Justice Abbott, says, "The sentence of the Court of Admiralty was against the plaintiff, both as to the value of the ship and the value of these stores and implements. It was contended that the plaintiff was not answerable in respect of the value of the latter, and on that ground a prohibition was applied for. The case was argued before us after a special verdict had been found, and we are of opinion that the present plaintiff, the owner of *The Dundee*, is responsible to the value of the fishing stores." The Chief Justice then goes on to read the section referred to and says, "In this section the word 'ship' only is used, but in the following sections the phrase 'the value of the ship and her appurtenances' occurs not less than ten times. The same phrase occurs in the 1st section of 7 Geo. 2, c. 15 and of 26 Geo. 3, c. 86. The three Acts are all *in pari materiâ*, and there can be no doubt that the first section of the Act on which this question arises is to be understood as if the words, 'with all her appurtenances,' were used therein, supposing those words would make any difference in the sense." That decision amounts to this in reference to the present case, that the word "ship" undoubtedly covers all fishing stores on board needful for the accomplishment of the object of the voyage, and though given in reference to another statute, not before us, it is instructive as to what the word "ship" may properly be held to include.

In the other case of *Salmon* v. *Wood*, *Ex parte Gould*, the evidence went to show that there was nothing to identify any particular nets as belonging to any particular boats, and upon that the court held that fishing gear did not pass under the word "ship" as referred to in section 72 of the Merchant Shipping Act, 1854, but Wills, J., in his judgment says, "It has been argued that 'ship' is equivalent to 'ship and its appurtenances,' and to a certain extent that is doubtless so. It would include spare sails, duplicate anchors, anything, in fact, which it would not be prudent to send a ship to sea without." Taking, then, the definition of the materials on board this ship at the time of the mortgage as the necessary machinery or gear of a ship, being either articles necessary for steering the ship, lights for lighting it, and sails for sailing it, I think all such things passed in the mortgage under the word "ship." So far, such a construction gives no meaning to the word "appurtenances," but I have no doubt that there might be certain things which would more appropriately come under that description. Such a construction virtually settles the second question as well as the first—namely, as to articles put on board subsequent to the mortgage. This second class of articles were, beyond doubt, substituted for former similar articles, and come under the same definition. Though this is not admitted as to all, the true conclusion from the affidavits is that they were really put on board in substitution for articles which, being originally there, passed under the mortgage. It is said that there are no words in the mortgage professing to give to the mortgagee any interest in after-acquired articles. But no such words were necessary, because these articles are substituted for materials essential to the ship in question, as a ship. Such an argument would apply to any alteration in the ship itself, such as the replacement of its hull. The ship as repaired would undoubtedly belong to the mortgagee. Or, again, in the instance of a new mast, the same result would follow. We can draw no distinction, that I can see, between masts and sails such as are here the subject of dispute. If the original articles passed under the mortgage it seems to us that the articles substituted for these must equally pass. If so, there was no necessity for the registration of the mortgage as a bill of sale under the Act, and that objection fails.

VAUGHAN WILLIAMS, J., concurred.

Judgment for the claimant.

Solicitors for the claimant, *W. Battam*.

Solicitors for the execution creditor, *Bridges, Sawtell, Heywood, & Co.*

Solicitors for the defendant, *Goddard & Pocock*.

Q. B. Div. (Denman, Charles, and Vaughan Williams, JJ.) June 14, 17, 28.

BUDGETT & CO. *v.* BINNINGTON & CO. (*a*.)

Shipping — Charter-party — Demurrage — Liability of charterer—Fixed number of lay days—Strike affecting ship and charterer.

Where, by a charter-party, the charterer undertakes to unload a vessel within a given number of days, the

(*a*.) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

obligation to pay demurrage for delay is absolute, although the unloading is the joint act of the ship and the consignee, unless the delay can be traced to the shipowner; so that, where a strike occurred, which prevented both the master and the charterer from doing their respective parts in unloading the ship, it was held that the charterer was liable.

Motion for judgment.

This was an action tried at Bristol before Cave, J., and a jury.

The plaintiffs, who were indorsees of the bill of lading for a cargo of barley shipped on board the defendants' ship *Fairfield*," sought to recover from the defendants the sum of £147 15s. 11d. which they had paid by way of demurrage to the defendants under protest in order to obtain their cargo.

By the bill of lading the shippers or their assigns agreed to pay freight and demurrage, "all conditions as *per* charter-party." By the charter-party the cargo was to be brought and taken from alongside the steamer at freighters' expense and risk, but the ship's crew were to render all customary assistance in hauling lighters alongside, and "thirteen running days, Sundays excepted," were to be allowed the charterers for sending the cargo alongside and unloading, but in no case should more than seven days be allowable for unloading; demurrage over and above the "lay days" at fourpence per ton on the steamer's gross register tonnage per running day—and "the freighters' liability was to cease when the cargo was shipped, the owner or his agent having an absolute lien on the cargo for freight, dead freight, demurrage, lighterage at port of discharge, and average." The lay days were all consumed in loading, but the shippers agreed to allow six more days for unloading. The bill of lading contained the usual exemptions; but neither the bill of lading nor the charter-party contained any reference to strikes.

The Fairfield was ordered to Bristol, where she arrived on Monday, November 25, and unloading at once commenced. The mode of proceeding was this. The shipowners employed certain stevedores to do their part of the work (which by the custom of the port belonged both to the ship and to the consignees), and the consignees certain other stevedores to do their part. For the first three days the unloading proceeded without delay, but on Thursday, November 28, the dock labourers employed by the stevedores of both parties struck work, and nothing was done or capable of being done with the cargo till December 4. It then recommenced and was concluded on December 5. The defendants claimed demurrage from November 30, and exercised their lien on the cargo in respect of the amount claimed. By consent the question left to the jury was, "Were the shipowners ready and willing to do their part of that which it was customary for them to do?" The jury answered "No."

The judge left the parties to move for judgment.

Bucknill, Q.C., and *J. V. Austin*, for the defendants.—The defendants are entitled to judgment on the authority of *Thiess* v. *Byers*, 24 W. R. 611, 1 Q. B. D. 244. The only distinction between that case and this is that in *Thiess* v. *Byers* the cause which prevented both parties from doing their share of the work was bad weather, instead of strikes. No exception was made in that case as to weather, no exception is made in this as to strikes, and in both the number of lay days was fixed.

They cited *Randall* v. *Lynch*, 2 Camp. 352; *Lear* v. *Yates*, 3 Taunt 387; *Harper* v. *McCarthy*, 2 B. & P. (N. R.) 258; *Porteus* v. *Watney*, 27 W. R. 30, 3 Q. B. D. 543; *Postlethwaite* v. *Freeland*, 28 W.R. 833, 5 App. Cas. 599; also Abbott on Shipping, 5th ed., p. 180; Carver's Law of Carriage by Sea, p. 608

Cohen, Q.C., and *Pyke* (*E. V. Bullen* with them), for the plaintiffs.—This case is distinguishable from *Thiess* v. *Byers* because the shipowners are here in default, and their default was part of the cause of delay. The shipowners had not got the men ready to do their part of the work in unloading, whereas in *Thiess* v. *Byers* the men were there, and it was only *vis major* which prevented them from fulfilling their part of the bargain. All the cases assume the readiness and willingness of the shipowner to do his part which in this case is negatived by the verdict of the jury. In *Nelson* v. *Dahl*, 28 W. R., at p. 61, 12 Ch. D., at p. 583, Brett, M. R., says, "The ship must be ready so far as she is concerned to unload." In *Mackay* v. *Dick*, 29 W. R. 542, 6 App. Cas., at p. 263, Lord Blackburn says: "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect." Here the shipowner agreed to have sufficient labourers to do his part of the unloading, and as he failed to do so he cannot sue the charterers for the delay which is partly caused by himself. The liability of the charterers is absolute with one exception—namely, when the delay is traceable, as in this case, to the shipowner himself.

They also cited *Randall* v. *Lynch*; *Porteus* v. *Watney*; *Barrett* v. *Dutton*, 4 Camp. 333; *Mathews* v. *Gibbs*, 9 W. R. 200; *Ford* v. *Colesworth*, 18 W. R. 1169, L. R. 5 Q. B. 544; *Pordage* v. *Cole*, 1 Wms. Saund. 319; *Morton* v. *Lamb*, 7 T. R. 125; *Appleby* v. *Myers*, L. R. 2 C. P. 251, 15 W. R. C. L. Dig. 127; *Bankart* v. *Bowers*, L. R. 1 C. P. 484, 15 W. R. C. L. Dig. 123; *Straker* v. *Kidd*, 26 W. R. 511, 3 Q. B. D. 223; *Benson* v. *Blunt*, 1 Q. B. 870; *Grant* v. *Coverdale*, 32 W. R. 881, 9 App. Cas. 470; *Paradine* v. *Jane Aleyn* 26, Style, 47; also Leake on Contract, p. 647, and Carver on Shipping, p. 608.

Bucknill, Q.C., in reply.

The judgment of the COURT was read by

VAUGHAN WILLIAMS, J.—The question in this case is, whether, under the circumstances of it, the shipowner is entitled to charge demurrage. The shipowner refused to give up the goods of the plaintiff unless the demurrage claimed was paid, and the plaintiff, having paid under protest, seeks to recover what he paid in this action.

The facts of the case are these:—

The plaintiffs chartered the steamer *Fairfield* under a charter-party, whereunder the plaintiffs were allowed thirteen running days, Sundays excepted, for sending the cargo alongside and unloading, but in no case should more than seven running days, Sundays excepted, be allowed for unloading, and agreed to pay the demurrage over and above the said lay days at 4d. per ton on the steamer's gross register tonnage per running day.

By the charter-party the master undertook to deliver the cargo from alongside. By the custom of the port of Bristol the unloading of the cargo is the joint act of the ship and the consignee. In the case of a grain cargo the first act done is that the consignee sends on board men with shovels and bushels and sacks. These men measure the grain and place it in sacks. Then the master nominally (but the stevedores, in fact, as his agents) raises the sacks from the hold and brings them to the bulwarks ready to deliver over the side to the consignee or his agents—

viz., in the port of Bristol the stevedores employed by the dock company.

The ship in question arrived on the 23rd day of November, and the unloading was begun on Monday, the 25th, but in the midst of the unloading, on the 28th, the dockers and stevedores struck, as well those employed by the dock company as those employed by the ship, and the result of this was that neither was the master in such a position that he could deliver nor the consignees in such a position that they could receive or otherwise do their part in the unloading.

The jury were, by agreement of the parties, asked the following question—viz., Was the shipowner ready and willing to do his part of that which it was customary for him to do? The answer of the jury was "No." The learned judge, in the course of his summing-up, in answer to a juror, said that if the master was not able to do his part, he was not ready and willing. The question is, For whom judgment ought to be entered under the circumstances?

It is said by the plaintiff that readiness and willingness of the master to deliver the cargo to the consignee is a condition precedent, the non-existence of which, according to the finding of the jury, disentitles the master from claiming this demurrage; and it is further said that, even though readiness and willingness to deliver the cargo may not be a condition precedent, it is something which the master has to do on his part, concurrently with the part which the consignee has to take in the unloading of the ship, and that, therefore, on the well-known principle established by the cases cited in the notes to *Peeters* v. *Opie*, 2 Wm. Saunders, 346, and *Armitage* v. *Insole*, 14 Q. B. 728, and many other cases, the master cannot demand performance by the consignee of his part without averring readiness and willingness, if not a tender of performance, of the conditions concurrent due from him which, for the purpose of effectively making the demand on the consignee, become conditions precedent. While approving of this contention, so far as it relates to conditions precedent, we are of opinion that they are not applicable to the present case, and, therefore, afford no ground for holding that the master was not entitled to claim demurrage. The fact is, that the obligation of the consignee to pay demurrage is "absolute," as was decided in *Thiess* v. *Byers*.

The readiness and willingness of the master to make delivery is not the consideration of, or condition precedent to, the undertaking to pay demurrage for the detention of the ship, and, this being so, it is not sufficient to relieve the consignee of the obligation to pay demurrage that he should show that the master was unable to perform some obligation undertaken by him in the charter-party, but it must appear that the consignee was prevented from discharging the ship within the time allowed for unloading by the act of the master or those for whom he was responsible. If this were not so the master would not have been entitled to recover demurrage in the cases of *Thiess* v. *Byers*; *Porteus* v. *Watney*; *Straker* v. *Kidd*; for in each of these cases it is plain from the facts that the master was not ready and willing to make delivery because he was prevented in the one case by the weather, and in the other two cases by the non-removal by third persons of the superincumbent cargo. It is quite true that in *Straker* v. *Kidd* Lush, J., speaks of an implied condition that the shipowner shall be "ready and willing to deliver," but his meaning is made plain by the next sentence in his judgment, where he says, "if he (the master) wrongfully refuses to give over the goods, or if, by reason of any default of his, or of any obstacle for which he is responsible, the consignee is unable to get his goods, this would afford a good answer to the claim"; and again, after stating that the contract is absolute and not conditional, the learned judge says: "The defendants are therefore liable unless they can show that some act or default of the owner, or of someone for whom he is responsible, prevented them from performing their contract."

In the present case the plaintiffs were not prevented from performing their contract by any default of the shipowner or those for whom he was responsible. It was the action of the stevedores and dockers which alike prevented the plaintiffs and defendants from doing their part in the unloading.

This in no way relieves the charterer or consignee from the absolute contract to pay demurrage for delay and detention of the ship during unloading. If the strike of the stevedores had resulted from unreasonable conduct of the master in refusing reasonable wages asked by the stevedores, the case might have been different, for then, perhaps, it might have been said that the shipowner prevented the charterer performing the contract, and that the act of the shipowner was the *causa causans* preventing the charterer; but even in such a case the charterer would, in our opinion, have to show that he was actually prevented by the default of the shipowner, *i.e.*, that there were no available means of performing the contract, notwithstanding the default of the shipowner: *Alston* v. *Herring*, 11 Ex. 822. If such means were available, the charterer must avail himself of them to discharge the ship, and take his remedy by suing the shipowner for breach of contract, or he will be liable to demurrage. The result in the present case is that judgment must be entered for defendants, with costs of action and of this motion.

Solicitors for the plaintiffs, *Whites & Co.*, for *Henry Brittan & Co.*, Bristol.

Solicitors for the defendants, *W. A. Crump & Sons.*

IN BANKRUPTCY.

Q. B. Div. (Cave and A. L Smith, JJ.) June 19.

Ex parte POPPLETON.
In re LOCK. (*a.*)

County court—Motion by trustee against high bailiff of county court—Formal notice—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 53, 54, 186—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 45.

Where a motion made in the county court by the trustee in the bankruptcy for an order declaring that he was entitled to certain property of the bankrupt which had been seized by the high bailiff under a writ of execution, was dismissed by the county court judge on the preliminary objection being taken that formal notice of the motion had not been given.

Held, that the provisions of section 53 *of the County Courts Act*, 1888, *by which, before an action is commenced against any person for anything done in pursuance of the Act, formal notice in writing must be given to the defendant, do not apply to a motion made in a bankruptcy; and that the case must go back to the county court judge to be heard upon the merits.*

Appeal from a decision of his Honour Judge Owen, in the county court at Cardiff, allowing a preliminary objection which was taken to an application made by the trustee in the bankruptcy.

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

The case raised an important point of practice under sections 53 and 54 of the County Courts Act, 1888, by which certain formalities, including a notice in writing to the defendant, must be complied with before any action can be commenced against any person for anything done in pursuance of that Act.

Previous to the receiving order being made against the debtor two executions had been levied by the high bailiff of the Cardiff County Court against the debtor, and some intimation having been given that a petition for a receiving order was about to be filed, the goods were sold at 10 o'clock on the morning of February 4, 1890. The bankruptcy petition was presented against the debtor at 10.20 on the same day, and a motion was subsequently made to the county court by the trustee in the bankruptcy against the high bailiff, under section 45 of the Bankruptcy Act, 1883, for an order declaring that the trustee was entitled to the goods, and directing the high bailiff to give up possession of them or their value to the trustee, on the ground that the execution was not completed at the time when the bankruptcy petition was presented.

At the hearing of this motion the preliminary objection was taken by the high bailiff that the formalities required by sections 53 and 54 of the County Courts Act, 1888, had not been complied with, which objection was allowed by the county court judge, and the application of the trustee was accordingly dismissed.

The trustee now appealed, it being admitted that if the appeal was successful the case must go back to the county court judge to be heard upon the merits.

Kisch, for the trustee.—The County Courts Act, 1888, has nothing to do with such a matter as this at all; and even if it has, then, according to the true meaning of sections 53 and 54, this matter is not within them. This was not an action. The trustee was applying for a declaration that he had a title to the goods by virtue of the Bankruptcy Act. According to the interpretation clause an "action" includes a suit, and means every proceeding in the court which may be commenced as prescribed by plaint.

Herbert Reed, for the high bailiff.—The county court judge was right in allowing the preliminary objection, because this motion was in reality an action against the high bailiff for wrong performance of his office. [A. L. SMITH, J.—Here the trustee made a motion. Did you ever know an action started by motion?] The term "action" must apply to any proceeding in which a person attempts to enforce a right. The word must have an extended meaning given to it. Here the trustee is really seeking to recover damages for something which took place before his title accrued. It is really nothing else but an action for damages, and notice ought to have been given. The question is one of great importance to county court officials.

CAVE, J.—This contention is an idle one. It is absurd to say that this was an action for trespass or for damages. It is simply a motion by the trustee to recover property which was the bankrupt's, and which the high bailiff has got in his hands, or, as is alleged, has improperly disposed of. It is not an action at all.

A. L. SMITH, J.—We have been told that what we are doing will take away the birthright of officials in the country, but we cannot help that. An "action" is a well-known thing, which is commenced by writ or plaint. The term "prosecution" is equally well known. In section 53 of the County Courts Act, 1888, both these terms are dealt with. Then it appears to have been thought by somebody that that would not cover a "suit." It was accordingly provided by the interpretation clause that "action" shall "include suit, and shall mean every proceeding in the court which may be commenced as prescribed by plaint." Now it is said that we ought to extend that further, and say that it shall include any proceeding by motion. We cannot do so.

Appeal allowed.

Solicitors for the trustee, *A. Kisch*, for *D. Davis*, Birmingham.

Solicitors for the high bailiff, *Bell, Brodrick, & Gray*, for *Linton & Kenshole*, Cardiff.

Q. B Div. (Cave and A. L. Smith, JJ.) June 17.

Ex parte HASLUCK.
In re LEHMANN. (*a*.)

Bankruptcy notice—Judgment debt—Right of judgment creditor to include claim for interest—1 & 2 Vict. c. 110, s. 17—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-section 1 (g)—Bankruptcy Rules, 1886, r. 136.

A judgment creditor, in issuing a bankruptcy notice against a debtor under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, is entitled to include in such bankruptcy notice a claim for interest on the judgment debt.

Appeal *ex parte* from the refusal of the registrar of the county court at Guildford to issue a bankruptcy notice against the debtor.

The case raised an important question as to the right of a judgment creditor, under section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, to issue a bankruptcy notice against a debtor so as to include a demand for interest on the judgment debt.

On February 15, 1890, an application was made by the appellant to the registrar of the Guildford County Court to issue a bankruptcy notice against the debtor, by which notice was given that unless within seven days the sum of £14,896, claimed as being the amount due on a final judgment obtained in 1888, was paid by the debtor, or secured or compounded for, or unless the court was satisfied that the debtor had a counter-claim, set-off, or cross demand against the applicant which equalled or exceeded the sum claimed and which he could not set up in the action in which the judgment was obtained, such debtor would be considered to have committed an act of bankruptcy on which bankruptcy proceedings might be taken against him.

Of the amount of £14,896 claimed, the sum of £13,796 was the amount of the judgment, a sum of £1,100 being added for interest on the judgment debt at the rate of four per cent.; but the county court registrar refused to allow this latter sum to be included, and he altered the bankruptcy notice by reducing the claim to £13,796.

The judgment creditor now appealed.

Cautley, for the appellant.—The issuing of a bankruptcy notice depends on section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883. By rule 136 of the Bankruptcy Rules, 1886, "a bankruptcy notice shall be in the Form No. 6 in the Appendix, with such variations as circumstances may require." The rule and the form must be read with section 4, sub-section 1 (*g*),

(*a*.) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

of the Act, and it is quite clear that variations in the form were intended. The form is such as clearly to cover the interest on the jugdment debt. By section 17 of the Act 1 & 2 Vict. c. 110 it is provided that "every judgment shall carry interest at the rate of £4 per cent. per annum from the time of entering up the judgment until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment." It is impossible to satisfy the judgment debt in accordance with the terms of the judgment without paying interest.

He referred to *Ex parte Lewis, In re Clagett*, 36 W. R. 653.

CAVE, J.—I think the judgment creditor is entitled to have a bankruptcy notice issued for the amount due on the judgment which includes the interest. There might be a question whether the two amounts should not appear separately in the notice, but that is a matter of detail. The creditor is entitled to have the amount of the interest added to the judgment debt so that the debtor may be informed by the notice that he cannot comply with the notice without paying the interest on the debt.

A. L. SMITH, J., concurred.

Appeal allowed.

Solicitor for the appellant. *M. S. Rubinstein.*

House of Lords.

From C. A. (England). May 12, 1890.

COLONIAL BANK *v.* CADY.
LONDON CHARTERED BANK OF AUSTRALIA *v.* CADY (*a.*)

Company—Shares—Transfer—Executor—Broker—Blank indorsement — Certificates — Estoppel — Domicile — Foreign law.

The executors of a registered owner of shares in a New York railway company signed blank transfers, which were indorsed on the certificates, and handed them to their brokers, with the intention of having the shares registered in their own names. The brokers deposited the transfers, by way of security, with their bankers, and were afterwards adjudicated bankrupts. The documents themselves were quite consistent with the fact that the executors had signed merely to complete their title.

Held (affirming the Court of Appeal), *that the executors were not estopped, as against the banks, from asserting their title to the shares and certificates as part of the testator's estate.*

Transactions as to share certificates taking place in England between persons domiciled there are to be decided by English law; but what is effectual to transfer the shares in a foreign country, by the laws of that country.

Appeals from two orders of the Court of Appeal, reported 36 W. R. 625, 38 Ch. D. 388. The facts are given in the report below, and shortly in the judgments of Lords Watson and Herschell.

Rigby, Q.C. (*Christopher James* with him), for the Colonial Bank, appellants.—*Pickering* v. *Busk*, 15 East, 38; *France* v. *Clark*, 32 W. R. 466, 26 Ch. D. 257; *Baxendale* v. *Bennett*, 26 W. R. 899, 3 Q. B. D. 525; *Carr* v. *London and North-Western Railway Co.*, 23 W. R. 747, L. R. 10 C. P. 317; *Pickard* v. *Sears*, 6 A. & E. 469; *Goodwin* v. *Robarts*, 24 W. R. 987, 1 App. 476, were referred to; and as to the American law, *McNeil* v. *Tenth National Bank*, 1 Sickel's N. Y. Rep. 325; *Kortright* v. *Buffalo Commercial Bank*, 20 Wendell's N. Y. Rep. 91, on appeal, 22 Wendell's N. Y. Rep. 348.

Latham, Q.C. (*T. H. Wright* with him), for the London Chartered Bank of Australia, distinguished the present, from *Lord Sheffield's case*, 37 W. R. 33, 13 App. Cas. 333.

Sir H. Davey, Q.C. (*Warmington, Q.C.*, and *Decimus Sturges* with him), for the respondents in both appeals.

The following cases were referred to:—*Lord Sheffield's case; Colonial Bank* v. *Whinney*, 34 W. R. 705, 11 App. Cas. 426; *Bank of Ireland* v. *Evans*, 5 H. L. Cas. 389; *Swan* v. *North British Australian Co.*, 11 W. R. 862, 2 H. & C. 175; *Merchants of Staple of England* v. *Bank of England*, 36 W. R. 880, 21 Q. B. D. 160; *City Bank* v. *Barrow*, 5 App. Cas. 664, 29 W. R. Dig. 176; *Colonial Bank* v. *Hepworth*, 36 W. R. 259, 36 Ch. D. 36.

The House took time for consideration.

May 12.—Lord HALSBURY, L.C.—The executors of Mr. Michael Williams had vested in them by law the shares which are the subject-matter of this controversy. The facts which gave rise to the controversy are simply that the executors, in order to get themselves registered in the books of the company, intrusted the possession of the share certificates to a person named Blakeway, who, in fraud of the trust reposed in him, pledged the certificates to raise money for himself with the appellant banks. The share certificates were in a form which contemplated the holder of them being entitled, when so disposed, to transfer the shares of which he was on the face of the document itself the owner by a form which, though on the same piece of paper as the share certificates themselves, was a separate instrument, and purported, when completed, by being signed by the person who on the face of the instrument was stated to be the owner, to transfer to someone else, by the execution of this form of assignment, his property in the shares. It is admitted that the shares (or, to speak more accurately, the share certificates) are not negotiable instruments, and the executors, being informed that in order to get themselves registered in the books of the company they must sign their names at the end of the document, acted upon that assurance, and, as I have said, intrusted the possession of (never intending to part with the property in) the share certificates to Blakeway. Blakeway was a stockbroker in London, and the transaction of loan took place in London; but the shares in question are shares in a corporation established in New York, and subject to the laws of that State. If it were necessary to consider what law must govern, as between these parties, the right to these certificates on the one hand, and the right to detain them as pledged for the money advanced on them on the other—though the certificates themselves were the certificates of shares in a foreign corporation—I should not doubt that it is to the law of England you must look, and not to the law of the United States. But, in the view which I take of the transaction in question, it does not appear to me that there is any such conflict as has been suggested at the bar.

It is not denied that Mr. Williams's executors never intended to part with the property in these shares. They simply parted with the custody of them, and I am unable to follow the observation made by Kekewich, J., in his judgment when he says that "it cannot be suggested for a moment that the executors are

(a.) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

precluded from asserting the truth." "On the contrary," he said, "my judgment goes on an examination of the real facts." Blakeway's authority was simply to obtain the registration of the executors, and, if the real facts are examined, the executors never intended to part with the property, and did not do any act which, to them at least, suggested that they were giving an authority other than what I have described; and how it can be said that, apart from what Kekewich, J., describes as "a familiar use of the word estoppel," they have parted with the property to someone else, I am wholly unable to understand. But the doctrine that a person shall not be permitted to represent, or permit to be represented, a state of facts at one time, and afterwards, when such representation has induced another person to change his position, seek to show that such his representation was erroneous, is a doctrine too well established now to be shaken, and, whether it is accurately called "estoppel" or not, the principle is perfectly intelligible. But Kekewich, J., then goes on to say that "the executors are precluded from asserting that Blakeway was not by the custody of these documents precluded from dealing with them as he from time to time considered desirable." If this means the mere custody apart from what the instrument upon the face of it represented to any person to whom it might be exhibited, I am wholly unable to assent to any such proposition. But if it means that the document itself, in the condition in which it was intrusted to Blakeway, represented by its being in that condition that Blakeway was entitled to deal with it, then the decision of the learned judge becomes intelligible, but only upon the ground (which he nevertheless himself disclaims) that the executors made, or permitted to be made, a representation that Blakeway had full dominion over the certificates to do what he pleased with them, which representation having been made the executors are estopped from denying it. Now, the question is, Have they made, or permitted to be made, on their behalf any such representation? With the greatest respect for the gentlemen who have given evidence on the subject of the law of New York, so far as it is relevant to the matter in hand, it seems to me that the law is the same in both countries, and, as I say, the question is, whether, expressly or impliedly, the executors permitted a representation to be made by Blakeway that he was entitled to deal with the certificates as he pleased. Now, the form of the certificates, and of that which is intended to be used as a transfer when a registered owner makes the transfer, appears to me to be all-important. I have intentionally, in what I have said before, refused to adopt the phrase used at the bar, "that the executors executed the transfer."

The document, such as it is, with the names of the two executors subscribed, will not read so as to be a perfect and intelligible document. The person who begins by describing himself as the owner of the shares is not the person who signs; and, as Lindley, L.J., very pertinently inquires, "What is it the executors have done? What representation have they made which they are precluded from denying or explaining away?" The mere form of the document which they have signed certainly does not in itself purport to show that they are intending to give a complete title to anybody. But undoubtedly a document may by usage become so well understood, in a particular sense, that a person may be well estopped from denying that when he issues it to the world it must bear the sense which usage has attached to it. And that brings one to inquire whether it is true that the issue of this document to the world in this form would show that the person signing had intended to give a complete title to anyone. To my mind the evidence shows beyond doubt that the document might mean at least one of two things—either that the executors were going to sell these shares and transfer them to someone else, or that they were signing in order that they might be themselves registered in the books of the company as the legal representative of the deceased holder, John Michael Williams.

Now if that is all that the document upon the face of it represents, and I cannot doubt that when all the evidence is looked to that is not an unfavourable mode of representing it towards the appellants, let us see what would have been the result if Blakeway, instead of simply tendering the document as security for a loan to himself, had said in plain terms to the bank what I have described as being the representation made by the document itself. "I tell you (the bank) I have been intrusted with these certificates for only one of two purposes, but I will not explain which—either to sell or to get the names of the owners of them registered in the books of the company." Can there be any difference between that which is stated in plain terms and that which, as a matter of business, ought to have been inferred from the nature of the document itself? I think none. I am therefore of opinion that the judgments of the Court of Appeal ought to be affirmed, and these appeals dismissed with costs, and I move your lordships accordingly.

Lord WATSON.—These appeals involve the right of the appellant banks to retain, in a question with the respondents, certain documents of title representing 1,210 hundred-dollar shares of the capital stock of the New York Central and Hudson River Railroad Co. The company and its undertaking are American, and the rights of its shareholders, as well as the effect of its stock certificates, are admittedly governed by the law of the State of New York. The certificates issued by the company to its registered shareholders are for ten shares each, and bear *in gremio* that the shares are "transferable in person or by attorney only on the surrender and cancellation of this certificate, by an indorsement thereof hereon, and in the form and manner which may at the time be required by the transfer regulations of the company." The indorsement on the certificate is in the form of a transfer for value received, blank in the names of the transferor and transferee, which is obviously meant to be executed by the person who is entered in the register of the company and in the body of the certificate as the owner of the shares. The system thus adopted has the merit of inseparably connecting the certificate with the transfer, and so preventing the dishonest creation of a legal right by transfer to one person, and a competing equitable right by deposit of the certificate with another. The late John Michael Williams was the registered owner of these 1,210 shares, for which he held certificates in the usual form. The respondents, who are executors of the deceased, were desirous of having the shares transferred to their own names; and for that purpose they, on the 29th of January, 1881, sent the certificates to Thomas, Sons, & Co., their London brokers, having previously, as directed by that firm, signed as executors the blank transfer on the back of each certificate. Instead of using the certificates for the purpose for which they were sent, William Evan Blakeway, one of the partners of Thomas, Sons, & Co., on the 10th of February and the 20th of April, 1881, delivered them to the appellants, the Colonial Bank, along with a mass of other securities, in order to cover advances made and to be made to his firm. On the 15th of August, 1883, certificates representing 500 of these shares were returned to Blakeway, who, on the

same day, obtained an advance of £20,000 from the appellants, the London Chartered Bank of Australia, on the security, *inter alia*, of the certificates for these 500 shares, which he authorized the bank to sell or otherwise dispose of at their discretion in the event of the advance not being repaid by the end of the month. Thomas, Sons, & Co. were adjudicated bankrupts on the 4th of February, 1884, when it appears that the securities held by the appellants were not sufficient to cover their advances. As soon as the frauds practised by Blakeway came to their knowledge, the respondents applied to the appellants for the certificates then held by them for 710 and 500 shares respectively. Neither of the appellants had obtained registration in respect of these shares, which still stood in the books of the company in the name of the deceased, John Michael Williams, but they declined to comply with the respondents' demand, on the ground that, according to the law of New York, delivery of the certificates with the indorsed transfer signed by the respondents was *per se* sufficient to pass to recipients for value and without notice the full legal and equitable right to the shares. That is their main defence to these actions, which pray for a declaration that the several deposits of the respondents' certificates were fraudulent, and conferred no title on the appellants, and for delivery of the certificates. That the interest in the railway company's stock, which possession of these certificates confers upon a holder who has lawfully acquired them, must depend upon the law of the company's domicil, seems clear enough, and has not been disputed by the respondents. But the parties to the various transactions, by means of which the certificates passed from the possession of the respondents into the hands of the appellants, are all domiciled in England; and it is, in my opinion, equally clear that the validity of the contracts of pledge between Blakeway and the appellants, and the right of the latter to retain and use the documents as their own, must be governed by the rules of English law. In the application of these rules the appellants are, of course, entitled to the benefit of any privilege which the law of America attaches to possession of these documents, as conferring right or title to the property of the shares. In so far as the law of America is concerned, your lordships have the aid of three experts, two of whom were examined by the appellants, and one by the respondents. As I understand their evidence, the principles of American law do not differ in any way, or at least in any material respect, from those by which an English court would be guided in similar circumstances. When the indorsed transfer has been duly executed by the original owner of the shares, the name of the transferee being left blank, delivery of the certificate in that condition by him or by his authority transmits his title to the shares both legal and equitable. The person to whom it is delivered can effectually transfer his interest by handing his certificate to another, and the document may thus pass from hand to hand until it comes into the possession of a holder who thinks fit to insert his own name as transferee, and to present the document to the company for the purpose of having his name entered in the register of shareholders, and obtaining a new certificate in his own favour. The appellant's witnesses say that delivery of the certificate with the transfer executed in blank, "passes the property" in the shares; but that statement must be accepted subject to the explanations by which it is qualified. The right of the holder appears from these explanations to be in the nature of a *jus ad rem* and not of a *jus in re*. Delivery does not invest him with the ownership of the shares in the sense that no further act is required in order to perfect his right. Notwithstanding his having parted with the certificate and transfer, the original transferor, who is entered as owner in the certificate and register, continues to be the only shareholder recognized by the company as entitled to vote and draw dividends in respect of the shares until the transferee or holder for the time being obtains registration in his own name. It would, therefore, be more accurate to say that such delivery passes, not the property in the shares, but a title, legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner. According to the custom of bankers and stockbrokers, both in this country and America, a certificate with the indorsed transfer executed in the manner already described is regarded as being "in order," and its delivery in exchange for value received is understood to be sufficient to pass the full title of the registered owner. Even when the delivery has been fraudulent, as in the present case, the Supreme Court of New York has held that the registered owner cannot reclaim the document from a holder who has given valuable consideration in good faith, and without notice of the fraud. But it is necessary to observe that the decision of the court did not attribute to the instrument any privilege or negotiability in the legal sense of that term. It was based (to use the language of Mr. Carter, one of the appellants' witnesses) "upon the circumstance that the registered owner has so dealt with the certificate as to lead the purchaser for value to believe that he was taking a good title to it. In other words, the foundation rests in the principle of estoppel."

Thus far the principles of American appear to me to be in harmony with the principles of English law. According to the latter, the true owner of such documents of title is not held to have parted with his interest in them, except where he intended to pass such interest, or where, by reason of some act or omission, he has estopped himself from saying that he did not intend to pass it.

The cases cited in the course of the argument which relate to competition between equitable and legal rights to stock or shares have really no bearing here. Whether the respondents are estopped from saying that Blakeway had not their authority to dispose of the certificates in question is, in my opinion, the sole question presented for decision in these appeals. Had the transfers been executed by John Michael Williams, and the certificates thereafter sent by him to Thomas, Sons, & Co. for safe custody, I should not have hesitated to hold that Blakeway, though acting fraudulently, was nevertheless placed by his act in a position to give a title to an honest purchaser, which his employer could not dispute. But that is not the case with which we have to deal. The transfer was signed by the respondents, who were not the registered owners of the shares, and were not named in the certificate. Whatever may be the effect of an instrument so executed, one thing is clear, that it cannot be regarded as, either in law or by custom, equivalent to a certificate and transfer executed by the registered owner himself. When the executors of a registered owner find it necessary to dispose of his shares they may for that purpose sign either the indorsed transfers or a separate transfer. But these documents themselves are insufficient to enable a person to whom the executors intend to pass the shares to obtain registration and a new certificate in his own name. In order to effect that object it must be proved to the satisfaction of the company that the persons signing the transfer as executors really possess

doubt that such a delivery would have been effectual for that purpose. But they were not. As I have already said, the only object they had in handing them thus signed to the brokers was to complete their title by obtaining registration in their own names. And the question to be determined is whether parting with the possession of the certificate so signed was an act which estops them from setting up their title against a person who has taken the certificates *bonâ fide* and for value from the brokers intrusted with them. A most important piece of evidence was adduced at the trial bearing upon this point. It was proved that it was the usual course, where executors desire registration in their own name, to forward the certificates with the indorsement signed by them, and acknowledged with a duly authenticated copy of the will, to the New York office, and that on such certificates and copy will being filed new certificates in the names of the executors are returned to them. It thus appears that certificates, signed as those now in controversy were, may be in the hands of brokers for either of two purposes, to effect a transfer or to complete the title of the executors. Their possession is just as consistent with the one purpose as the other. The case seems to me to differ essentially from that of a transfer signed by the registered owner. He must, presumably, have signed it with the intention some time or other of effecting a transfer. No other reasonable construction can be put on his act, and if he intrusts it on that condition to a third party, I think those dealing with such third party have a right to assume that he has authority to complete a transfer. But when the indorsement is signed by executors, who are not the registered owners, there can be no such presumption. They may well have signed it merely to complete their title without the intention of ever parting with the shares. Under such circumstances I do not think anyone dealing with a broker in possession of such certificates has a right to assume that he has authority to complete a transfer of them; his possession is equally consistent with the absence of any such authority, and with his holding them merely for the purpose of procuring registration in the name of the executor. Indeed, I think the evidence shows that the latter would be the more probable explanation of the signature by the executors. For, though an attempt was made to prove that it was a common practice for executors to sign indorsed transfers for the purpose of transferring the shares on a sale or pledge, the attempt signally failed. Under the rules of the New York Stock Exchange the delivery of certificates with the indorsement signed by the executors of the registered owner, is not a good delivery. And in the New York financial market, amongst bankers and brokers, it is not usual to lend upon the security of share certificates thus signed by executors; they are not regarded as being in order. Any such transaction would be exceptional only, and depend upon confidence in, or some special arrangement with, the borrower. Nor would a transfer signed by executors be a good transfer on the London Stock Exchange. A certificate and transfer would not be accepted unless it was clean on the face of it. And it is a remarkable fact that the representatives of several of the most important banking establishments in this country, who were called as witnesses, were unable to point to a single instance in which certificates with indorsed transfers signed by the executors of the registered owner had been taken in the course of their business as security for an advance. I have come without hesitation to the conclusion that there is no estoppel in this case as against the respondents which prevents their setting up their title to the shares and the certificates which represent them, a title which they have never intended to part with, and of which they can have been deprived, if at all only by estoppel. For these reasons I think the judgment appealed from should be affirmed.

Lord MORRIS. — I do not think it necessary to consider some nice questions which might arise under certain circumstances on the transfer by delivery and indorsement of certificates which are admittedly not negotiable instruments. In this case did the transfer and indorsement made by the executors of John Michael Williams transmit title to the shares to the appellants? On the facts (which it is not necessary to recapitulate), if the transfer and executorial indorsement did so vest the property it must have done so by estoppel, as well by the law of the State of New York as by the law of England. Mr. Carter, a member of the American Bar, examined on behalf of the appellants, thus states the law of New York: "The foundation of the title of a *bonâ fide* purchaser for value of a certificate of stock which has been delivered to him in fraud of the rights of the registered owner rests upon the circumstance that the registered owner has so dealt with the certificate as to lead the purchaser for value to believe honestly that he was taking a good title to it; in other words, the foundation rests on the principle of estoppel." Applying that principle to this case, the appellants, in taking delivery of the certificates from Blakeway, should have acted in such a manner as reasonable men would in dealing with such an important matter of business. They did not so act. According to the American evidence the certificates were not "in order," and would not, according to the rules of the New York Stock Exchange, pass from hand to hand. The documents were imperfect, and though in a proper case the imperfections might be remedied, that is not a sufficient answer when the appellants have to rely on title by estoppel. According to the English evidence, the certificates as indorsed would not be accepted in delivery on the English Stock Exchange. Consequently, whether considered from American usage and law or English, the documents were imperfect; the appellants were thereby put on inquiry, and being so put, can have no better title than their transferor Blakeway. In my opinion the judgments should be affirmed.

Orders appealed from affirmed, and appeals dismissed, with costs.

Solicitors for the Colonial Bank, *Druces & Attlee.*

Solicitors for the London Chartered Bank of Australia, *Freshfields & Williams.*

Solicitors for the respondents, *Young, Jones, Roberts, & Hale.*

Court of Appeal.

From Chan. Div. June 24, 25; July 5, 1890.

In re KERSHAW.

WHITAKER *v.* KERSHAW. (*a.*)

Executor—Residue—Distribution of residue—Shares in company—Liability for future calls—Indemnity—Executor's right to repayment—Married woman—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* (2)—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 16, 75.

Residue consisting of shares in a company, on which

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

there was a liability for future calls, was handed over by the executor, with notice of such liability, to the residuary legatee, a married woman. Before a transfer of the shares was registered, a call was made, and the executor was compelled by the company to pay the call.

Held, that a liability for future calls was not a debt, and that, as no debt existed at the time the residue had been handed over, the executor was entitled to compel the residuary legatee to repay to the executor the amount of the calls.

Jervis *v.* Wolferstan, *L. R.* 18 *Eq.* 18, 22 *W. R. Dig.* 251, *approved.*

Held, also, that, although the residuary legatee was a married woman, and although her liability did not depend on any express or implied contract on her part, yet that she was liable to be sued as a feme sole *by the executor, having regard to the words "or otherwise" in section* 1, *sub-section* (2), *of the Married Women's Property Act*, 1882, *which enacts that "a married woman shall be capable of being sued either in contract or in tort, or otherwise."*

Appeal from North, J.

The testator, William Kershaw, who died in 1886, had by his will bequeathed his residuary estate to the plaintiffs in the present action, upon trust to pay the debts of the testator and, subject thereto, upon trust for the testator's son, John Kershaw, absolutely. The testator had also appointed the plaintiffs his executors.

On the 12th of March, 1887, John Kershaw assigned all his interest in the testator's residuary estate to his wife, the defendant, Harriet Kershaw, as her separate property.

The residuary estate of the testator consisted of a sum of £1,103 cash, and fifty shares of £5 each in the Belgian Mills Co., on each of which a sum of £3 had been paid up, leaving £2 per share still uncalled, but liable at any time to be called up on the passing of a resolution to that effect by the directors of the company.

On the 29th of April, 1887, the plaintiffs paid the £1,103 cash to Mrs. Kershaw, and handed her the certificates of the fifty shares, but no transfer of the shares to her was executed. Mr. and Mrs. Kershaw, however, executed a release to the plaintiffs.

There was some evidence to show that the plaintiffs knew that £2 per share at that time still remained uncalled, and that it was not improbable a call would shortly be made.

In August, 1887, a call of 10s. per share, payable on the 10th of September, 1887, was made. Immediately upon receiving notice of the said call the plaintiffs sent the notice to the defendant, Mrs. Kershaw, and requested her to pay the same, but she refused to do so.

The Belgian Mills Co. having brought an action against the plaintiffs to enforce payment of the said call, on the 3rd of January, 1888, the plaintiffs paid to the company the sum of £27 9s., being the amount of such call (£25), together with interest thereon from the 10th of September, 1887, and costs.

The plaintiffs thereupon informed the defendant of the payment by them of this call, and requested her to pay to them the sum of £25, with interest thereon at four per cent. per annum from the 10th of September, 1887, and also to accept and register a transfer of the said shares. The defendant, however, refused to do so.

The plaintiffs then took out an originating summons, claiming a lien on the shares for the amount of the call and costs, and on the 23rd of February, 1888, an order was made declaring that they had a lien for the amount of the call, interest, and costs, directing the costs to be taxed, and, in default of payment of the amount due, the plaintiffs were to be at liberty to sell the shares. The costs were taxed at £67 18s. 9d.

The defendant, Mrs. Kershaw, having refused to pay, the shares were sold, and realized only £26 5s.

The plaintiffs then instituted the present action against Mrs. Kershaw claiming payment from her of the difference between the sum they had received by the sale of the shares and the sum due to them. Mrs. Kershaw, by her defence, pleaded that she had not at the commencement of the action nor at the present time any separate estate free from a restraint on anticipation.

It appeared from the evidence that Mrs. Kershaw had, prior to the commencement of the action, disposed of the £1,103 cash; but that she was entitled to a contingent reversionary interest under the testator's will.

North, J., at the trial of the action, held that the case was governed by *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18, 22 W. R. Dig. 251, and made an order declaring that the plaintiffs were entitled to be indemnified out of the testator's residuary estate against the sum paid by them for calls (£25) and interest, and against so much of the £67 18s. 9d. costs as did not relate to the costs of the originating summons, such amount to be certified, and also against their costs of the action, to be taxed as between solicitor and client. And it was ordered "that the plaintiffs recover against the defendant Harriet Kershaw the said sum of £25 and interest, the said costs to be certified and costs to be taxed, such amount to be payable out of her separate property, and not otherwise. Execution hereon to be limited to the separate property of the defendant not subject to any restriction against anticipation, unless, by reason of section 19 of the Married Women's Property Act, 1882, the property shall be liable to execution notwithstanding such restraint."

Mrs. Kershaw appealed.

Napier Higgins, Q.C., and *E. Ford*, for the appellant.—The liability for calls is a debt: *Williams* v. *Harding*, L. R. 1 H. L. 9, 14 W. R. H. L. Dig. 3, and see section 16 of the Companies Act, 1862. Section 75 does not displace section 16. *Jervis* v. *Wolferstan* is distinguishable, for there the liability was a remote and contingent liability, but here the liability was defined and known to be likely soon to arise. In *Fraser* or *Robinson* v. *Murdoch*, 30 W. R. 162, 6 App. Cas. 855, Lord Blackburn, at p. 872, considered that Sir George Jessel, in *Jervis* v. *Wolferstan*, stated the right of trustees to indemnity in somewhat too wide terms. Executors are not entitled to recover back residue which they have paid away after having had notice of a debt, or even notice of a claim: Williams on Executors, 8th ed., p. 1457. Further, the defendant is a married woman, and there is no evidence of any express contract or engagement by her pledging her separate estate to indemnify the executors, and no such engagement can be implied: *Leedham* v. *Chawner*, 4 K. & J. 458. 7 W. R. Ch. Dig. 86; *Leake* v. *Driffield*, 38 W. R. 93, 24 Q. B. D. 98; *Harrison* v. *Harrison*, 36 W. R. 748. The words "or otherwise" in section 1, sub-section (2), of the Married Women's Property Act, 1882, refer to suing on contract or on tort.

Cozens-Hardy, Q.C., and *Upjohn*, for the plaintiffs, the respondents.—The other side have overlooked the fact that *Pike* v. *Fitzgibbon*, 29 W. R. 551, 17 Ch. D. 454, is now no longer law; it is sufficient if the married woman have separate estate at the date of the judgment obtained against her: *In re Shakespear*, 33 W. R. 744, 30 Ch. D. 169; *Palliser* v. *Gurney*, 35 W. R. 760, 19 Q. B. D. 519. *Jervis* v. *Wolferstan* governs the present case, and is a clear authority to

show that the plaintiffs are entitled to recover back their money.

Napier Higgins, Q.C., in reply.—The executors having taken proceedings to establish a lien on the shares, and having obtained a sale of the shares, are not entitled afterwards to proceed against the defendant personally: *Phosphate Sewage Co.* v. *Molleson*, 4 App. Cas. 801, 28 W. R. Dig. 86. The maxim *Nemo bis vexari* applies. [BOWEN, L.J.—This objection ought to have been taken in the court below.]

Cur. adv. vult.

July 5.—COTTON, L.J.—In this case a testator left the residue of his personal estate to his son, John Kershaw, who assigned his interest in it to his wife, the defendant, Harriet Kershaw, for her separate use. The residue comprised fifty shares of £5 each in the Belgian Mills Co. (Limited) on which £3 per share had been paid. The plaintiffs, who are the executors, paid the clear residue to the defendant by the direction of John Kershaw, and gave her the certificates of these shares, but by some accident no transfer of them to her was executed. After they had so paid the residue to the defendant, an action was commenced against them for a call on the shares, and they were obliged to pay it. They applied to Mrs. Kershaw to indemnify them against the amount they had been obliged to pay, but she refused to do so. They then sought to indemnify themselves by taking proceedings in the Chancery Division to obtain a sale of the shares, and they were sold by order of the court; but they did not produce sufficient to indemnify them. The defendant having still refused to pay them the balance, they commenced this action against her to recover the amount out of her separate estate. Their demand has been resisted on several grounds. I will first consider the case as if Mrs. Kershaw were a *feme sole*. If an executor pays away the residue of an estate to a legatee without knowledge of anything which interferes with the right of the legatee to receive it, he is entitled to call on the residuary legatee to refund, in the event of the executor afterwards being obliged to pay anything on behalf of the testator's estate. That is not a right depending on contract. It is said these executors have lost that right because, with knowledge of the liability on these shares, they paid over the residue to Mrs. Kershaw. If an executor with knowledge of a debt hands over the residue to the legatee, and the executor is afterwards obliged to pay that debt, he cannot recover the amount from the residuary legatee. But that rule does not apply where the executor has no notice of the debt, but only notice of a liability which may mature into a debt. A liability to a call is not a debt until the amount is actually called for. In *Jervis* v. *Wolferstan* Sir George Jessel, M.R., held that notice of a liability does not prevent an executor from recovering back the assets if he has paid them away, when the liability becomes a debt. It is true that in that case the Master of the Rolls referred only to a liability of a very shadowy nature, but he did not proceed on that, but on the principle that notice of a liability is not sufficient to deprive the executors of their right to recover. It must be notice of a debt, and where there is no debt the executor does not lose his right to recover. If notice of a liability was sufficient to deprive an executor of his right to recover it would cause enormous difficulty in administering estates, considering the liability of so many persons on shares and leases, and nearly every estate would have to be administered by the court. But it is said a call on shares stands on a different footing, and constitutes a debt from the time when the testator became a shareholder. But liability to a call is not a debt until the call is made. We were referred to section 16 of the Companies Act, 1862, which enacts that, "All moneys payable by any member to the company, in pursuance of the conditions and regulations of the company, or any such conditions or regulations, shall be deemed to be a debt due from such member to the company." The money payable is to be a debt, but when? When it becomes payable in accordance with the regulations of the company, and by the articles of association of this company the shareholder is only obliged to make the payment when called on by the directors to do so. There is, therefore, no debt until a call is made. We were also referred to section 75 of that Act, which enacts: "The liability of any person to contribute to the assets of a company under this Act in the event of the same being wound up shall be deemed to create a debt (in England and Ireland of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time, or respective times, when calls are made as hereinafter mentioned for enforcing such liability, and it shall be lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls as well as calls already made." That section only applies where the company is being wound up. There is a marked distinction between sections 16 and 75.

No debt was existing here when the executors paid over the residue to the defendant. Therefore, if Mrs. Kershaw had been a *feme sole*, the executors would have been entitled to compel her to refund. But the defendant, Mrs. Kershaw, is a married woman, and it is said that the plaintiffs cannot sue her as a *feme sole* because she entered into no contract with respect to her separate estate, and that the claim of the executors to indemnity does not give them a right to sue a married woman who has entered into no contract. No doubt here there is no contract by her, but I do not agree that therefore she cannot be sued. It is said that the Married Women's Property Act, 1882, is against that. I do not agree. By section 1, sub-section 2, it is provided that a married woman shall be capable of being sued either in contract or tort, "or otherwise," as if she were a *feme sole*. It is said that that power of suing a married woman is only in connection with her power to contract. I do not agree with that. The power to contract is distinct from the liability to be sued. The words "or otherwise" cannot be disregarded. They make her liable to be sued as if she were a *feme sole*. If the defendant here were a *feme sole* the executors would be entitled to sue her and recover this money. It is also said she has no separate estate. She has not as separate estate that which was handed to her. But she has separate estate, and though the plaintiffs' remedy against her may be defeated by the restraint on anticipation, yet she has separate estate.

It was urged that this judgment will to some extent cause the executors to be paid twice over. That is not so, for the judgment excludes the costs of the former proceedings, so that the executors will only be paid what has not already been paid to them. They got a right under the previous order, not an order for payment. Then it is said that the former judgment makes this *res judicata*. The former order was for a limited purpose, a sale and indemnity out of the proceeds; the present action is to obtain a refund of money paid, so that it is for a different purpose. This point could not be dealt with in the former action, as there was no knowledge that the sale of those shares would not indemnify the plaintiffs. I am, therefore, of opinion that the appeal fails.

FRY, L.J.—I am authorized by Bowen, L.J., to say that he concurs in this decision. North, J., gave the plaintiffs relief for two distinct sums, one was the amount of the call on the shares, and the other the unpaid balance of their costs, charges, and expenses as trustees. Those two amounts stand on two different footings. The main argument on behalf of the appellant was, that the plaintiffs had paid the residue of the estate to her with notice of a debt due from the testator, and that if no debt was due they had notice of a liability which brought the case within the same rule as if there had been notice of a debt. I am of opinion that the plaintiffs had no notice of a debt. They had notice of a liability, but that was merely a liability, and not a debt. Section 16 of the Companies Act, 1862, is explicit to show that this liability only became a debt when the amount became payable in pursuance to the articles of the company; that is, when a call was made. It was a liability before the call was made, and a debt afterwards. Section 75 shows that, on a winding up, that which was before a liability becomes a debt. If a liability is the same as a debt, that is one of the idlest pieces of legislation one can conceive. I hold, therefore, that the plaintiffs had no notice of a debt. Then it is said that notice of a liability is sufficient. That point was considered by Sir George Jessel, M.R., in *Jervis* v. *Wolferstan*, where he said:—"I have looked through many cases, and I have asked for the assistance of the bar, and I cannot find the rule stated in wider terms than these, that he cannot recover from a legatee a payment made with notice of a debt." This is the rule of law, and it is founded on good sense. If the executors could not recover any sum paid to a residuary legatee when they had notice of a liability, it would keep a large part of most estates in the hands of the executors.

Then it is argued that the defendant is a married woman, and that there is no evidence that she is possessed of separate estate. I agree with what Cotton, L.J., has said on that point. On what principle can the married woman be sued in this case? It is suggested she could be sued on the ground of an implied contract to indemnify these executors; but that does not appear to me to be a satisfactory ground on which to rest her liability. I think the right to sue the defendant in this case is given to the plaintiffs by the words "or otherwise" in section 1, sub-section (2), of the Married Women's Property Act, 1882. It enables a married woman to be sued "in contract, or in tort, or otherwise." The action here stands on the following footing: A contract was entered into by the testator, whose property the defendant has, under which a debt arises, after his death. The creditor can sue the executors and recover to the extent of the assets, and the executors pay him, and have an equal right against the estate and the legatee of that estate. That right is based on the original contract of the testator, whose money got into the hands of this married woman. The object and effect of that sub-section is to enable a married woman to be sued on any cause of action on which a man can be sued, subject to the fact that her power to contract is limited, and that the remedy is confined to her separate estate. The cause of action is the same as in the case of a man, the relief is different. Then there is a point which was not argued, but which we have considered. Can an executor recover his costs, charges, and expenses, after he has paid over the residue of the estate? I think they may be recovered from the legatee to the extent of the estate received by him, though, as the point was not argued, I leave myself free to decide otherwise if the point should arise for decision. I am therefore of opinion that this appeal fails.

Solicitors for the plaintiffs, *Woodcock, Ryland, & Parker*, for *Tweedale, Sons, & Lees*, Oldham.

Solicitors for the defendants, *Pitman & Sons*, for *J. E. & R. Whitworth*, Manchester.

From Chan. Div. May 19, 20.

In re PORTUGUESE CONSOLIDATED COPPER MINES. BADMAN'S AND BOSANQUET'S CASES. (a.)

Company – Shares – Allotment – Directors – Allotment by unauthorized directors – Ratification by company – Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 67.

A. and B. had applied for shares in a mining company, and on October 24 1888, *two of the four directors of the company met and allotted shares to A. and B. and other applicants. The allotments so made were invalid, the two directors not having authority to make allotments. Letters of allotment were, however, sent out, and were received by A. and B. on October* 25. *A. returned his allotment letter, but the secretary refused to receive it back, and both A. and B. immediately wrote complaining of the manner in which the allotments had been made, and asking to be relieved from taking the shares, but neither of them expressly repudiated the shares. On October* 31 *B. paid the allotment money to the company's bankers under protest, as he alleged, but there was no evidence that any protest had been communicated to the company. On December* 24 *the company brought an action against A. for the allotment money payable by him. On January* 7, 1889, *at a meeting of directors, at which two were present, it was resolved that certificates be sealed of the shares allotted to A. and B., and this was accordingly done and notice thereof given to A. and B. There was no evidence that the meeting of January* 7 *was in any way irregular or invalid. On January* 16, *at a meeting of all the four directors, the minutes of the prior meeting of January* 7 *were signed.*

A. and B. subsequently applied to have their names removed from the shareholders' register.

Held, (1) *that the invalid allotments made to A. and B. on October* 24 *were capable of being ratified by the company, and had been so ratified as regards A. on December* 24, *when the action to recovr the allotment money was brought against him by the company, and had also been so ratified as regards both A. and B. either on January* 7, 1889, *or on January* 16 *at the latest*; (2) *that, under the circumstances of the case, and in the absence of any prior repudiation of the shares by A. or B., the ratification had been made within a reasonable time; and, consequently, that neither A. nor B. were entitled to have their names removed from the register.*

Bolton *v.* Lambert, 37 *W. R.* 434, 41 *Ch. D.* 295, *followed.*

Decision of North, J., *affirmed.*

Appeals from North, J.

The Portuguese Consolidated Copper Mines Co. was registered on the 20th of October, 1888. The articles of association provided:—

Clause (70) "The shares shall be allotted by the directors to such persons at such times and in such manner as they shall think proper."

(75) "The qualification of a director shall be the holding of at least forty shares."

(80) "The first directors shall be appointed by the majority of the subscribers to the memorandum of association."

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

(91) "The business of the company shall be managed by the directors."

(96) "The directors shall hold meetings for the dispatch of business at such times and places, and may adjourn and otherwise regulate such meetings as they think fit, and may determine the *quorum* necessary for the transaction of business."

On the 22nd of October, at a meeting at which the seven subscribers to the memorandum of association were present, it was unanimously resolved "that the following gentlemen be appointed directors of the company: Lord Inchiquin, Captain Skewis, Matthew Loam, Richard Wood, and J. H. Hoyle; the latter gentleman will take his seat after allotment."

A prospectus dated October 17, 1888, and a form of application for shares had been sent to and received by each of the present appellants, Messrs. Bosanquet and Badman.

The prospectus contained a statement that the "share capital of the company is £100,000 in twenty thousand shares of £5 each, payable as follows:—10s. on application, £1 10s. on allotment, and the balance, as and when required, in calls of not more than £1 each at intervals not less than two months each. In cases where the number of shares allotted is less than the number of shares applied for, the surplus paid on deposit on such shares will be credited towards the amounts payable on allotment. Should no allotment be made, the deposits will be returned in full."

The form of application addressed to the directors of the company was as follows:—

"Gentlemen, — Having paid to the company's bankers the sum of £ , being a deposit of 10s. per share on application, I request you to allot me that amount upon the terms of the company's prospectus; and I hereby agree to accept the same or any smaller number that may be allotted to me, and to pay the balance of £ per share, as provided by the said prospectus."

On the 23rd of October Bosanquet signed an application in the above form for 200 shares, and Badman for 50 shares. On the 24th of October two of the directors Captain Skewis and Richard Wood, met, and allotted to Bosanquet and Badman the shares they had applied for. No allotments of shares to the directors themselves were, however, then made, but the meeting was adjourned to the 25th of October, when the same directors attended and allotted forty shares to each of the directors. Notice of the allotments were sent to each of the allottees. The meeting was further adjourned to the 26th of October, when Captain Skewis, Wood, and Loam attended and passed a resolution confirming the allotments already made.

Badman had, when he applied for his shares, sent a cheque for the money due on application, but on receiving the allotment letter he stopped the cheque, and returned the allotment letter, saying that he wished to be relieved from the shares; but he did not in terms repudiate the shares on the ground that the allotment was invalidly made. The secretary returned him the allotment letter, but he did not pay the allotment money. As regards Bosanquet, he paid the money payable on allotment of the shares, as well as the application moneys, but he alleged that he had paid the allotment money under protest; there was, however, no evidence that any protest had been communicated to the company. He also did not repudiate the shares on the ground of invalidity of allotment, though he complained that the allotment was unfair.

On December 24, 1888, an action in the name of the company was instituted against Badman to recover the amount of the application and allotment moneys payable by him, and the company obtained an order for payment under order 14.

On January 7, 1889, at a meeting of directors at which two only were present, it was resolved that certificates of the shares which had been allotted should be issued, and this was accordingly done, and notice thereof was sent to the shareholders. Bosanquet wrote in reply that he did not at present intend to take the shares, and was in hopes to be soon in a position to compel the company to return his money.

On January 16 another meeting of directors was held, at which Lord Inchiquin, Captain Skewis, Loam, and Richard Wood were present, and Lord Inchiquin, as chairman, signed the minutes of the previous meeting of January 7.

On February 18, 1889, a petition for winding up the company was presented.

On March 7, 1889, at a duly constituted meeting of directors, a resolution was passed confirming the allotments made on the 24th, 25th, and 26th of October, 1888.

On April 2, 1889, North, J., held, in *Steele's case, In re Portuguese Consolidated Copper Mines*, 42 Ch. D. 160, 37 W. R. Dig. 36, that the allotments made in October were invalid, notice of the meeting of October 24 not having been given to all the directors, and this decision was affirmed by the Court of Appeal on May 31, 1889.

On February 10, 1890, North, J., dismissed applications made by Badman and Bosanquet to have their names removed from the register as holders of the shares allotted to them on the ground that they had withdrawn their respective applications for shares before any valid resolution to allot the shares had been passed by the directors.

From this decision Bosanquet and Badman now appealed.

Napier Higgins, Q.C., and *Farwell*, for the appellant Bosanquet.—Bosanquet's application to take shares was based upon the terms set out in the prospectus and the articles of association. The prospectus held out five persons by name (including Lord Inchiquin), whom it was proposed should be directors, and the articles provided that the shares should be allotted by four of these directors, and that the qualification of a director was the holding of forty shares (articles 70 and 75). These terms were a condition precedent of the contract. But the shares were, in fact, allotted to the appellant at a meeting, held on the 24th of October, at which only two of the directors were present, and when not a single share had, as yet, been allotted to the directors. There was, therefore, in fact no contract to take shares: *Ernest* v. *Nicholls*, 6 W. R. 24, 6 H. L. Cas. 401; and nothing capable of ratification, so that *Bolton* v. *Lambert*, 37 W. R. 434, 41 Ch. D. 295, does not apply. It has been decided by the Court of Appeal in *In re Portuguese Consolidated Copper Mines, Steele's case*, that the two directors who purported to allot the shares at the meeting of the 24th of October, could not validly do so because the meeting was not a properly constituted meeting; the ratification relied on is a ratification made by two directors, of whom Hoyle was one, but he was excluded by the terms of the prospectus from taking part in the allotments, and therefore he was not capable of ratifying the previous invalid allotment. The alleged ratification is, therefore, itself invalid. It must be shown that the persons who ratified were persons who at the date of the supposed contract were capable of contracting; the principle of ratification depends on relation back to that date, and that principle applies equally to both parties: *Saunderson* v. *Griffiths*, 5 B. & C. 909; *Doe* v. *Walters*, 10 B. & C. 626.

The date of the alleged ratification is the 7th of March, 1889, and the date of Bosanquet's application for shares is the 22nd of October, 1888; the ratification, therefore, was made too late, for it would have been too late to allot five months after the application: *Ramsgate Victoria Hotel Co.* v. *Montefiore*, 14 W. R. 335, L. R. 1 Ex. 109; *Lyell* v. *Kennedy*, 38 W. R. 353, 14 App. Cas. 437. Again, ratification cannot be used inequitably; the directors are not entitled to put off the ratification until shortly before the company goes into liquidation: *Homer District Co.* v. *Smith*, 39 Ch. D. 546; *Mayor of Kidderminster* v. *Hardwick*, 22 W. R. 160, L. R. 9 Ex. 13. Bosanquet paid the allotment moneys under protest.

E. Beaumont, for the appellant Badman.—Badman, when he received the allotment letter, at once stopped the cheque he had given, and wrote to say he did not wish to take the shares; he was not then, however, aware of the fact of the invalidity of the allotment, or he would have then distinctly repudiated. As to the alleged ratification, even if the ratification took place on the 24th of December, 1888—the date of the issue of the writ by the company against Badman—it was too late. The value of shares in a company like this, a mining company, fluctuate rapidly in a short period even, and a delay of two months in making an allotment would be inequitable to an applicant for shares; and if such delay would render it inequitable to allot, it must be also inequitable to confirm an invalid document. The circumstances here preclude any supposition of a continuing offer on Badman's part. [BOWEN, L.J., referred to *Hagedorn* v. *Oliverson*, 2 Man. & Sel. 485]. There the underwriter had got all he bargained for—viz., the premiums—and the only question was whether an alien could take advantage of the insurance.

He also referred to *Mathew's case*, 3 De G. & Sm. 234.

Cozens-Hardy, Q.C., and *W. Baker*, for the respondent company, were called on to argue only with regard to the question whether the ratification was made within a reasonable time.—There was in fact no repudiation of the shares by either of the appellants until after the ratification of the contract. The present cases are therefore distinguishable from *Steele's case*, because Steele distinctly repudiated the shares directly he received the allotment letter. The allotments were confirmed and ratified by the meetings held on January 7 and January 16, and the latter date is the very latest time at which the ratification can be fixed. The company did nothing to mislead either Badman or Bosanquet into the belief that they would not be held to their bargain. *Ex parte Baily*, 16 W. R. 1093, L. R. 3 Ch. App. 592, is distinguishable, and the ratification is within a reasonable time.

Napier Higgins, Q.C., in reply.—Though at the meeting of January 16 the minutes of the meeting of January 7 were signed by Lord Inchiquin, there is no evidence that those minutes were read and confirmed at the meeting of January 16. [*Baker* referred to the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67.]

COTTON, L.J.—There are two appeals before us, and to a considerable extent the arguments are common to both, but we must deal with them separately in considering the question of ratification.

The facts in Bosanquet's case are these. He applied for shares in the ordinary way (the terms of the application I shall refer to presently), and there was an allotment made to him of the shares he had applied for. The allotment was made at a meeting no notice of which had been sent to one of the directors, so that those who attended the meeting were not able to bind the company; nevertheless they purported to make a contract on behalf of the company allotting 200 shares to Bosanquet. The allotment was made on the 25th or the 26th of October, and on October 31 Bosanquet paid (though he said he did so under protest) the money which was to be paid by him on allotment. After that nothing is done practically until January 7, 1889, when a meeting is held at which it was resolved that the certificates of the shares be sealed with the seal of the company and be issued to Bosanquet and the other allottees.

In Badman's case the facts are that he applied for, and had shares allotted to him in the same way, but on receiving the allotment letter he wrote saying—not that he had made no contract—but that he wished to be excused taking the shares, and he returned the letter of allotment; this, however, the secretary refused to receive, and sent him back the returned allotment letter.

I will first deal with the argument that is common to both cases. It was said that according to the terms of the contract, and as a part of those terms, there was that which prevented—independently of anything else, and even if the board who made the contract had been duly authorized to contract on behalf of the company—there being any contract which could be enforced; for it was said that according to the terms of the prospectus, and having regard to the articles, certain named persons were to be agents on behalf of the company to allot the shares and to determine the allotments. But that would not be part of the contract; it might be a ground, if it could be established, for setting aside the contract on the ground that it was wrong that that contract should be made by the persons who made it. The form of application was relied on in support of this argument, and it was as follows:—"Having paid to the company's bankers the sum of £ , being a deposit of ten shillings per share on application, I request you to allot me that amount on the terms of the company's prospectus." What do the words "on the terms of the company's prospectus" mean? Do they mean on condition that the allotment is made by the persons named in the prospectus and articles as about to make the allotment? I cannot think that they mean that. I think those words have reference to the terms as to payment, which are to bind the parties when the contract is made, and do not refer to any provision in the prospectus or articles as to the persons who are to make the contract. The prospectus contains the following terms:—"Payable as follows: 10s. on application; £1 10s. on allotment; and the balance, as and when required, in calls of not more than £1 each at intervals of not less than two months each"; and further, "in cases where the number of shares allotted is less than the number of shares applied for, the surplus paid on deposit on such shares will be credited towards the amounts payable on allotment. Should no allotment be made the deposits will be returned in full." In my opinion those are the terms on which the application is made, and it is not contended that anything has been done with reference to those terms which prevents this contract to take shares being enforced against either of these applicants.

Then it was urged that the Court of Appeal has already decided that the board which purported to make the allotments was so constituted that it could not validly make the contract on behalf of the company, because no notice of the meeting had been sent to one of the directors, although if that had been done there would have been a sufficient number of directors, as no *quorum* of directors had been fixed by the articles. And it was said that, as there was no contract by persons authorized on behalf of the company, there could be no ratification except by the persons who could have originally made the contract—

i.e., the contract of allotment. That I think is a fallacious argument; but looking at the facts of the case—at least as regards Mr. Bosanquet—I do not think it need be considered. The contract of allotment and the ratification of it are distinct matters. There is a contract purporting to be a contract of the company, and purporting to be made on behalf of the company, and although the Court of Appeal has held that the persons who purported to make the contract of allotment had no power to bind the company, yet as regards ratification any persons who were authorized on behalf of the company to ratify can do so, even though they were not the persons originally authorized to enter into the contract. The argument really depends on the fallacy of considering the contract as one made, not by or on behalf of the company, but by the individual directors who purported either to allot, or who afterwards confirmed that allotment. The contract is the contract of the company, and I know of no rule which compels the court to hold that the confirmation of the contract may not be made by those who have authority on behalf of the company to confirm the contract. In this case the directors have full power to do everything on behalf of the company except what is specially reserved to be done by the company acting in general meeting; and in my opinion, therefore, it is not necessary to show that those who confirmed this contract—for it purports to be a contract made on behalf of the company—were the persons who were nominated as the persons to allot the shares.

Then the question arises as to what ratification there was, and whether that ratification has been made within a reasonable time. I will take Badman's case first. He never in fact repudiated the shares, and on the 24th of December an action was brought against him in the name of the company to enforce payment of the moneys which he ought to have paid both on application and on allotment; for though he had sent a cheque for the money payable on application for the shares, he had stopped that cheque. That action, therefore—which we must assume to have been properly brought on behalf of the company—was an assertion by the company that they held Badman to his bargain, and it was an election by the company—if up to that time they were not bound by the unauthorized act of those who purported to act as their agents—to adopt that unauthorized act as a contract made by persons whom they authorized, and whose action they ratified and confirmed. The ratification, therefore, in Badman's case must be taken to have been made on the 24th of December, and that, in my opinion, was not an unreasonable time. There had been no previous declaration by Badman that he repudiated being bound; there had been only an appeal *ad misericordiam* by him to the directors, saying in effect, "I cannot pay, I ask you kindly to allow me to be relieved from the shares, and not to enforce your claims against me." The company treated him as being entitled to these shares and as being a shareholder; and although it is true that in a company like this, shares do fluctuate considerably as regards their value and prospects, yet I cannot think that at that time there existed any sufficient reason for holding that it was inequitable for the company, as against Badman, to ratify that which had been purported to be done by an insufficient number of directors, so as to bind him by it.

Then as to Bosanquet. He had paid the money payable on allotment, and although it is said he paid it under protest, that cannot be regarded. There is no evidence as to whom the alleged protest was made; the only evidence is that when he paid the £150 to the bankers on allotment, he wrote on the letter of allotment "paid under protest." The bankers were not agents to receive on behalf of the company any notice of protest, and therefore that cannot be regarded. In his evidence, no doubt, Bosanquet does state that he hoped to get further evidence and then to get off his liability; but he did not even then state that he considered the allotment was bad; he only said it was very unfair, which I think meant that he considered that the directors had allotted hastily, and that he hoped to find out some reason, in consequence of what he considered their hasty and unfair conduct, for getting off the contract he had entered into. The next thing that occurs is on the 7th of January, when a resolution was passed that the certificates of the shares should be sealed and sent to him, and they were sent to him on the following day. Then he sends an answer that he does not at present intend to take the shares. That I think, however, is not material as regards the point I am now dealing with—the point as to ratification—because the certificates had been already sealed and a resolution passed at a meeting of directors, which was entered in the minute book. Section 67 has a bearing upon this:—[His lordship read the section, and continued:—] We have no evidence at all as to the circumstances under which this meeting was held. There is no evidence in this case, such as there was in *Steele's case*, that there had been no notice of the meeting sent to those directors who were not present at it, and I think that we are bound by this section to hold, in the absence of any evidence to the contrary, that the meeting was duly held and convened, and, if so, notice must have been sent to all the directors, and then those who were at the meeting would be in a position to act for, and on behalf of, the company, as there was no *quorum* required by the articles. Therefore, as early as the 7th of January there is, I think, a ratification by the company of the act of their invalid body of directors, treating Bosanquet as the holder of these shares. But, at all events, at a little later date—viz., the 16th of January—there was a meeting held of all the four directors, who, it is said by Mr. Higgins, could alone ratify, on behalf of the company, the previous allotment; and Lord Inchiquin, as chairman of the meeting held on the 16th of January, signed the minutes of the previous meeting of the 7th of January. It is true that in the minutes of the meeting of the 16th of January there is nothing said about the minutes of the preceding meeting having been read and confirmed, but we know that in the ordinary and regular course of business, at meetings of this kind, the minutes of a previous meeting are not signed until they have been read, and that then they are signed for the purpose of confirming them. The minutes of the meeting of the 16th of January, therefore, show that all the directors recognized and adopted the contract with Bosanquet, and that if it had not been already ratified by the meeting of the 7th of January, it was, at latest, ratified and made effectual by the signature given on the 16th of January by the direction of a meeting of all the directors. On the 16th of January, therefore, at the latest, there was an effectual ratification and adoption of the contract purporting to have been made on behalf of the company by those who acted in October; or, to put it in another way, there was then, at latest, an election by the company to be bound by the act of those who had acted on the 24th and 25th of October.

Then, is that too late? It is said there had been a considerable alteration in the position and prospects of this company between the 24th of October and the 16th of January. In my opinion that has not been satisfactorily established. I do not think that what Mr. Higgins has referred to establishes it, and in any

case it was a matter which ought to have been brought forward pointedly, in such a way that those who represent the company could have met it by showing that there was no such substantial alteration in the state of the company between the 24th of October and the 16th of January as to make it inequitable to ratify on the latter date, the previous act of those who were not authorized to act so as to bind the company.

In my opinion, therefore, though *Steele's case* does show that the allotment made in October did not amount to a contract so as to bind the company, yet the case of *Bolton* v. *Lambert* is an authority for holding that the ratification should relate back, and that there has been an effectual ratification so as to bind both Bosanquet and Badman. The appeal, therefore, fails.

LINDLEY, L.J.—I am of the same opinion. I think this case is governed, when the facts are understood, by the case of *Bolton* v. *Lambert*.

It is said, first of all, that the allotment which was in fact made on the 24th of October, 1888, in response to an application in the ordinary form for shares, was altogether a nullity. If it was altogether a nullity, it was void, as distinguished from voidable. It is said to have been a nullity on two grounds, first, because the real contract between the parties was a personal contract—*i.e.*, that the allotment (if any) should be made by the gentlemen whose names are on the prospectus. I cannot take that view of the contract; it is a forced and unbusiness-like view, and, having regard to the articles which refer to the directors, I cannot say that it is the true view. It is, in my opinion, no part of the contract that the allotment (if any) should be made by some directors as distinguished from others. Secondly, it is said that the fact that the contract was made by persons without authority makes it void. That point is covered by authority, it was the very point urged in *Bolton* v. *Lambert*, but the Court of Appeal repudiated it, and held that the contract was only voidable at the option of the principal, that the principal at his option could either avoid it or could elect to uphold it.

Now, one is struck by the fact, that there is in the present case no sign, from the beginning to the end, of anything like an election by the company to avoid the allotment, or to disavow the act of those who purported to be their agents. The company never take that line; on the contrary, everything they do is consistent, and consistent only, with the view that they ratified and upheld the act of those agents.

It has been said that there was no valid ratification, because, inasmuch as the directors who ratified could not have allotted, the company were not bound by such ratification. That appears to me to be a fallacy. Of course a principal cannot by his agent ratify something which he could not do originally, but it is not sound law to say that a principal cannot ratify by an agent something which he could originally have employed another agent to do and which has been done.

The remaining point—viz., as to whether ratification was within a reasonable time—is a more difficult one. There was certainly no repudiation, and that is important. In Badman's case there was certainly nothing like repudiation of the contract by him. He said he would "rather be off it," but the company would not let him off, and the bringing of the action against him for the money, on the 24th of December, is as clear an election to abide by the allotment as anything can possibly be. It was urged by Mr. Beaumont that it was too late for the company then to say that the allotment had been made; but the case is not like the cases cited in which there had been an application followed by the lapse of four or five months, and then an allotment. It is nothing of that kind, and it appears to me this argument is utterly untenable.

Bosanquet's case is a little better, but here again one must examine closely what passed. Bosanquet certainly never repudiated what was done until February 16, 1889, even if he did so then, as to which I will say something presently. His letter of October 26, 1888, was not a repudiation, but merely a complaint. Then between that date and January 16 there was this very important matter. It seems that the company—who had got his money, because he had paid his £300 to the bankers—he says he paid it under protest, but that protest is not brought home to the company at all—put their seal to his certificate, and the secretary wrote to him that he could have the certificate in exchange for his letter of allotment, but he would not have it. What is that but a clear, distinct, unequivocal act by the company in conformity with what they had done, as adopting the allotment as a valid contract? It appears to me that after that it would have been useless for the company to say that it was competent for them to repudiate the acts of their so-called agents or improperly appointed agents. They could not have done it.

But the case does not quite rest there, because after some further correspondence there is on January the 7th a formal resolution adopting in terms what had been done, not only in Bosanquet's case but in all the other cases. Though I thought at first it was a little unfair, I have come to the conclusion, having regard to the fact of the sealing of the certificates and the offering of them to Bosanquet, that it was then neither too late nor unfair for the company to ratify what had been done. It appears to me, therefore, that Bosanquet fails to make out that there is a defect in this ratification.

It comes, therefore, to this, that there was an allotment, in fact, by agents who had no authority, but whose authority never was repudiated by the appellants, and which authority has always been acted on by the principal from first to last.

The appeal, therefore, must be dismissed.

BOWEN, L.J.—I also think that this appeal must fail. The first point which Mr. Higgins raised is one the answer to which depends on the true construction of the contract. It is a question of construction. It was said that it was a condition of this contract that the shares should only be allotted by designated persons, persons who were indicated in the prospectus as the agents of the company to allot. It is not open to the appellant on this appeal to take the specific ground of misrepresentation, because that was not taken in the court below, and the proceeding has not been so shaped. But I agree that it does not follow necessarily that facts amounting to a misrepresentation may not give rise to relief upon another ground; and if Mr. Higgins could show that the true construction of this contract was that the shares were only to be allotted by designated persons, then, no doubt, he would be entitled to say, if the designated persons had not allotted the shares, that there had been a failure of a condition precedent or a warranty. If the contract was one of that kind, it would be in some sense a personal contract; not in the sense that the continuing personality of the party contracted with, was of the essence of the contract, but in the sense that the personality of the agent of the party contracted with, was of the essence of the contract. It would be a peculiar kind of contract. I do not know that I can call to mind for the moment any contract which

would be an illustration of the doctrine; but, nevertheless, as persons may in a free country contract on what terms they please, one can conceive in theory that there might be a contract of which it was a condition that the agent of one of the parties, and the only agent to act, should be a designated person

But is that what this contract of allotment comes to? It certainly can only be held to be such a contract if the words, "upon the terms of the prospectus," used in the letter of application, are read in the sense in which Mr. Higgins asked us to read them. I think that is not the right construction to put upon them. I do not think that those words mean that the applicant only agrees to contract on the condition that the shares are to be allotted by the particular agents held out in the prospectus, but I think that they mean that he agrees that if the contract of allotment is made, the obligations of the parties under the contract shall be consistent with the terms of the prospectus. Therefore, that objection fails. If it had been a good objection, I agree that it would have gone to the root of the case.

But then Mr. Higgins also says, assuming this was a contract of allotment made in the first instance by persons who were not the lawfully authorized agents of the company—who had no authority to bind the company—that the allotment was therefore in the first instance irregular and invalid, and that there was no allotment at all; and, further, he says that this is a case in which either there could be no ratification, or that there were at all events matters which prevented the company setting up ratification.

Now, I agree that as this is an act done professedly on behalf of the company by persons who had not in fact authority to act as agents of the company, it does require ratification by the company to make the act a good one, and to make it binding; and I also think a ratification by the company must occur within a reasonable time. I think that the principle upon which that is good law is—not as an election not to avoid the contract, because original contract, from my point of view, there was none, there being no authorized agents to make it—but an election to confirm the act which purported originally to be done by the authority of the company, although it was not so in fact, and, being an election, it must take place within a reasonable time, and the standard of reasonableness must depend upon the circumstances of each case. I do not think it requires authority to make that clear. If authority were wanted, *Bailey's Case* would supply it; and I think also that among the circumstances of the case almost the most important is the character of the parties between whom the question arises. I think that the question of reasonableness may differ if the subject-matter of discussion arises as between two contracting parties or as between a principal and his own agent.

With regard to the reasonableness of the time during which the ratification may take place, the strongest way of putting the argument on behalf of the appellants was that the act, in order to be binding, must be ratified within the period during which the original act could lawfully itself have been done, and for that proposition no doubt ordinary cases like *Bird* v. *Brown*, 4 Ex. 786, and *Lord Audley's case*, Cro. Eliz. 561, might be relied on; and it was argued that two months was much too long a time within which to keep open the question of allotment, and the case of *Ramsgate Hotel Co.* v. *Montefiore* was instanced, where it was held that after four or five months a person had a right to treat the matter as if an acceptance by the company had not been given, or indeed declined. But the fallacy of the argument, as it seems to me, lies in this, that there is no hard and fast line of two months in any case; the measure of the reasonableness of the time entirely depends on the circumstances of the case. You cannot take a hypothetical case, where on the hypothesis nothing has been done after an offer made, and all the parties have continued silent for two or three months, and assuming in that hypothetical case that two or three months would have been too long to wait to ratify, then apply that standard to a case where the circumstances are totally different, as is the present case. This is not the case of an offer, with silence following upon the offer for some time. It is true it is a case where there has been no valid allotment, but the parties have been acting together from first to last, or for some time at least, upon the faith that there had been an allotment; and although the parties are at arm's length, and there has been a controversy, yet the facts differ totally from the case of what I call silence, in which two months or three months might be a time beyond which the court would not consider the offer to be open, because *primâ facie*, of course, an offer made is a continuing offer until such time as is indicated, either by the parties or by reason, for closing with it or refusing it. It must be a question of fact in each case what the reasonable limit is. Mere time is nothing, except with reference to the circumstances.

Now, can it be said that the circumstances, with regard to either Bosanquet or Badman, closed the matter before the time at which the company's ratification is to be assumed to have taken place. In Badman's case I think that the ratification was clear on December 24. The action was brought by the authority of the company on that day. It cannot be denied that the requisite ratification must be a ratification by the company or its appointed agents, or agents who have authority to ratify; and an action brought by the authority of the company is the fairest and most open indication of an election to treat that which is no contract as if it had been *ab initio* a contract, and to give it vitality as from the first. There has been no repudiation, and the circumstances which have been pointed out by my learned brethren prevent the court from holding that the time was too long.

We certainly have no materials from which we can safely come to the conclusion that there had been such an alteration in the prospects of the company as rendered it unfair that what had been assumed to be in the first instance good between the parties, could not be made good by a subsequent option or election on December 24.

As to Bosanquet's case, I take it that the real ratification was either on January 7 or on January 16. I desire to reserve the point as to whether what took place on January 7 was not in itself valid. I do not dispute it, because it is not necessary to do so, but I should not like to say that it was invalid if it stood alone. It was, however, in any event made good by what took place on January 16, for the reasons which Cotton, L J., has given.

I only wish, further, to say that, even if there had been no ratification till March—the date at which the ratification is assumed, in the court below, to have occurred—I still would, even in that case, doubt whether, under these particular circumstances—and it is a question of circumstances—the ratification had then come too late.

Then it was further ingeniously argued by Mr. Higgins and Mr. Farwell that the ratification when it was made was not made by persons who could have done the original act. There is a fallacy in that argument. The ratification, when made, was made by the company, not by the agents of the company.

It was through the agents of the company and by means of the agents of the company, but the act itself was the act of the company if it was a good act in law, and the moment you resolve the argument into its elements, that moment you see where the fallacy lurks. In order to make the argument good it requires to be said that the act of ratification was the act of the agent, and not the act of the principal by his agent. Once observe that it is the act of the principal by his agent, and then the argument fails, unless, indeed, it can be said that it is a principle of law that a person cannot ratify an act done without authority, although professing to be done on his behalf, except by an agent clothed with the same measure of authority as would have been required to do the original act. But there is no such law. It is only necessary to see whether the agent is clothed with authority to do that act, not whether he would have been clothed with authority to do some other act; and the only act which we have to consider in the last instance being an act of ratification, the question we have to ask is, whether the person who purported to ratify on behalf of the company had really authority to do it. The validity of his ratification does not depend upon any supposed authority in the original agent. That is not the basis of the law of ratification, because supposed authority in the original agent there is none.

These last observations do not apply, it is true, to the ratification in Badman's case, because there the ratification was by reason of the action which the company brought by properly authorized agents; at least, they do not apply so obviously to it, but they apply to the argument used as to the constitution of the board which ultimately ratified what had been originally done.

I think the appeal fails, with the usual result.

Appeal dismissed.

Solicitors for Badman, *Munns & Longden.*

Solicitors for Bosanquet, *Stretton, Hilliard, Dale, & Newman.*

Solicitors for the company, *Burn & Berridge.*

High Court of Justice.

Chan. Div. Kay, J. — Aug. 7, 1890.

In re FOSTER.
LLOYD *v.* CARR. (*a.*)

Apportionment — Tenant for life and remaindermen — Trust fund—Will—Insufficient assets.

A trust fund being insufficient to pay the arrears of income and the corpus *in full,*

Held, that the total amount of income and capital actually received in respect of the trust estate must be divided between the tenant for life and the remaindermen in the proportion of the two sums which they would have respectively received if the fund had been sufficient to pay them in full; the tenant for life giving credit for the amount of income actually received by her.

Adjourned summons.

The trustees of the residuary personal estate of a testator in 1845 invested £7,535, portion of the trust estate, upon mortgage of freehold premises; and interest at five per cent was reserved by the mortgage. In 1862, the interest being in arrear, the trustees entered into possession of the mortgaged property, and remained in possession until the death of Sarah Foster, the tenant for life of the residuary estate, in 1888. Sarah Foster received the whole of the net rents and profits of the property while the trustees were in possession; but in two years only did the rents and profits exceed the amount of interest payable under the mortgage, and in other years they fell below that amount. The property was sold after the death of Sarah Foster, and realized only £7,005 and the executors of her will claimed £376 on account of arrears of income due to her as tenant for life.

The trustee accordingly took out this summons, asking that it might be determined whether any and what portion of the sum of £7,005 ought to be paid to the executors of Sarah Foster, and, if any portion was payable, upon what basis it ought to be calculated and ascertained.

Howard, for the summons.

G. Henderson, for the residuary legatees in remainder, referred to *In re Moore, Moore* v. *Johnson*, 33 W. R. 447.

Renshaw, Q.C., and *Farwell*, for the executors of the tenant for life.—The fund should be apportioned between the remaindermen and the tenant for life according to their respective losses: *Cox* v. *Cox*, 17 W. R. 790, L. R. 8 Eq 343; *In re Tinkler's Estate*, L. R. 20 Eq. 456, 24 W. R. Dig. 310; *Maclaren* v. *Stainton*, L. R. 11 Eq. 382, 19 W. R. Ch. Dig. 2; *In re Hobson, Walker* v. *Appach*, 34 W. R. 70.

KAY, J., made the following order:—Treat the capital moneys which have been produced by the sale and paid, and all moneys received by the tenant for life, as a fund recovered by the mortgagees. Add these sums together and divide the total sum in the following way:—

Estimate how much the tenant for life would have received if the mortgage interest had been regularly paid, deducting income tax. Then take the capital sum to which the remaindermen would be entitled on the supposition that the capital of the mortgage debt had been fully paid. Then divide the total sum recovered, ascertained as above directed, between the representatives of the tenant for life and the remaindermen in the proportion of these two sums, which they ought to have respectively received; and in making that division let the representatives of the tenant for life give credit for what she actually received. And if the sale did not take place until a little while after the death of the tenant for life, then credit the remaindermen with interest during that time. They ought to receive the full amount of the *corpus* with interest from the death of the tenant for life at four per cent. per annum, and therefore that interest will be an addition to the sum which the remaindermen ought to receive.

The total sum recovered will be divisible between the tenant for life and the remaindermen in that proportion.

The costs of the trustees will come out of the residuary estate, if any, and if there is no other residuary estate, then out of the capital of this fund. Each of the other parties will bear his own costs, and then they will come out of the proportionate share of each.

Solicitors, *Murray, Hutchins, & Stirling; G. Coldham*, for *Andrewes, Canham, & Andrewes*, Sudbury; *Turner & Hacon.*

(*a.*) Reported by JAMES H. BAKEWELL, Esq, Barrister-at-Law.

Chan. Div. North, J. } July 26, 1890.

In re EAST DULWICH NO. 295 STARR-BOWKETT BUILDING SOCIETY. (*a*)

County court — Winding-up petition — Transfer from county court to High Court—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 126.

The High Court has jurisdiction to order the transfer of a winding-up petition from the county court to itself, notwithstanding that the petition has been opened in the county court.

Motion.

This was an application under section 126 of the County Courts Act, 1888, for the transfer of a petition to wind up the above society, which had been presented in the county court, to the High Court. The application was based on the fact that the affairs of the building society had been before North, J., on previous occasions, and that his lordship was throughly conversant with the circumstances of the society. In the former litigation a Mr. Sibun had recovered costs against the society, and he thereupon had presented the winding-up petition as a judgment creditor in respect of these costs.

Counsel on behalf of the society, upon the petition being called on, had applied to the county court judge not to proceed with it in order that it might be transferred to this court. The county court judge, however, permitted the petition to be opened, and the first witness to be examined, and then adjourned the further hearing till a date after this application, intimating that, in his opinion, it would be better to have it transferred to this court.

Higgins, Q.C., and *Bramwell Davis*, for the society.—The questions involved are difficult and complicated, and more suitable to be tried by your lordship as already conversant with the facts involved. It is not a suitable case to be tried in the county court. We apply under section 126 of the County Courts Act, 1888.

Cozens-Hardy, Q.C., and *Casserley*, for the petitioner.—The application is too late. No order for transfer can be now made, as the matter has been opened before the county court judge. The society, if dissatisfied with the county court judge's decision, can appeal to the Divisional Court.

Beaumont Morice, for some withdrawing members.

NORTH, J.—I am of opinion that the order asked for in this case should be made. Two points have been raised for my decision—viz., whether there is jurisdiction at this stage of the proceedings to order a transfer to the High Court, and whether, if the court has such power, it should exercise it in the present case. Now section 126 of the County Courts Act, 1888, provides:—"It shall be lawful for the High Court or a judge thereof to order the removal into the High Court, by writ of *certiorari*, or otherwise, of any action or matter commenced in the court under the provisions of this Act if the High Court or a judge thereof shall deem it desirable that the action or matter shall be tried in the High Court, and upon such terms as to payment of costs, giving security, or otherwise as the High Court or a judge thereof shall think fit to impose," that is, the court may make the order at any time before the matter is finally decided. Nothing in the section says that it shall be made at any particular period of the proceedings. Cases might of course arise where, if the application was made at an early stage of the proceedings, it would be allowed, whereas at a later stage it would be refused. The circumstances in this case are peculiar. Proceedings in reference to the society have been before me several times, and I am hence familiar with many things in the case with which the county court judge cannot be acquainted, and which would necessitate the entering into complicated circumstances to lead up to the petition and render it necessary for the various matters being gone into at great length. The learned judge also evidently wished the petition to be dealt with here. Nothing, or very little will be lost by the transfer. I do not think the difference in expense would be material. It is, in my opinion, a case in which I should exercise the discretion vested in me, and I make the order accordingly.

Solicitors, *Crawford & Chester; Savery & Stevens; James Neal.*

(*a*.) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) June 7.

Ex parte SCOTT.

In re SCOTT & MITCHELL. (*a*.)

Bankruptcy—Appeal from order made in county court—Deposit as security for costs of appeal—Withdrawal of appeal—Right of appellant to return of deposit—Bankruptcy Rules, 1886, *r.* 131—*Practice.*

On an appeal being brought from an order made in the county court, the sum of £20 was lodged in the High Court by the appellant as security for the costs of the appeal, in pursuance of rule 131 *of the Bankruptcy Rules*, 1886. *The appeal was afterwards withdrawn, the costs of the respondent in respect of it being paid; but an application by the appellant for a return of the deposit was opposed by the respondent, on the ground that certain costs incurred by the appellant in the county court had not been paid.*

Held, that the appellant was entitled to have the deposit paid out, and that the respondent could not claim the deposit as security for the costs incurred by the appellant in unsuccessfully contesting the motion in the county court.

Application on behalf of Mrs. Scott, the wife of one of the bankrupts, for an order that a sum of £20 paid into court under rule 131 of the Bankruptcy Rules, 1886, as security for the costs of an appeal, might be paid out, all the costs occasioned by the said appeal having been paid.

The bankruptcy took place in the Dorsetshire County Court, and in August, 1889, a motion was made in that court by the trustee in the bankruptcy for an order declaring that certain property which was claimed by Mrs. Scott as her separate property was in reality the property of the bankrupt. This motion was allowed by the county court judge with costs, which were taxed at £10 3s. 6d.

Without paying these costs an appeal was brought by Mrs. Scott from the decision of the county court judge, for which purpose she was required to deposit in the High Court the sum of £20 as security for the costs of the appeal in accordance with rule 131 of the Bankruptcy Rules, 1886.

Before the appeal came on for hearing, however, it was discovered that, although the bankruptcy was a small bankruptcy, the necessary leave to appeal had not been obtained, and that it was then too late to remedy the omission. The appeal was accordingly withdrawn, the costs of the trustee in respect of it, amounting to about £4, being paid; but on an appli-

(*a*.) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

cation being made by Mrs. Scott that the deposit might be returned to her, the trustee refused to consent to its being paid out, and claimed that the £20 in question, in addition to being security for the costs of the appeal, was also security for the costs generally incurred in the bankruptcy; and he contended that the £20 should not be paid over until the £10 3s. 6d. unpaid costs in the county court had been satisfied.

An application was now made by Mrs. Scott to the court for an order that the deposit might be paid out to her forthwith.

Clavell Salter, for the applicant.—The short point is whether the £20 is security for the costs of the appeal, or whether it can be said to be general security for costs generally incurred in the bankruptcy. The £10 3s. 6d. cannot in any sense be the costs of the appeal. The costs of the appeal have been paid The sidenote to rule 131 says "Security for costs of appeal," and the £20 was only deposited for that purpose.

F. C. Willis, for the trustee.—Under the circumstances this money ought not to be paid out until all the costs have been satisfied. The order was made in August on Mrs Scott to pay these costs, and she has not done so. It is only reasonable that the trustee should have them before the deposit is returned.

CAVE, J.—This motion must be allowed The sum of £20 is paid into court for the purpose of satisfying any costs which the appellant may be ordered to pay. It is paid into court on behalf of the appellant in pursuance of a rule of the court, and must be dealt with in accordance with the rule; but there is no ground for saying that, because the money has been paid into court by somebody by reason of the obligation of the rule, therefore I must go beyond the rule and make it subject to some claim of the trustee which the rule does not make it subject to. The costs of the appeal having been paid, the money in court must be paid out. The trustee must also pay the costs of this application, but he may set off those costs against the other costs if he likes to do so.

Application allowed.

Solicitor for the applicant, *F. Bradley.*

Solicitors for the trustee, *Clarke, Rawlins, & Co.*

House of Lords.

From C.A. (England.) } Aug. 1, 1890.

COMMISSIONERS OF INLAND REVENUE *v.* FORREST. (*a.*)

Inland revenue—Duty on property of corporate body—Exemption—Property appropriated and applied for the promotion of science—Customs and Inland Revenue Act, 1885 (48 *&* 49 *Vict. c.* 51), *s.* 11, *sub-section* 3.

The property of the Institution of Civil Engineers, being legally appropriated and applied for the promotion of the "science" of civil engineering, comes within the exemption under sub-section 3 *of section* 11 *of the Customs and Inland Revenue Act,* 1885, *and is consequently not liable to the duty imposed by that section.*

Decision of the Court of Appeal (36 *W. R.* 598, 20 *Q. B. D.* 621) *affirmed* (Lord Halsbury, L.C., *dissenting*).

This was an appeal from the judgment of the Court of Appeal, reported 36 W. R. 598, 20 Q. B. D. 621, reversing the judgment of the Queen's Bench Division, 36 W. R. 523, where the facts are fully stated.

Sir R. Webster, A.G., and *Dicey* (*Sir E. Clarke, S.G.*, with them), for the appellants.

Sir H. Davey, Q.C., Moulton, Q.C., and *Radcliffe*, for the respondents.

The House took time for consideration.

Aug. 1.—Lord HALSBURY, L.C.—The question in this appeal is whether the Institution of Civil Engineers is liable to be assessed in respect of the annual value, income, or profits of their property, to the duty imposed by part 2, section 11, of the Customs and Inland Revenue Act, 1885, or whether their property is entitled to exemption under sub-section 3 of the same section. It is not disputed that the property is liable to duty unless the exemption applies. The exemption is in these words: "Property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or any charitable purpose, or for the promotion of education, literature, science, or the fine arts." For the purposes of this discussion it is immaterial to consider the exact meaning of any of the words except the word "science," except also so far as the other words may in their collocation or otherwise reflect light upon the true meaning to be given to the word "science." It is, of course, impossible to contend that the word "science" is to be understood in its widest sense as being equivalent to knowledge, since, if it were, the exemption would practically withdraw every institution from taxation, inasmuch as, to use the language of one of the great philosophical teachers of Germany, in his lectures on the vocation of a scholar, "Culture must not be one-sided, but all-sided." And I agree with the Lord Chief Justice that if such an interpretation were to be given to the exemption "it would be very difficult to imagine any institution whatsoever which would be excluded." There is no branch of knowledge, however apparently trivial and unimportant, which may not—nay, which does not—contribute something to the storehouse of "science," so interpreted. I think, therefore, it would be unreasonable to suppose that an exemption so wide as practically to make the tax inoperative could have been in the mind of the Legislature.

But in the exemption itself I find, as an additional head of exemption, "the fine arts"—not all arts, it will be observed, but the fine arts. I infer, therefore, that the Legislature intended that an institution for the promotion of an art, unless it were a fine art, was to be subject to taxation. Now, without supposing that the statute contemplated the controversy (now many centuries old) between what was an art and what was a science, I think one may see by the generality of its phraseology "education," "literature," "science," and the limitation of "the fine arts" to the last head of exemption, that it did intend to exclude from its operation all institutions which could not broadly be described as being for the promotion of education, literature, science, or the fine arts—that is to say, education generally, literature generally, and science generally. I do not stop here to discuss the question of whether the exemption would be lost by some additional object or purpose, since I agree with almost all who have considered this question that the statute would be satisfied if the main purpose and object of the institution were that which the statute considers the subject of exemption. Now, though I do not mean to say that all the cases under the earlier statute can be absolutely reconciled, yet I think a principle can be deduced from them which is very relevant to the matter in hand. The Zoological

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

Society, *Reg.* v. *Zoological Society*, 2 W. R. 491, and the Russell Institution, *Russell Institution* v. *Vestry of St. Giles*, 2 W. R. 169, 3 E. & B. 416, were held not to be within the exemption; and, with reference to the fine arts, though music was assumed to be one of the fine arts, a musical institution, *Reg.* v. *Brandt*, 16 Q. B. 462, was held not to be within the exemption, whereas the Linnean Society, *St. Anne. Westminster* v. *Linnean Society*, 2 W. R. 516, 3 E. & B. 793, and the Birmingham Library, *Churchwardens of Birmingham* v. *Shaw*, 10 Q. B. 868, were held to be within it. When one examines the various grounds on which these decisions rested, it would appear that wherever the amusement of the members—as in the Musical Society; amusement though combined with the instruction derived from the study of natural history, as in the Zoological Society; the supply and opportunities of reading newspapers, as in the Russell Institution—was one of the purposes and objects of the institution, then the judges were of opinion that the exemption would not apply. But where, as in the Linnean Society, the object was purely the promotion of the particular branch of knowledge to which that institution applied itself, or in the case of the Birmingham Library, where the judgment of the court assumed that literature generally was the object of the society, then the exemption did apply. These cases were decided under the Act of 1843, which enacts: "Whereas it is expedient that societies established exclusively for purposes of science, literature, or the fine arts should be exempt from the charge of county, borough, parochial, and other local rates in respect of land and buildings occupied by them for the transaction of their business and for carrying into effect their purposes. Be it, therefore, enacted, &c., that from and after the 1st day of October, 1843, no person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay to any county, borough, parochial, or other local rates or cesses in respect of any land, houses, or buildings, or parts of houses or buildings, belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or as owner, and occupied by it for the transaction of its business, and for carrying into effect its purposes. Provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members, and provided also that such society shall obtain the certificate of the barrister-at-law or Lord Advocate as hereinafter mentioned." It is said, however, that the cases under the Act of 1843 ought not to guide us, because of the difference in the two Acts. Now, though the Acts are differently framed, the words which your lordships have to construe are practically identical. Property legally appropriated and applied for the promotion of "literature, science, and the fine arts" in the one Act corresponds very nearly with a society "instituted for purposes of science, literature, or the fine arts" in the other.

Two differences are suggested—one, that the Act of 1843 was a relief of existing liability to local rates. I agree that such a distinction exists, but I am wholly unable to apply such a distinction as relevant to the matter in hand. All exemptions from taxation to some extent increase the burden on other members of the community, and I confess I cannot imagine the Legislature meant one thing in 1843 by science, and a different thing in 1885, when it was determined to make corporations which never die pay something in lieu of succession duty. Neither does the use of the word "exclusively" appear to me to touch the particular point. Parke, B., in the earlier Act, pointed out that the word "exclusively" was not necessary: *Purvis* v. *Traill*, 3 Ex. 344. Can it be said that property, or the income or profit whereof is legally "appropriated" and "applied" must not be exclusively appropriated and applied in order to bring such property within the exemption? The omission of the word "exclusively" means nothing, since its existence or non-existence could add nothing to the true construction of the words that are there. I cannot concur with the argument which has found favour with one of your lordships—that the condition under which the society obtained exemption under the Act of 1843 was that in some degree it partook of the character of a charitable institution. I think it would be a surprise to the members of—*e.g.*, the Linnean Society—to hear their society so described. It is no reflection on the council of the institution in question that they are desirous to promote the success of their members in the profession to which they belong, and that they wish to promote their success in the best way, by supplying them with the best possible professional education. I am wholly unable to see that there is any difference between the two Acts, both of them involving exemption from public burdens, whether local or Imperial, and both of them using language which, as I have said, is practically identical; and, through the framing of the Acts being necessarily different, from the fact that one refers to a corporation and the other to societies, the other differences, which I do not think relevant to the subject now under discussion, are quite accounted for without supposing that the word "science" is to receive a different interpretation in the two different Acts. Assuming, therefore, that the principles which I have suggested are to decide the matter, it becomes a question of fact whether, in this particular case, the institution is for the promotion of science in the sense in which I understand that word. In the historical notice which is part of the case, I find it is stated that "early in the present century it was desired to found an institution having for its object the furtherance of professional knowledge," and that the institution was, in fact, founded by gentlemen who were "impressed with the difficulties of gaining the knowledge necessary for the diversified practice of engineering, for promoting regular intercourse between persons engaged in the profession to the end that such persons might mutually benefit by the interchange of individual observation and experience." I have quoted these words not in the nature of an admission by the society (for which purpose a mere historical sketch would be very unfairly used), but because I think they aptly describe, in fact, both the purpose for which the institution was founded and the practice under it. The institution itself is for the benefit of persons who are civil engineers, to facilitate their work and to instruct them better in their own profession, to enable them the better to perform and practise the art by which they are to make their livelihood. They are to be instructed (the mode of instruction appears to me to be immaterial, whether by lectures, papers read, or the like) in various arts and in various applications of arts, as to which, except in the widest general sense—which I have already said I do not assume the statute intended—it could not be contended that such instruction was for the promotion of science. The statement is that "the persons for whose benefit the society has been formed are defined by its chartered title—the Institution of Civil Engineers." As the exact meaning of the words "civil engineers" is very important, and has given rise to much discussion, the council considers it desirable to state the sense attached to them by the institution.

The charter defines "the profession of a civil engineer" as "the art of directing the great sources of power in nature for the use and convenience of man," and some examples of this definition are given. But it was pointed out by Thomas Tredgold, who drew up the "description of a civil engineer," partly embodied in the charter, that "the scope and utility of civil engineering will be increased with every discovery in philosophy, and its resources with every invention in mechanical or chemical science." Consequently, since the charter was drawn the range of practice of the profession has become much enlarged. Thus the practitioners in this art may now have to do with many classes of works, for example: (1) Works for facilitating and improving internal communications, as roads, railways, tramways, navigation by canals and rivers, bridges, and telegraphs of various kinds; (2) works connected with the sea-coast, and for facilitating communication between the sea and the land, such as harbours, docks, piers, breakwaters, sea-walls, lighthouses, &c.; (3) works for facilitating communication across the seas, including naval architecture, iron shipbuilding, and the construction and laying of submarine telegraph cables; (4) works for reclamation, irrigation, or drainage of land, and for the prevention or the regulation of floods, including the improvement of rivers as arterial drains; (5) works for cities and towns, such as sewerage, water supply, light, and street improvements; (6) large and massive buildings generally, in their scientific and mechanical arrangements; (7) the operations of mining and of metallurgy, so far as they involve the application of mechanical science; (8) the design and construction of the mechanical prime-movers, such as steam-engines, water-wheels, and other hydraulic motors, windmills, electric and other engines; (9) the design, construction, and adaptation to practical use of machinery and mechanical appliances of all kinds; (10) the design and manufacture generally of all large and important metallic structures, including artillery and other large munitions of war." This is a comprehensive but by no means complete catalogue, and if an estimate is attempted to be formed of the work done under it during the century, and of the effect this work has had on the development of trade and commerce, on finance, on government, on every branch of industry, and, indeed, on every possible aspect of human interest, it must be admitted that the profession of civil engineering has become truly a great power. And, in exact accordance with the design which the founders of the institution had in view, I find premiums have been awarded for such papers as "Modern Machine Tools and Workshop Appliances for the Treatment of Heavy Forgings and Castings," "The Hydraulic Passenger Lifts at the Underground Stations of the Mersey Railway," and "Brickmaking." The council of the institution is intrusted, under various trusts, to award prizes or medals to persons who write papers on the subjects with which the institution is conversant, and although this has only an indirect bearing on what the institution is, it is, I think, not without its importance as showing the class of subjects which persons who were interested in promoting the interests of civil engineers imagined would be appropriately dealt with by the institution in question. I find in the subjects for papers what I should have expected to find for an institution of such a character as I have described: "The Construction and Testing of Air Locks and Shaft Tubes for Sinking Foundation"; "Concrete Work under Water"; "The Manufacture, Properties, and use of Castings of Malleable Cast Iron and Cast Steel"; "Modern Appliances for the Consumption of Liquid Fuel for Steam Boilers and other Industrial Uses"; "The Production of Heating Gas from Coal"; "Compressed Oil Gas and its Application"; "The Driving Axles of Locomotive Engines." These and many others seem to me to indicate that the real object and purpose of this institution (which certainly needs no eulogy from me or from anyone else in respect of its usefulness) is to promote the education of civil engineers as civil engineers, to enable them to succeed in their profession, to enable them to take charge of and direct works of the most complicated, difficult, and extraordinary value; such triumphs, for instance, of modern engineering as the Forth Bridge, and the like. But all this, to my mind, tends to show that it is a professional society founded for the advantage and in the interest of the profession of civil engineers, supplying most valuable and important means for the training and instruction of that profession, but for the interest and advantage of the members of the institution, as members of the institution, and therefore not within the exemption. To use the language of Lord Campbell, in one of the cases to which I have referred, "I think a member of it makes a very good bargain for himself in becoming a member of it," and I do not think that, unless the benefit was intended to be conferred directly, and not indirectly, on the whole community in the promotion of knowledge, that the Legislature intended to exempt from taxation an institution such as this, which, in my view, is primarily intended in the interest of, and for the advantage of, its own members. I am, therefore, of opinion that the judgment of the Court of Appeal ought to be reversed, and the judgment of the Queen's Bench Division be restored.

Lord WATSON.—The 11th section of the Customs and Inland Revenue Act, 1885, imposes a compensatory duty, at the rate of 5 per cent., upon the yearly value, income, or profits accruing from real and personal estate, permanently invested in bodies corporate and unincorporate, which escapes liability to probate, legacy, or succession duties. The taxing enactments of the clause are expressed in broad and comprehensive terms, but these are qualified by seven sub-sections, which exempt from the incidence of the new tax the various classes of property therein specified, in respect either of the time and manner of its acquisition, or of the purposes to which it is appropriated and applied. The appellants assert their right to charge the respondent, as the officer whom the statute makes accountable for the Institution of Civil Engineers, with duty upon the annual income of the institution during the year ending April 5, 1886. It is not disputed that the property sought to be charged is within the general taxing words of the Act; but the respondent pleads that it is also within the exemptions provided by the 11th clause. His plea was rejected by a divisional court, consisting of Lord Coleridge, C.J., and Field, J.; but it was sustained in the Court of Appeal by Lord Esher, M.R., and Fry, L.J.; Lopes, L.J., dissenting from the judgment. The exemption relied on by the respondent is to be found in sub-section 3, which specially excepts from the operation of the clause "property which, or the profits or income whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts." In order to obtain the benefit of the exemption it must be shown, in the first place, that the property for which it is claimed is, in point of fact, applied to one or other of the purposes thus specified; and, in the second place, that it is legally appropriated to such purpose within the meaning of the statute.

The respondent maintains that the property and funds of the institution which he represents are devoted and applied to the promotion of science; the appellants contend that they are not. That is the whole matter of controversy in this appeal. The Institution of Civil Engineers was incorporated by Royal charter in June, 1828. The "objects and views" of the body politic and corporate, for the advancement of which it was expressly created, are stated to be "for the general advancement of mechanical science, and, more particularly, for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man, as the means of production and of traffic in states both for external and internal trade, as applied in the construction of roads, bridges, aqueducts, canals, river navigation, and docks, for internal intercourse and exchange, and in the construction of ports, harbours, moles, breakwaters, and lighthouses, and in the art of navigation by artificial power for the purposes of commerce, and in the construction and adaptation of machinery, and in the drainage of cities and towns." The charter prescribes rules for the government of the corporation, by which general meetings are authorized to make bye-laws for the admission of members and the management of its property, and also to enter into any resolution that shall be thought necessary and proper with respect to the affairs and concerns of the body corporate, subject to the condition that bye-laws or resolutions made contrary to the general scope and true intent of the charter shall be absolutely null and void. Since the date of its incorporation alterations have been made from time to time in the bye-laws of the institution, but there has been no material change either in the qualifications for membership or in its objects and the means of their attainment. According to the bye-laws now in force the persons entitled to the privileges of corporation consist of three classes: (1) Members, being civil engineers of eminence in their profession, who have been in practice on their own account for five years at least; (2) associates, who must be above twenty-five years of age, regularly educated as civil engineers, and actually engaged in the design or construction of one or more of the class of works enumerated in the charter; and (3) honorary members, being either distinguished individuals, who, from their position, can assist in the promotion of public works, or persons eminent for science and experience in pursuits connected with the profession of a civil engineer, but who are not engaged in the practice of that profession within the United Kingdom or its dependencies. The same degree of professional eminence is not required in the case of associates as in the case of members; but the former may be transferred to the higher grade when they become duly qualified. Students of civil engineering, who are not members, and have no voice in the management of the society, are admitted to certain privileges; but they can only enjoy that position between the ages of eighteen and twenty-six, and they must be the present or past pupils of a member, and be engaged in designing or executing engineering works. Admission to corporate privileges is by ballot; and any corporator may be expelled by the majority of a special meeting, convened on the requisition of twenty members, with the approval of the council of management. Students are admitted by the council, on the recommendation of the member whose pupils they are or have been, and the continuance of their privileges is dependent upon the pleasure of the council. During the session of the society, which commences in November and ends in the month of May following, weekly meetings are held, at which papers on engineering subjects, selected by the council, are read and discussed. These discussions are taken down in shorthand, and, with the papers read, are inserted at full length in the minutes of the society's proceedings, which are annually printed and a copy sent to every corporate member and student. The minutes are not sold; but copies of them are sent to 185 similar institutions and public libraries in different parts of the world, in order that persons interested in engineering science may have access to them. Meetings are also held by the students, at which papers prepared by themselves are read and discussed; and such of these papers as possess exceptional merit are published in the minutes of the institution. The library, which contains a large collection of native and foreign works on engineering, besides standard books of science, is open to corporate members for consultation and reference; and students have the privilege of using it, subject to regulations prescribed by the council. The appellants relied in the course of the argument upon *Reg.* v. *The Institution of Civil Engineers*, 28 W. R. 253, 5 Q. B. D. 48, in which it was held by a divisional court, consisting of Field and Manisty, JJ., that the institution was not exempted from payment of local rates in respect of the premises which it occupied by virtue of section 1 of 6 & 7 Vict. c. 36. That Act exempts from the incidence of county, borough, parochial, and other local rates, premises occupied for the transaction of its business by a society "instituted for the purposes of science, literature, or the fine arts exclusively," it being expressly conditioned that "such society shall be supported wholly or in part by voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto and between any of its members." These provisions appear to me to differ so much both in their subject-matter and scope from the exempting enactments with which we have to deal in this case, that little or no assistance can be derived from them, or from the decisions which followed upon them, in construing the Act of 1885. There are many societies excluded from the benefit of the exemptions established by the earlier, which are plainly entitled to the immunity provided by the later statute. In order to bring a society within section 1 of the Act of 1843, two statutory requisites must concur. The society must be one instituted exclusively for purposes of science, literature, or the fine arts; and it must also be supported, in whole or in part, by annual voluntary contributions. I do not think the Legislature intended that fixed yearly payments which individuals agree to make, in consideration of their being admitted to a society, and allowed to share in its management (there being a legal obligation to make such payments as long as their membership continues), should be regarded as voluntary contributions within the meaning of the Act. But the contrary was decided after some hesitation, and to that circumstance the difficulties subsequently encountered in construing the exemption appear to me to have been mainly due. Then it is not sufficient compliance with the plain language of the Act that a society be established chiefly for the purpose of promoting science, literature, or the fine arts. One or other of these must be its exclusive object; so that an institution which also contemplated some other, though altogether subsidiary object, could not claim the benefit of the exemption. The provisions of subsection 3 present, in several important particulars, a striking contrast to these enactments. They dispense with the necessity for any of the enumerated purposes

being exclusive, it being sufficient that the property of the institution is in the main devoted to one or other of them: and the exemption is made to depend upon the appropriation and application of such property, or its income, without reference to the sources from which it is acquired. I think the general construction of the sub-section was correctly expressed by the Lord President (Inglis) in the Scotch case of *Society of Writers to the Signet* v. *Commissioners of Inland Revenue*, 14 Ct. Sess. Cas., 4th series, 34, the only decision, before the present case, on this branch of the Act of 1885. His lordship, after pointing out that societies whose funds are expended mainly upon other objects, and only promote indirectly the purposes enumerated, are not within the protection of the clause, goes on to say: "But I apprehend that the meaning of this clause of exemption is that the property or income shall be, if not exclusively, yet certainly in the main, and as its chief object, devoted to the promotion of education, literature, science, or the fine arts." The principle thus enunciated was referred to, and appears to have been unanimously accepted, both in the Divisional Court and in the Court of Appeal, although the learned judges differed in its application to the facts of this case. The contrast between the provisions of the two statutes becomes more apparent when the other sub-sections of the Act of 1885 are taken into account. In the present case, Field, J., said, in the Divisional Court, with reference to sub-section 3: "It seems to me that the exemption is intended to some extent to be correlative with the public benefit derived from the corporate body; that is to say, that the statute did not contemplate the exemption of bodies conferring mere individual local benefit." That observation might be very appropriate, and similar language has been used by learned judges in dealing with the Act of 1843; but I do not think it is applicable to the exemptions in sub-section 3, which depend upon the intrinsic character of the object which a society promotes, and not upon the scope of the benefits which may result from its transactions. Sub-section 2 expressly exempts property or its income, which shall be legally appropriated and applied "for the benefit of the public at large, or of any county, shire, borough, or place, or the inhabitants or ratepayers thereof." If societies instituted for the promotion of science must show that they are conferring a benefit upon the public at large in order to obtain exemption, the provisions of sub-section 3 add nothing to the provision already made in sub-section 2. But the enactments of the latter appear to me to compel a liberal reading of the sub-section which follows it, and to indicate the intention of the Legislature to exempt every society whose corporate endeavours are mainly directed, whether successfully or not, to the extension of the bounds of science, and are not, as in the case of the Society of Writers to the Signet, confined to the individual action of the corporators, each within the limits of his own professional business, and for his own private interest. The judgment of the court in *Society of Writers to the Signet* v. *Commissioners of Inland Revenue* was given against the body pleading statutory exemption; and in the circumstances of the case there cannot, in my apprehension, be any doubt as to its soundness. The position of the society, so far as concerns its constitutional objects, is strictly analogous to that occupied in England by the Inns of Court, and in Scotland by the Faculty of Advocates. It is simply one of the several portals through one or other of which an individual must pass before he can practise as an agent before the Court of Session. Persons who prefer to enter their profession by that portal join the society; but their chief, if not their only object in doing so, is to acquire the *status* and privileges of a duly qualified legal practitioner. Their qualifications are tested by examination before their admission; but when once they have become members they do nothing whatever towards advancing the science of law, unless it be by actively pursuing their profession in their individual capacity. The Institution of Civil Engineers stands, in my opinion, in a very different position from such professional bodies as the Society of Writers to the Signet. The mere fact that membership is confined to those who are actively engaged, and have attained some degree of eminence in the profession, does not militate against the object of the institution being the advancement of engineering science; because they are really the only persons possessing the knowledge and practical experience requisite for the efficient promotion of that object. Membership is not required for admission to the profession of a civil engineer; it confers no rights or privileges in the practice of that profession, over which the institution neither has, nor professes to have, any power of control. A writer to the Signet, in carrying on his private business, and in no other form, exercises his rights and privileges as a member of the society to which he belongs; but a member of the Society of Civil Engineers does nothing whatever in his corporate capacity except when he takes part in its proceedings within the walls of the institution. Lord Coleridge suggests that "any man who wants most effectively and successfully to practise the profession of a civil engineer will join the institution and go through the course of teaching which it provides." Now I have been unable to discover that the institution provides anything which can be appropriately denominated a course of teaching. Its members must be men who have both learnt, and effectively practised, their profession before they joined. I do not doubt that membership is accompanied with a certain amount of prestige, which may prove to be of some service to the member in his professional career; but I believe that the same result would attend membership of any society which effectively promoted a branch of science intimately connected with the profession or business in which the member was engaged. That there is a science of civil engineering, and that its development is of the utmost consequence to our national interests, are, to my mind, propositions not admitting of dispute. I would not for a moment suggest that a society which devotes its funds to giving concerts for the entertainment of members and their friends promotes the science of music; or that the cause of literature is advanced by the establishment of a reading-room for subscribing members. The main, if not the sole, object of such societies is to amuse or instruct the individual members. But I can discover no real analogy between societies of that kind and the Institution of Civil Engineers. The discussion of mechanical and engineering problems by the members of the institution cannot fail to elicit information and speculation of value to the profession at large, and of advantage to all interested in the various departments of science, for whose use everything read or spoken by members is recorded in the printed minutes, and constitutes a substantial addition to the sum of human knowledge. It occurs to me that, if anyone were asked to say what would be a more efficient method of promoting engineering science than that which the institution has adopted, he would have difficulty in making a satisfactory reply. I have accordingly come to the conclusion that the income of the institution is, in fact, applied not for the professional ends of individuals, but for "the promotion of science" in the proper

sense of the words; and in that view I entertain no doubt that such income is "legally appropriated" within the meaning of the Act, because the purposes to which it is applied are the same with those prescribed by the charter of incorporation. I have not thought it necessary to dwell upon the first of these points, because I entirely concur in the judgments delivered by Lord Esher and Fry, L.J., in the Court of Appeal. The order appealed from ought, in my opinion, to be affirmed with costs, and I move accordingly.

Lord MACNAGHTEN.—I do not think that the reported decisions on the construction and effect of the Act of 1843 throw any light upon the question now before your lordships. The Act of 1843 was in relief of existing liability to local rates. Exemption from local rates involves an additional burden on a limited area. It means a tax on immediate neighbours, some of whom may be little better than actual paupers. A privilege so invidious was naturally confined within narrow limits. It was confined to societies established exclusively for the purposes of science, literature, or the fine arts. The word "exclusively," as Lord Campbell observes in *Reg.* v. *Cockburn*, 16 Q. B. 480, is "anxiously introduced, both into the preamble and the enactment." That is the first condition of exemption under the Act of 1843. The next is that the society must be "supported wholly or in part by annual voluntary contributions." This provision has given rise to much difference of judicial opinion. But, if I am not mistaken, the result of the later authorities favours the view suggested by Lord Campbell in the following passage: "The Legislature may have intended to throw an additional burden on the other ratepayers of the parish by exempting from rateability property before rateable only when it is occupied for the purposes of a society supported in part by charitable donations, and not by payments made with a view to the personal accommodation and advantage of the members, although the object of their pursuit may be the cultivation of science, literature, or the fine arts": *Russell Institution* v. *Vestry of St. Giles*. So that, to bring itself within the exemption, a society must have no purpose beside those specified in the Act, and must also, in some degree, partake of the character of a charitable institution. On these two conditions all the cases decided under the Act of 1843 seem to have turned. Neither the one nor the other is required as a condition of exemption by the Act of 1885. The duty granted by that Act was imposed on property belonging to bodies, corporate or unincorporate, in order to compensate the revenue for their immunity from death duties. It was a new tax levied for Imperial purposes. As might be expected, the range of exemption is much more extensive. The conditions are far more liberal. The two Acts differ widely in their scope, and even when they happen to deal with the same subject the wording is not the same. It was argued, indeed, that the language was practically identical, but the expression, to my mind, involves an assumption that the meaning is the same, and an admission that the language is different. I do not, therefore, propose to trouble your lordships with any further reference to the numerous decisions which were cited in the course of the argument, beyond observing, with regard to the case of *Reg.* v. *The Institution of Civil Engineers*, that while I entirely agree in the conclusion, I have some difficulty in accepting the propositions and following the reasoning on which the conclusion is based. In the present case the Crown seeks to charge the property of the Institution of Civil Engineers by virtue of section 11 of the Act of 1885. The institution claims exemption under sub-section 3, on the ground that its property and income are legally appropriated and applied for the promotion of science. The first question is, What is the meaning of the word "science" in that sub-section? I see no reason why it should be confined to pure or speculative science. The expression plainly includes applied science, and it was intended, I think, to denote a particular branch of science, as well as universal science or science generally. If it be at all material, the word "science" in the Act of 1843 appears to have been construed in the same way. I cannot, therefore, doubt that mechanical science as employed in civil engineering is science within the meaning of the exemption contained in section 11 of the Act of 1885. That being so, the question at issue may be stated shortly. Is the property of the Institution of Civil Engineers legally appropriated and applied for the promotion of the science of civil engineering; or is it legally appropriated and applied for the benefit of civil engineers, in order to enable them to practise their profession to greater advantage? It cannot, I think, be doubted that the institution has raised the standard of the profession, and that to a civil engineer it is of advantage, and probably of pecuniary advantage, to be a member. But is that result the purpose of the society, or is it an incidental, though an important and perhaps a necessary, consequence of the way in which the institution does its work in the pursuit of science? The charter and bye-laws define the purpose of the institution as being "for the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer." I cannot see any reason to doubt that the eminent men who founded the institution and obtained its charter from the Crown were perfectly sincere in describing the objects which they set before them. They professed to be zealous in the interests of science; why should it be assumed or suspected that their real purpose was the advantage of their own craft? It may be that the advancement of the interests of the profession of civil engineering is inseparably bound up with the advancement of mechanical science. Probably the founders of the society were not insensible of the advantages which such an institution was likely to confer upon its members in their professional capacity. That would have been a formidable objection if the language of the Act of 1885 had been the same as that of the Act of 1843. But under the Act of 1885, in the case of a scientific institution, the only question is whether the property sought to be charged is legally appropriated and applied for the promotion of science. If it is, it seems to me that the exemption must hold good, although the institution to which the property belongs may serve another purpose as well. Now, I think it is clear that, according to the true construction of the charter, the property of the institution is dedicated to the promotion of science. Is it, in fact, so applied? It seems to me that the society has loyally adhered to the declared objects of its charter. There was, I think, much force in the observation which was made by one of the learned counsel for the respondents—that, in the present state of knowledge, advance in mechanical science is only to be expected from conferences of specialists—from the interchange in friendly rivalry of the ideas of the most highly trained, the most ingenious, and the most experienced members of the profession. That is the method by which this society pursues its professed object. The council every year invite original communications on various specified subjects, and on other questions of professional interest. For communications of ade-

quate merit premiums are awarded, which, for the most part, are open to any person of any country, whether he be a member of the institution or not. During the session, which extends over six months in each year, there are weekly meetings of the society, at which every member is at liberty to introduce a stranger. At these meetings papers selected from communications received in response to the invitation of the council are read and discussed, the discussions often lasting over several evenings. In order to facilitate discussion proof copies of the papers intended to be read are supplied to any persons, whether members or not, who are supposed to be specially conversant with the particular subject. A shorthand note of the discussion is taken, and, after due correction, printed in the "minutes of proceedings" for the year, together with the papers read at the weekly meetings, and communications from persons interested in the subjects discussed who may have been unavoidably absent during the discussion. The minutes also contain other selected papers and a summary of information gathered from the transactions of foreign engineering societies and from foreign scientific periodicals on all branches of professional knowledge, so as to form a record from year to year of the progress of engineering science. There are, besides, occasional lectures delivered by men of eminence on "the principles involved in the action of the great sources of power in nature and their practical application," which are afterwards published in separate volumes. "The minutes of proceedings" are not on sale to the public, but they are not a sealed book. Copies are sent to every member, and copies are also presented to other institutions and public libraries at home and abroad, so that the information contained in them is practically accessible to any person who may wish to avail himself of it. The principal part of the expenditure of the society is incurred in the production of the "minutes of proceedings," and in connection with the lectures, and in the maintenance of the library of the institution, which contains a large and valuable collection of scientific works. The rest of the expenditure goes in establishment charges and other matters of that sort. Substantially, as it seems to me, the whole of the society's income is applied to the promotion of science. I cannot conceive in what better way the promotion of mechanical science, and in particular of those branches of mechanical science which lie within the province of civil engineering, could be effected. I cannot doubt that by means of the discussions on the papers read at the ordinary meetings of the society much new light has been thrown on scientific questions, and much knowledge, which would otherwise have perished, has been preserved. I see no trace of a selfish or illiberal spirit in the proceedings of the society, nor do I find anything to lead me to suppose that its property and income are applied otherwise than *bonâ fide* for the promotion of science. The action of the society may incidentally benefit the profession to which its members belong—I have no doubt that is so—but I agree with the Master of the Rolls in thinking that "that which this society does is something higher and larger than the mere education of students and others for the profession of civil engineers." I think the appeal should be dismissed.

Judgment appealed from affirmed, and appeal dismissed, with costs.

Solicitors for the appellants, *Sir W. Melvill, Solicitor of Inland Revenue.*

Solicitors for the respondent, *Radcliffes & Cator.*

Court of Appeal.

From Chan. Div. Nov. 3.

BARNETT v. KING. (a.)

Bankruptcy—Covenant to pay out of estate six months after death—Claim barred by bankruptcy proceedings—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 37, *sub-section* 3.

By a deed made between R. D. K. of the one part and E. B. of the other part, R. D. K. covenanted that his executors and administrators would pay E. B. the sum of £3,000, *with interest at five per cent. from the date of the death of R. D. K., within six months from his death. R. D. K. subsequently filed his petition in bankruptcy, and an order was made thereunder. E. B. knew of these proceedings, but abstained from proving in respect of this liability. R. D. K. died, and E. B. commenced this action against the executors under the covenant in the deed.*

Held, that this was a debt which fell within section 37 *of the Bankruptcy Act,* 1883, *and any proceedings under the deed were barred by the proceedings in bankruptcy.*

Appeal from Stirling, J.

By a deed dated the 6th of June, 1885, and made between Sir Richard Duckworth King of the one part and Mr. Edward Barnett (the plaintiff) of the other part, Sir R. D. King covenanted with the plaintiff, his executors, administrators, and assigns, that the executors and administrators of him (Sir R. D. King) should within six calendar months from his death pay to the plaintiff, his executors, administrators, and assigns, the sum of £3,000, and interest thereon at the rate of five per cent. per annum from the date of the death of Sir R. D. King.

In February, 1886, Sir R. D. King filed his petition in bankruptcy, and a receiving order was made thereunder on the 26th of February.

On the 2nd of November, 1887, Sir R. D. King died, having by his will appointed the defendants, Sir George St. Vincent King and Mr. Charles Edward Barnett, executors thereof, and in June, 1888, the plaintiff commenced this action against the defendants under the covenant in the deed of the 6th of June, 1885, claiming the sum of £3,000 and interest thereon at the rate of five per cent. per annum from the 2nd of November, 1887.

The defendants raised (among others) the defence that any right of action which the plaintiff might have had under the deed was barred by the bankruptcy proceedings taken by Sir R. D. King, of which the plaintiff was fully aware, the debt falling within sub-section 3 of section 37 of the Bankruptcy Act, 1883, which enacts that, save as previously mentioned in the section, "all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy."

Stirling, J., held that the debt arising upon this covenant fell within section 37 of the Bankruptcy Act, 1883, and any proceedings upon it were barred by the bankruptcy proceedings.

The plaintiff appealed.

Cautley (*Herbert Reed* with him), for the appellant.

Graham Hastings, Q.C., and *John Henderson*, for the respondents, were not called upon.

(a.) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

Sir JAMES HANNEN.—We are all of opinion that this appeal must be dismissed. The question resolves itself into whether or not an obligation to pay money out of the estate of the deceased six months after his death is a liability or obligation within the meaning of section 37 of the Bankruptcy Act, 1882. It was contended by the appellant that the section means that only such liabilities are capable of proof (and, therefore, affected by the proceedings in bankruptcy) as relate to the debtor personally; and that this liability, which could only arise after his death, is not within the meaning of this section. I think that is far too narrow a construction of the language of the Act. In my opinion the true meaning is that the section applies not only to an obligation to pay money by the obligor himself. but also to an obligation to pay out of his estate. I think the observation made by Fry, L.J., during the argument an exceedingly strong one. that the effect of the appellant's contention would be this, that, supposing the holder of this deed had taken the proper steps to do so, he could not have proved in respect of this liability in the bankruptcy proceedings. This is an unreasonable conclusion to arrive at; and in my opinion the decision of Stirling, J., is correct, and any proceedings under this deed are barred by the proceedings in bankruptcy.

BOWEN and FRY, L.JJ., concurred.

Appeal dismissed.

Solicitors, *Latham, Farmer, & Co.; Lawes & Sons.*

From Q. B. Div. Nov. 3.

WILDING *v.* BEAN. (*a.*)

Practice—Writ—Defendant out of jurisdiction—Substituted service—Ord. 9, r. 2.

The plaintiff, having issued a writ against the defendant and being unable to discover her address, obtained an order for substituted service upon her solicitor. It then appeared that she had gone abroad before the writ was issued without any intention of evading service, and had remained out of the jurisdiction ever since.

Held, that the writ being a writ for service within the jurisdiction, the order for substituted service could not be maintained.

Fry *v.* Moore, 37 *W. R.* 565, 23 *Q. B. D.* 395, *followed.*

Appeal from the decision of a divisional court (Pollock, B., and Grantham, J.) setting aside an order for substituted service of the writ in the action.

In July, 1890, the plaintiff issued a writ against the defendant, and endeavoured to effect service of it upon her. He applied to the defendant's solicitor for her address, which the solicitor declined to give, and the plaintiff then obtained an order at chambers for substituted service of the writ upon the solicitor. It then appeared that the defendant was out of the jurisdiction, and had gone abroad some days before the issue of the writ, but without any intention of evading service. She had been out of the jurisdiction ever since.

The Divisional Court set aside the order, and the plaintiff appealed.

Henn Collins, Q.C., and *R. M. Bray*, for the appellant.

Morton Daniel, for the respondent.

The following cases were cited: *Watt* v. *Barnett*, 26 W. R. 745, 3 Q. B. D. 363; *Hope* v. *Hope*, 2 W. R. 698, 4 De G. M. & G. 328; *Fry* v. *Moore*, 37 W. R. 565, 23 Q. B. D. 395; *In re Urquhart*, 38 W. R. 612, 24 Q. B. D. 723; *Slade* v. *Slade*, 30 W. R. 28.

Lord ESHER, M.R.—In this case the plaintiff, believing that he had a cause of action against the defendant, issued a writ in general terms for service in England. He attempted to serve the writ upon her in England, but failed. Then the plaintiff went to a person who had acted as the lady's solicitor, and asked him where she was; he declined to give her address. There was no duty on him to disclose his client's address, even if he knew it. The plaintiff then obtained an order for what is called substituted service of the writ—that is to say, for service of the writ on the solicitor. It then was discovered that the plaintiff had been acting in error. The lady, whom he supposed to have been in England at the time the writ was issued, was then abroad and out of the jurisdiction. The question, therefore, is whether it was right to order substituted service of this particular writ. The writ is an ordinary writ for service in England. By the law and comity of nations such a writ cannot be served abroad. It was rightly decided in *Fry* v. *Moore* that if such a writ cannot be served directly, it cannot be served indirectly by means of an order for substituted service. While the defendant is abroad, and out of the jurisdiction, this writ cannot be served upon her. Therefore there cannot be substituted service of this writ, and the order for it must be set aside. No doubt Parliament has given leave, under certain circumstances, for the court to issue writs out of the jurisdiction. Where those conditions are fulfilled, the court will, in certain cases, issue writs which can be served abroad. If this had been such a writ as that, then, possibly, under certain circumstances, the court might order substituted service of that writ. But this writ, as I have said, could under no circumstances have been served abroad, and therefore the order for substituted service was wrong. If the defendant had left the jurisdiction in order to evade service of the writ I think the case would be different, but there is no evidence at all of her having done so. The appeal must be dismissed.

LINDLEY, L.J.—I agree. I think the case is governed by the decision in *Fry* v. *Moore*.

LOPES, L.J.—If it were proved that this lady left the jurisdiction in order to evade service of the writ I think that the order for substituted service might be maintained. There being, however, no evidence of this, I think the case falls within the decision of *Fry* v. *Moore*

Appeal dismissed.

Solicitor for the appellent, *G. B. Crook.*

Solicitor for the respondent, *R. S. Gregson.*

From Q. B. Div. [and Q. B. Div.] July 17; Oct. 28.

BIRD *v.* DAVEY.

MARCH (CLAIMANT). (*a.*)

Bill of sale—Attesting witness—Two attestation clauses—Address and description—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 9, 10; *Form in schedule.*

Where there are two or more grantors and two or more attestation clauses in a bill of sale given by way of security,

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

(*a.*) Reported by W. F. BARRY, Esq., and Sir SHERSTON BAKER, Barristers-at-Law.

the bill of sale is not rendered void under the Bills of Sale Act, 1882, by reason of the address and description of the attesting witness not being repeated in the second and subsequent attestation clauses, provided that it is clearly apparent upon the face of the bill of sale itself that the attesting witness is the same person in each case.

Parsons *v.* Brand, 38 *W. R.* 388, 25 *Q. B. D.* 110, *distinguished.*

Appeal from the judgment of the judge of the Romford County Court upon an interpleader issue to determine the right to certain goods which had been seized in execution by the plaintiff, and claimed by the grantee under a bill of sale.

There were three grantors, one of them being the execution debtor, and two attestation clauses in the bill of sale. The first attestation clause stated that the bill of sale was executed by one of the grantors "in the presence of me (the alterations initialled by me having been first made), Geo. Bailey, solicitor, Romford." The second attestation clause, which came immediately below the first, and which stated that the bill of sale was executed by the two other grantors, was in precisely the same form as the first, except that after the signature "Geo. Bailey" no address or description was added. It was apparent upon the face of the bill of sale that the document was originally drawn with only one grantor and one attestation clause; that the names of the two other grantors were subsequently inserted, together with the alterations and additions consequent thereon, as well as the words in the first attestation clause, "the alterations initialled by me having been first made"; and that the second attestation clause was also added. Each of the alterations was initialled once "G. B." The signature "Geo. Bailey" in each attestation clause was in the same handwriting, and the alterations and additions were apparently so too. The county court judge held that the bill of sale was valid. The execution creditor appealed.

July 17.—*Lynden Bell*, for the execution creditor.

C. E. Jones, for the claimant.

POLLOCK, B.—My decision in this case is founded upon this: there have been two, or rather three cases, on the same point—namely, *Blankenstein* v. *Robertson*, 24 Q. B. D. 543, 38 W. R. Dig. 23; *Parsons* v. *Brand*. and *Coulson* v. *Dickson*, 38 W. R. 388, 25 Q. B. D. 110. The result of these cases is this, that the form given in the schedule must be taken to include the attestation clause, and that the execution of the bill of sale and the mode of execution are a part of that form. In those cases it was argued that the court might refer to the affidavit to supply the omission, but the court said not, and they said that the statute must be complied with. In the present case, no doubt, it is not contended that the affidavit can be referred to, but it is said that the court ought to assume that the attesting witness in the second clause is the same as the person who attests the first clause. It seems to me that that could not be done without sinning against the spirit of the cases cited. There might be two men of the same name, as, for instance, there might be father and son of the same name. I am of opinion that the present case comes within the authority of those cases.

DAY, J.—If this case had been unfettered by authority I should have been of opinion that this attestation clause was abundantly sufficient. Because the address and description have not been added in the second attestation clause, I am constrained by the cases cited to hold that this bill of sale is void. The second clause is merely signed by Geo. Bailey. I entirely concur that if a jury were asked if the Geo. Bailey who signed the second clause was the same Geo. Bailey who signed the first they would have no hesitation in saying that they were the same. But I am bound to hold that the words "the address and description" are part of the statutory form, that they are not in the present attestation clause, and, therefore, that this bill of sale is void.

Appeal allowed. Leave to appeal.

The claimant appealed.

Oct. 28.—*C. E. Jones*, for the claimant.—The address and description of the attesting witness appear upon the bill of sale as required by the form in the Bills of Sale Act, 1882. It is clear from the mode in which the bill of sale is drawn, and from the handwriting, that the attesting witness was the same in each attestation clause. The words in each attestation clause, "The alterations initialled by me having been first made," together with the fact that the alterations are only initialled once, clearly show this. It is not necessary to repeat the address and description in each attestation clause; it is sufficient if, on the face of the bill, it is apparent that the attesting witness is the same in each case. In *Blankenstein* v. *Robertson*, 24 Q. B. D. 543, 38 W. R. Dig. 23, and *Parsons* v. *Brand*, *Coulson* v. *Dickson*, 38 W. R. 388, 25 Q. B. D. 110, the address and description were not in the bill of sale, and it was held that the omission could not be supplied from the affidavit or by evidence. These cases, therefore, are distinguishable.

Lynden Bell, for the execution creditor.— The address and description of the attesting witness must be inserted in each attestation clause. Each attestation clause ought to be complete in itself, otherwise the bill of sale is not in accordance with the form. Secondly, the information required by the form has not been given. There is nothing on the face of the bill of sale to show that the attesting witness is the same person in each case. The information required to be given—viz., the address and description of the witness in the second attestation clause—cannot be deduced from the bill of sale itself. The similarity of the handwriting in the original bill of sale cannot avail, because intending lenders who search the register would only see a copy of the bill of sale, and not the original. The form has, therefore, not been followed, and the bill of sale is void.

C. E. Jones replied.

Lord ESHER, M R.—It has been contended that this bill of sale is not in accordance with the form because the address and description of the attesting witness have not been given in the second attestation clause. Now it has been decided by this court that the address and description of the attesting witness must be given on the face of the bill of sale. It would not be sufficient to show from the affidavit or by extraneous evidence what the address and description were; nor would it be sufficient, in the case of a bill of sale where there are two attestation clauses, to show from the affidavit or by evidence that the witness was the same in each case. Still, however, if it is clear upon the face of the bill of sale, and without the help of any extraneous evidence, that the attesting witness was the same person in each case, then the address and description are given on the face of the bill of sale in accordance with the form, and the bill of sale is valid. The court must be satisfied upon that point from the bill of sale itself without any doubt whatever; in other words, the inference from the bill of sale itself must be an irresistible inference that the witness is the same in each case. If, on looking at the bill of sale, the court has no doubt from the handwriting that the attesting witness is the same person in each case, then the address and description are

given on the face of the bill of sale. Inasmuch as the Act, when prescribing these particulars, is dealing with the original bill of sale, the original may be looked at for the purpose of comparing the handwriting, though no extraneous evidence is admissible in regard to it. In the present case no member of the court has the smallest doubt on looking at the bill of sale that the witness, "Geo. Bailey," in each attestation clause is the same person. The address and description of the witness are therefore given in the bill of sale, and the bill of sale is good. The case of *Parsons* v. *Brand* is distinguishable, as there the address and description of the witness did not appear upon the bill of sale at all. The appeal must be allowed, and the judgment of the county court judge restored.

LINDLEY, L.J.—I am of the same opinion. The learned judges in the Divisional Court considered themselves bound by the authority of *Parsons* v. *Brand* to hold that this bill of sale was void. In that case, however, this court decided that an omission in the bill of sale could not be supplied from the affidavit, but that the bill of sale itself must be in accordance with the form. Section 9 of the Act provides that a bill of sale shall be void unless made in accordance with the form. Section 10 provides that the execution of a bill of sale by the grantor shall be attested by at least one credible witness. The question, then, is whether this bill of sale is attested in accordance with the form. The form, when dealing with the attestation clause, says "Add witness's name, address, and description." These particulars must be given somewhere in the attestation clause. If a person signs more than one attestation clause he need only state his address and description once so long as it is clear from the face of the bill of sale that the witness in each case is the same person. The Act does not require him to repeat his address and description over again. In *Thomas* v. *Kelly*, 37 W. R., at p. 356, 13 App. Cas., at p. 520, Lord Macnaghten said: "When is an instrument which purports to be a bill of sale not in accordance with the statutory form? Possibly when it departs from the statutory form in anything which is not merely a matter of verbal difference." Taking that as our guide, can it be said that this attestation clause is not in accordance with the form? If, from the face of this bill of sale, the inference is irresistible, as it seems to me to be, that there is only one attesting witness, then the bill of sale is valid. In the cases cited the address and description of the attesting witness were omitted altogether from the bill of sale.

LOPES, L.J.—If, from the face of the bill of sale, without the assistance of any extraneous evidence, the conclusion is irresistible that the attesting witness in each attestation clause is the same person, then the address and description are given in the attestation clause, and the bill of sale is valid. To my mind the conclusion from this bill of sale is irresistible that "Geo. Bailey" in both cases is the same person. The learned judges in the court below relied upon the cases of *Parsons* v. *Brand* and *Coulson* v. *Dickson*. In the first case both the address and description of the witness were altogether omitted from the bill of sale. In the second case the address was given, but not the description. The court held that both bills of sale were bad as not being in accordance with the form, and that the defect could not be cured by anything extraneous to the bill of sale itself. That is not the case here.

Appeal allowed.

Solicitor for the plaintiff, *R. H. Ward.*

Solicitor for the claimant, *A. H. Hunt & Co.*

Adm. and C.A. June 5, 10; July 22, 1890.

"THE RUBY." (a.)

Shipping — Damage — Compulsory pilotage — Llanelly Pilotage District—Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104), *ss.* 353, 388—6 & 7 *Vict. c. lxxviii., s.* 158.

Subject to the provisions in the Merchant Shipping Acts exempting from compulsory pilotage certain vessels there referred to, pilotage is compulsory within the limits of the Llanelly Pilotage District for all vessels not exempted from compulsory pilotage by the terms of the pilotage bye-laws made by the Burry Navigation and Llanelly Harbour Commissioners.

This was an action of damage instituted on behalf of the owners of the steamship *Cambrian* against *The Ruby* and her freight.

This action was brought to recover the damages sustained in a collision between the two vessels on the 16th of February, 1890, in the River Burry, when both vessels were in charge of pilots licensed by the Burry Navigation and Llanelly Harbour Commissioners.

The owners of *The Ruby* appeared as defendants, and set up a defence on the merits, and also pleaded that at and before the time of the collision *The Ruby* was within a district where the employment of a pilot was compulsory by law, and was in charge of a duly licensed pilot by compulsion of law, and that if the said collision was caused or contributed to by any person on board *The Ruby*, which they denied, it was solely caused by the default or negligence of the said pilot, and not by any default or neglect of the defendants or their servants. The defendants further, by way of counter-claim, alleged that they had sustained damage by reason of the negligent navigation of *The Cambrian* by the plaintiffs or their servants, and for the amount of the damages occasioned by the collision claimed judgment against the plaintiffs and their bail.

The plaintiffs, in their reply, joined issue upon the defence, and by way of defence to the counter-claim, repeated the allegations in the statement of claim, and further pleaded as follows:—

3. The plaintiffs further say that at the time of the said collision *The Cambrian* was in charge of a duly licensed pilot for the district in which she was being navigated, all of whose orders were obeyed, and that if the said collision was caused or contributed to by the fault or incapacity of any person on board *The Cambrian*, which they deny, it was solely by the fault or incapacity of the said pilot, and if the court should be of opinion that the employment of such pilot was compulsory upon the plaintiffs by law at the time and place of such collision, the plaintiffs say they are not answerable for any loss or damage occasioned to the defendants by such collision by reason of the aforesaid circumstances, and under the provisions of section 388 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104).

The action was heard on the merits before Butt, J., and two of the Elder Brethren of the Trinity House on the 5th of June, when the court pronounced the collision to have been occasioned solely by the fault or incapacity of a duly licensed pilot, who was at the time of the said collision acting in charge of the steamship *Ruby*, but reserved for argument the question of law whether the employment of the pilot of *The Ruby* at the time and place of the collision was compulsory or not.

(a.) Reported by F. C. JEMMETT and A. P. PERCEVAL KEEP, Esqs., Barristers-at-Law.

June 10.—The reserved question of law came on for argument before Butt, J.

Sir Walter Phillimore and *J. P. Aspinall* appeared for the defendants, the owners of *The Ruby*.

Barnes, Q.C., and *Raikes* appeared for the plaintiffs, the owners of *The Cambrian*.

Such of the sections of the local Acts of Parliament relating to the pilotage jurisdiction of the Burry Navigation and Llanelly Harbour Commissioners as are material to this report are set out below in the judgments delivered in the Court of Appeal; and bye-laws under those sections were from time to time, from 1814 to the present time, made by the commissioners therein mentioned and their successors. Of the bye-laws so made, the following article was in force at the time of the passing of the Merchant Shipping Act, 1854:—

1. All vessels registering thirty tons and upwards passing over the Bar of Burry, either inwards or outwards, and all vessels with cargoes, though under that tonnage inwards, shall heave to and shall receive on board the first of the licensed pilots who shall offer, and the master of any vessel refusing or neglecting to do so, shall pay the pilotage as though such pilot had been taken on board, and be subject to a penalty not exceeding five pounds.

. . . . . .

A similar bye-law, purporting to be applicable to *The Ruby*, was in force at the date of the collision.

BUTT, J.—I have no doubt whatever that this pilotage was by law compulsory upon all persons trading to this port, Llanelly, at the time when the Merchant Shipping Act of 1854 came into operation; and if that is so, by the terms of that Act of Parliament pilotage continues compulsory.

It appears that the harbour authorities have made bye-laws ever since 1814, making pilotage, if they have any operation at all, compulsory. I see no ground upon which it can be said that this vessel was not obliged to take a pilot.

I do not think it really worth while to go through the somewhat lengthy preambles and clauses of these Acts of Parliament. The Act of the 6th and 7th Vict. c. lxxxviii. was passed at a time when, as a matter of fact (although as a matter of law it has been questioned), pilotage was compulsory in this port—that is to say, vessels were in the habit of taking pilots as if under compulsion.

I have no doubt that pilotage was compulsory in this case on the owners of *The Ruby*, and as I have found that *The Ruby* was to blame for this collision, but that the fault was the fault of the pilot alone, I must dismiss the claim against her owners. There will be no order as to the costs of the action; but unless the registrar finds that the practice has been, in a case like the present, for the court to make no order as to the costs of the counter-claim, the defendants will be condemned in the costs of the counter-claim.*

Against this decision on the question of compulsory pilotage the owners of *The Ruby* appealed.

* The minute of the decree subsequently entered in the registry was in the following terms:—The judge having heard counsel on both sides on the reserved question of law, pronounced that the employment of the pilot who was at the time of the collision in question in this action acting in charge of the steamship *Ruby* was compulsory by law, and he further pronounced against both the plaintiffs' claim and defendants' counter-claim for damages arising out of such collision, and made no order as to costs, except as to those (if any) consequent on the said counter-claim, in which he condemned the defendants.

July 22.—The appeal came on for hearing.

Barnes, Q.C., and *Raikes*, for the appellants.

Sir W. Phillimore and *Aspinall*, for the respondents.

Lord ESHER, M.R.—The question in this case is whether this vessel was bound to take a pilot on board, and whether the captain, when the pilot was on board, had to give up the navigation of the vessel to him. In other words, was pilotage compulsory? Such an obligation is put on a vessel, not for the benefit of individual shipowners, but for the protection of the general body of shipowners on account of the difficult navigation of most of our ports. The persons who made these bye-laws had not to think of the results which might ensue in consequence of pilotage being compulsory if ships came into collision, for these are a consequence of the principles of the common law. The bye-laws in question have the force of statutes. Llanelly is a small port, and the Legislature gave to local persons power to make bye-laws which have the same effect as statutes have in regard to larger ports. The preamble of the first local Act relating to this port—viz., that of 1813—shows the intention of the Legislature, that pilotage should be regulated and the entry to the port made safer. Section 158 of the Act of 1843 gives power to make bye-laws for regulating the navigation of the port. In order to regulate there must be ample power of control, and one of the first things required for the proper navigation of the port is that vessels should be steered in and out safely. A pilot acquainted with the locality would do this best. Therefore the authorities would have power to select and license pilots. There are decisions which show also that where authorities have power to make bye-laws, they have also power to impose reasonable penalties to enforce them. I am clearly of opinion that the authorities of this port have power to order a pilot to be taken on board vessels navigating into or out of it, and the fact that they have made bye-laws since 1814 regulating pilotage, and that these have never been disputed, is strong to show that this interpretation of them has been generally accepted. I have no doubt that pilotage was compulsory on this ship, and the appeal must be dismissed, with costs.

LINDLEY, L.J.—The question in this case is what is the true construction of section 158 of the Act of 1843. To discover it we must look to the earlier Acts, and especially to the preamble of the Act of 1813. When these are read it becomes obvious that the Legislature has given power to make pilotage compulsory in this port.

BOWEN, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the plaintiffs, *Pritchard & Sons.*

Solicitors for the defendants, *Cooper & Co.*

High Court of Justice.

Chan. Div. }
Chitty, J. } Aug. 5, 1890.

In re ANDERTON AND MILNER'S CONTRACT. (*a.*)

Landlord and tenant—Lease—Usual and proper covenants—Proviso for re-entry—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.

Under an agreement for a lease to contain usual and proper covenants, the landlord is not entitled to have inserted in the lease a proviso for re-entry upon breach of any of the covenants by the lessee or otherwise than on non-payment of rent.

Hodgkinson *v.* Crowe, 23 *W. R.* 406, 885, *L. R.* 10 *Ch.* 622, *is not affected by the* 14*th section of the Conveyancing Act,* 1881.

Vendor and purchaser summons.

This was a summons under the Vendor and Purchaser Act, 1874, to settle the form of covenants in a lease.

The only point requiring decision was as to the proper form of the proviso for re-entry in a lease to contain usual and proper covenants.

By agreement dated the 19th of February, 1890, F. W. Anderton, the lessor, agreed to lease certain houses for a term of seventy years to F. B. Milner, the lessee. The consideration was a premium of £230 and a ground-rent of 12 guineas. The lease was to be subject to the usual covenants to insure from loss by fire, repair, and pay rent and all outgoings that might be charged on the property and ground, and the lease and counterpart were to be prepared by the vendor's solicitor, and contain the usual and proper covenants thereinbefore mentioned, and also one for registration of transfers. The only covenants mentioned in the agreement are those stated above.

The conveyancing counsel to whom the judge referred the matter settled the lease with a proviso for re-entry on breach of any of the covenants.

The lessee refused to take the lease in this form, contending that the proviso must be limited to non-payment of rent.

The conveyancing counsel thereupon submitted the point to the court.

Percy F. Wheeler, for the lessor.—The question of "usual and proper covenants" was formerly governed by *Hodgkinson* v. *Crowe*, 23 W. R. 406, 885, L. R. 10 Ch. 622, but since the relief afforded to lessees by section 14 of the Conveyancing Act, 1881, the ground of that decision—viz., "unfairness to the tenant"—is no longer applicable. "Usual covenants" include "conditions": *Brookes* v. *Drysdale*, 26 W. R. 331, 3 C. P. D. 52; *Wilkins* v. *Fry*, 1 Mer., at p. 263. As to what are usual covenants see *Hampshire* v. *Wickens*, 26 W. R. 491, 7 Ch. D. 555.

D. L. Alexander, for the lessee.—The proviso is not usual in this general form. The Conveyancing Act has made no difference. It was passed in favour of the lessee, not to give the landlord greater rights. Again, the provisoes for re-entry directed in the leasing sections of the Settled Estates Acts of 1856 and 1877 and the Settled Land Act of 1882 show what the Legislature considers a usual and proper form of proviso. If the question of "relief" governed the point the proviso for re-entry before the Conveyancing Act would have been on non-payment of rent or breach of covenant to insure, in both of which cases relief could have been granted.

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

CHITTY, J.—The question is, how the proviso for re-entry ought to be drawn in this lease, which the conveyancing counsel has settled pursuant to the agreement.

The lease is one for seventy years of house property, at a ground-rent of twelve guineas. But the consideration for the lease is not the ground-rent alone, but also a sum of £230 premium, which is really paid in part purchase of the term. The property is to be held subject to the usual covenants to insure against loss by fire and so on. The lease and counterpart are to be prepared by the vendor's solicitor, and to contain "the usual and proper covenants hereinbefore mentioned." They have defined the usual covenants for themselves, and there they are to end. The agreement is not well drawn. There is no reference to the proviso for re-entry, and so it appears to me there must be the reasonable proviso which, by the practice of conveyancers, has been adopted in leases of this class. The question came before the Court of Appeal in *Hodgkinson* v. *Crowe*. There the agreement was for a mining lease to contain "all usual and customary mining clauses," and it was held by the Court of Appeal that no proviso for re-entry could be inserted except for non-payment of rent, any other clause being neither usual nor reasonable. James, L J., gave various grounds for his decision, such as that there are many cases where a court of equity can give no relief against a clause of re-entry for breach of covenants. But the main ground of the decision is that the general proviso of re-entry was not usual at that time. This decision was in 1875. No practice has sprung up since then, so far as I am aware, to insert a proviso for re-entry on breach of any of the covenants. The burden of proof lay on the lessor to show that such a practice existed, but no attempt has been made to do so, although the case has been well argued on his behalf. The learned conveyancer has suggested that the proviso is reasonable and proper at the present day, having regard to section 14 of the Conveyancing Act, 1881, under which relief against a power of re-entry is granted to the lessee on certain terms. It is, of course, possible that under this section a practice may grow up of inserting a wide proviso of re-entry, but that is not the point. The question is whether it has already grown up, and whether it was usual at the date of the contract—viz., on the 19th of February, 1890.

In *Hodgkinson* v. *Crowe* James, L J., referred to the Settled Estates Act of 1856 (19 & 20 Vict. c. 120), s. 2, sub-section (5), as to the proviso for re-entry contained in leases authorized by the court. This is the same as section 4, sub-section (5), of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), and both in this section and in section 7 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), which is subsequent to the Conveyancing Act, the Legislature seems to think that the proviso for re-entry on non-payment of rent is the usual proviso. While acknowledging that the suggestion of the learned conveyancing counsel is ingenious, I do not think it is sound; and, having regard to the purchase of the term, I should have required a very strong case to convince me that such a general proviso of re-entry ought to stand in this lease. The lease will stand with the condition of re-entry limited to non-payment of rent.

Solicitor for the lessor, *Godden S. Hare.*

Solicitor for the lessee, *J. C. F. Barfield.*

N.B.—The 32nd section of the Settled Estates Act, 1856, directs a proviso of re-entry on breach of any of the covenants. It was limited as above by section 46 of the Settled Estates Act, 1877.

Chan. Div. North, J. April 30; May 1, 1890.

Ex parte CROWN BANK (LIMITED). *In re* O'MALLEY. (a.)

Attachment — Contempt of court — Pending proceedings —Newspaper comments—Motion to commit.

A paragraph inserted in a newspaper commenting on a case pending before the court, and foretelling the result of the case, is a contempt of court.

Motion.

This was an application on behalf of the Crown Bank (Limited) to commit the publisher of the *Star* newspaper to prison for publishing, while a petition was pending to wind up the bank, the following paragraph :—

"THE CROWN BANK—LETTING LIGHT IN.

"We have respectfully directed attention to the so-called bank, and we have not hesitated to describe it as a fraudulent concern. Neither Mr. Gilpin nor any other person connected with it, has thought fit to challenge that description, and we observe with much satisfaction that the matter has now come before the courts. On Saturday a petition for winding up the bank was discussed in Mr. Justice North's court. The petition is ordered to stand over until next Saturday, when the chairman of the bank and Mr. Gilpin are directed to attend for the purpose of being examined. If they are compelled to make a full statement as to the affairs of the bank, we shall have some interesting revelations."

The above paragraph appeared after the petition had been ordered to stand over in order that the chairman of the bank and Mr. Gilpin, a director, might attend for cross-examination.

Previous to the presentation of the petition, on several occasions articles had appeared in the *Star* newspaper in reference to the bank, which commented unfavourably on the company and its directors, and were written, as the court held, on information supplied by the petitioning shareholder.

The publisher made an affidavit, stating that he was not aware he had been committing a contempt of court in publishing the remarks complained of, but that if the court should be of opinion that he had committed a contempt, humbly apologizing for the offence.

Cozens-Hardy, Q.C., and *Chadwyck-Healey*, for the motion.—This publication, pending litigation, tends to prejudice a fair trial. It is clear that the article is inspired by the petitioner: *Tichborne* v. *Mostyn*, 15 W. R. 1072, L. R. 7 Eq. 55 n.; *In re Cheltenham and Swansea Railway Carriage and Wagon Co.*, 17 W. R. 463, L. R. 8 Eq. 580.

Wurtzburg, for the respondent.—The court is slow to exercise the extraordinary jurisdiction to commit. When the trial is before a judge alone the comments would have no effect: *Metropolitan Music Hall Co.* v. *Lake*, 60 L. T. N. S. 749, 37 W. R Dig. 10; and *Plating Co.* v. *Farquharson*, 29 W. R. 510, L. R. 17 Ch. D. 49, 54.

Cozens-Hardy, Q.C., in reply.

NORTH, J.—The perusal of the paragraphs which appeared in the *Star* newspaper previously to the presentation of the petition clearly shows that the editor was put in motion by the petitioner, and that the views he was expressing were not the independent opinion of an impartial newspaper, but those of a partisan. So far as regards the earlier paragraphs, published prior to the presentation of the petition, they might be the subject of an action for libel, but are not a contempt of court. But when, after notice of the presentation of the petition, the *Star* deliberately took one side in the controversy and took on itself to predict what would be the result, in my opinion a gross contempt of court was committed. It was doing what might interfere with the course of justice. Whether such would be its result in any case I do not know. Whether any person exists with a mind so constituted that he would be influenced by such a paragraph in such a paper I cannot say. The only object for which such a paragraph could be inserted must be to influence persons reading it and induce them to take one side. It was not, therefore, an impartial statement, even if that were permissible, but it was a deliberate adoption of the view of one of the parties. I do not think a lengthy reference to the two authorities cited in support of the motion is necessary. In *The Case of the Printer of the Champion*, 2 Atk. 469, Lord Hardwicke says: "Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented, nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard. It has always been my opinion, as well as the opinion of those who have sat here before me, that such a proceeding ought to be discountenanced."

That view has both before and since always been taken by the courts, and, in my opinion, ought to be acted upon in this case. The case before me is entirely different from the cases relied upon by Mr. Wurtzburg, where a newspaper has inadvertently admitted advertisements, in ignorance of the existence of legal proceedings, and those cases have no application to a case where the act done is deliberate.

Under the circumstances there has been, in my opinion, a gross contempt of court, and I should send the publisher to prison but for the fact that I do not wish to give him the prestige which some foolish persons would attach to a man upon whom such a sentence is passed.

I order him to pay a fine of £50 and the costs of the proceedings as between solicitor and client. I think the company were quite right in bringing this matter before the court.

Solicitors, *Godden Hare; Shaen, Roscoe, Massey, & Co.*

(a) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

Chan. Div. Stirling, J. April 17, 23, 1890.

PHILLIPS v. HOMFRAY. (a.)

Interest—Compensation—Minerals wrongfully abstracted —3 & 4 Will. 4, c. 42, s. 29—Action for money had and received—Time for claiming interest.

By a decree made in 1871 *the defendants S. H. and R. F. and the estate of the defendant W. H. F. were declared liable in respect of all minerals gotten or removed by them from under the plaintiffs' land, and an inquiry was directed what quantity of minerals had been so gotten or removed, and it was ordered that the market value at the pit's mouth of all such minerals should be certified, all just allowances being made for carriage, but none for getting or working.*

After the decree the defendants S. H. and R. F. died, and the suit, so far as the inquiry was concerned, was continued against their respective legal representatives.

(a.) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

The official referee, before whom the inquiry was prosecuted, reported, in December, 1889, the value of the minerals to be £9,028 6s.

On the further consideration of the suit the plaintiffs claimed interest at £5 per cent., with half-yearly rests, on the amount found to be due to them.

Held, (1) *that the suit must be treated, not as an action of trover or trespass, but as an action for money had and received, to which section 29 of 3 & 4 Will. 4, c. 42, did not apply;* (2) *that no such relationship existed between the parties as to entitle the plaintiffs to treat the defendants as trustees of the sum found due from them;* and (3) *that the plaintiffs' claim to interest ought to have been adjudicated upon at the trial, and that it was too late to raise the question upon the further consideration.*

Further consideration.

This suit was instituted in 1866 against Samuel Homfray, Rowland Fothergill, and William Henry Forman, who carried on business under the style of the Tredegar Iron Co., asking for a declaration that the defendants were liable to the plaintiffs in respect of certain minerals gotten and removed by them from under land of the plaintiffs and for consequential relief.

In 1871 a decree was made declaring the liability of the defendants Homfray and Fothergill, and the estate of the deceased defendant Forman, in respect of the minerals so gotten or removed; and the liability of the first named defendants to make compensation to the plaintiffs for the user of all roads and passages under the farm; and an inquiry was directed as to what quantities of minerals had been so gotten or removed as aforesaid, and it was ordered that the market price or value of all such minerals at the pit's mouth should be certified, all just allowances being made to the defendants in respect of the cost of carriage to the pit's mouth, but none for the expense of getting, severing, or working the same. Further inquiries were also directed with regard to the compensation to be made by the two first-named defendants in respect of the use of the roads and passages under the farm, and the manner in which they had worked the minerals (L. R. 6 Ch. 770, 20 W. R. Ch. Dig. 121).

In 1883, Fothergill being then dead, these last inquiries were stayed as against his representatives (32 W. R. 6, 24 Ch. D. 439), and in 1884 they were stayed as against the representatives of Homfray, who was then dead.

In December, 1889, the official referee, before whom the first inquiry was prosecuted, reported the value of the minerals taken to be £9,028 6s.

Hastings, Q.C., and *F. T. Procter,* for the plaintiffs.—The plaintiffs are entitled to interest at £5 per cent. on the £9,028 6s., with half-yearly rests. The court has jurisdiction under section 29 of 3 & 4 Will. 4, c. 42 to give damages in the nature of interest in actions of trover or trespass *de bonis asportatis.* The present suit is in effect an equitable action of trover. Further, the defendants, being accounting parties, and having had the use of the plaintiffs' money for twenty-five years, must be treated as trustees thereof, and are, therefore, chargeable with compound interest.

They referred to *Wood* v. *Morewood,* 3 Q. B. 440n; Mayne on Damages, 4th ed., p. 372; *Dreyfus* v. *Peruvian Guano Co.,* 37 W. R. 394, 42 Ch. D. 66, 43 *Ibid.* 316, 38 W. R. Dig. 63; *Martin* v. *Porter.* 5 M. & W. 351; *Burdick* v. *Garrick,* 18 W. R. 387, L. R. 5 Ch. 233; *Jones* v. *Foxall,* 15 Beav. 388; *Williams* v. *Powell, Ibid.* 461; *Attorney-General* v. *Alford,* 3 W. R. 200. 4 De G. M. & G. 843; *Livingstone* v. *Rawyards Coal Co.,* 28 W. R. 357, 5 App. Cas. 25.

Rigby, Q.C., and *Sangster Green,* for the legal personal representatives of the defendants Forman and Homfray.—The sum awarded to the plaintiffs by the referee is in the nature of a penal sum, for it represents the value of the coal at the pit's mouth, without any allowance being made for the expense of getting, severing, or working it. The plaintiffs now claim interest in addition. If they base their claim on section 29 of 3 & 4 Will. 4, c. 42, which applies only to actions of trover and trespass, the maxim "*Actio personalis moritur cum personâ*" is applicable. On the other hand, if they rest their claim on section 28 of the same Act, which applies to the case of money had and received, they must also fail, for they were never able until the publication of the referee's report to give the notice required by the section. Further, the defendants were under no duty or liability to invest this money, for no fiduciary relationship existed between the plaintiffs and defendants.

Buckley, Q.C., and *Osler,* for the legal representatives of the defendant Fothergill.

Hastings, in reply, referred to *Hambly* v. *Trott,* 1 Cowp. 371. *Cur. adv. vult.*

April 23.—STIRLING, J., stated the facts, and continued:—The first ground on which it is sought to charge interest is that the plaintiffs are entitled to it under the statute 3 & 4 Will. 4, c. 42, s. 29. That section is confined to actions of trover, and trespass *de bonis asportatis.* The question is whether I can treat this present action as an action, as it was put in argument, in the nature of an equitable action of trover. It was decided in the case of *Hambly* v. *Trott* that an action of trover was one to which the rule of law, "*Actio personalis moritur cum personâ*" applies. There the action was brought against an executor for a conversion by his testator, and upon a plea of not guilty by the testator there was a verdict for the plaintiff. The case was twice argued, and after judgment had been reserved, Lord Mansfield, in delivering the judgment of the court, concludes as follows:—"The form of the plea is decisive—namely, that the testator was not guilty, and the issue is to try the guilt of the testator. And no mischief is done; for so far as the cause of action does not arise *ex delicto* or *ex maleficio* of the testator, but is founded in a duty which the testator owes the plaintiff; upon principles of civil obligation, another form of action may be brought as an action for money had and received." Thereupon the judgment was arrested.

That case was much considered and discussed in this very case of *Phillips* v. *Homfray* upon the appeal (24 Ch. D. 439), and, after carefully reading the judgment of Pearson, J., and the judgments delivered in the Court of Appeal, it does not appear that the proposition of law on which *Hambly* v. *Trott* was decided was in any way disputed. It was accepted by all the judges as good law that an action of trover was one which dies with the person.

The question on which the majority of the court differed from Baggallay, L.J., and Pearson, J., seems to have been this, whether any form of action could be suggested which could be brought at law, in which the damages or the sums which were sought to be recovered by means of inquiries 2, 3, and 4, could be recovered against an executor, and the opinion of the majority of the Court of Appeal was that no such action could be suggested. The judgment of Bowen, L.J., seems to me to show that very clearly. I will read one or two passages from it which appear to me to contain the substance of all that I need mention. He says:—"The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against

the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance. . . . The true test to be applied to the present case is whether the plaintiffs' claim against the deceased R. Fothergill, in respect of which inquiries 2 and 3 were directed to his lifetime, belongs to the category of action *ex delicto*, or whether any form of action against the executors of the deceased, or the deceased man in his lifetime, can be based upon any implied contract or duty. In other words, could the plaintiffs have sued the deceased at law in any form of action in which 'Not guilty' would not be the proper plea? If such alternative form of action could be conceived it must be either an action for the use, by the plaintiffs' permission, of the plaintiffs' roads and passages, similar in principle, though not identical, with an action for the use and occupation of the plaintiffs' land. Or it must be in the shape of an action for money had and received, based upon the supposition that funds are in the hands of the executors which properly belong in law or in equity to the plaintiffs. We do not believe that the principle of waiving a tort and suing in contract can be carried further than this—that a plaintiff is entitled, if he chooses it, to abstain from treating as a wrong the acts of the defendant in cases where, independently of the question of wrong, the plaintiff could make a case for relief." That is the ground of the decision of the majority of the Court of Appeal, which I need not say is binding upon me. The decision was that the proceedings must be stayed under inquiries 2, 3, and 4, but not under inquiry 1, with which I am now dealing. Having regard to that, I am of opinion that this action cannot be treated as in the nature of an action of trover, but rather as in the nature of an action for money had and received.

It appears to me, therefore, that section 29 of the Act 3 & 4 Will. 4, c. 42 does not apply, and that, if any section of that Act does apply, it is section 28. That section was not relied upon in the opening of the case by the learned counsel for the plaintiffs, and in his reply he stated expressly that he could not bring himself within that section. It appears to me, therefore, that the application for interest, so far as it is based on the statute, fails.

Then it was further said that the defendants were accounting parties, and that there was a general principle that accounting parties may be charged with interest. The principal cases which were cited in support of that proposition were two well-known cases—*Burdick* v. *Garrick* and *Attorney-General* v. *Alford*. In both these cases a fiduciary relation subsisted between the plaintiffs and the defendants, and the right to interest on the part of the plaintiffs was treated as arising by virtue of that relation, and the duty which the defendants owed to the plaintiffs by reason of it. No such relation exists here, and therefore the cases cited do not, in my opinion, apply. It was on those grounds that the plaintiffs rested their case. They appear to me to fail, and perhaps it might be sufficient to stop there, but I think it right to add this, that it does appear to me that the decree, as it now stands, is not consistent with the claim which is put forward by the plaintiffs. The decree appears to be framed so as simply to give the plaintiffs compensation for the value of this property, to be ascertained by means of the inquiry No. 1. If the defendants were to be charged with interest, it seems to me that the right course would have been to have made that case at the trial, and to have inserted in the decree proper directions as to the mode in which the interest was to be charged and ascertained. No such directions are to be found in it; and I think that it is too late now for the plaintiffs to come forward and ask to charge the defendants with interest.

The decree was not made till 1871. At the trial it must have been known that all the improper workings which were complained of had taken place prior to this, and the plaintiffs obtained a decree in which they charged the then defendants with the value, upon the footing on which the compensation is ascertained, when the defendants have been guilty, not of a mere accidental trespass, but of a wilful tortious act. That gives the plaintiffs more than the simple value of the property, because it gives them the value of the property without any allowance for the expense of getting, or severing, or working the minerals. For these reasons, I think the claim for interest cannot be sustained. I only desire to add this, that I do not think that in the present decision I depart from anything that was laid down or decided in the case of *Dreyfus* v. *Peruvian Guano Co.*, to which I was referred. In that case the form of the judgment was different. There the inquiry directed was what damages had been sustained by the plaintiffs by reason of the detention by the defendant company of the cargoes of guano in question in the action, and in working out that inquiry as to damages the chief clerk allowed interest. It was held by Kay, J., and, as I understand, also by the Court of Appeal, that he was justified in so doing, by reason of the statute. But, in the first place, that was a different form of inquiry, and, in the second place, there was no room for the application of the maxim, "*Actio personalis moritur cum persona*," the defendants there being a company, and being in existence as such at the date of the further consideration as well as at the time when the wrongful acts complained of were committed. I think, therefore, that no interest can be allowed.

Solicitors, *Ullithorne, Currey, & Villiers*, for *Simons & Plews*, Merthyr Tydfil; *T. W. Denby; Field, Roscoe, & Co.*

Prob. Div. and Adm. Div. Admiralty. } June 24.

"THE MARK LANE." (*a*.)

Shipping—Salvage—Exorbitant agreement—Costs.

The plaintiffs, in an action of salvage brought to recover salvage remuneration for salvage services rendered in the Atlantic Ocean in towing for 350 miles to a port of safety a steamship disabled in her machinery, and valued, with her cargo and freight, at above £23,000, but less than £25,000, pleaded an agreement made between the masters of the plaintiffs' and defendants' vessel before the commencement of the services, whereby it had been agreed that the master of the plaintiffs' vessel would make the attempt to tow the disabled vessel to the port where she was placed in safety for the sum of £5,000, and that, in case of failing in the attempt, the plaintiffs' vessel should be paid for the service rendered, and claimed (1) the said agreed sum of £5,000 as and for salvage for the services rendered by them, and (2) alternatively, such an amount of salvage as to the court should seem right At the hearing of the action the court, considering that £5,000 was an exorbitant sum for the salvage services rendered, awarded to the salvors £3,000 salvage remuneration, with costs, and apportioned the amount so awarded

(*a*.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

as follows:—£2,500 to the owners of the salving vessel, £150 to her master, and £350 to her officers and crew according to their rating.

This was an action of salvage instituted on behalf of the owners, master, and crew of the steamship *Crete* against the steamship *Mark Lane*, her cargo and freight.

Appearances as defendants were entered on behalf of the owners of *The Mark Lane* and her freight and on behalf of the owners of the cargo of that vessel, and the plaintiffs, on the 29th of May, 1890, delivered a statement of claim in which, after alleging that on the 13th of April, 1890, *The Crete*, a steamship of 1,121 tons net, on a voyage in the Atlantic Ocean from Philadelphia to Denmark, had sighted *The Mark Lane* disabled by the loss of three of her propeller blades, and leaking so badly through her stern tube that it had been necessary to plug the tube, so that the engines could not be used, that the master of *The Mark Lane* had requested the master of *The Crete* to take him in tow for Halifax, they pleaded that an agreement had been entered into in the word, and figures following:—

"About lat. 40.0 N., long. 50 50 W.
"Sunday, 13 April, 1890.

"It is now agreed between Enoch James, master of the steamship *Crete*, and John Pengelly, master of the steamship *Mark Lane*, of London, that the master of the steamship *Crete* will make the attempt to tow the steamship *Mark Lane* to Halifax, Nova Scotia, for the sum of £5,000 British sterling. In case of failing in the attempt to reach Halifax, and obliged to abandon through stress of weather, the steamship *Crete* to be paid for service rendered."

The statement of claim then set out in detail the services *The Crete* had rendered, that she had taken *The Mark Lane* in tow and had towed her in safety to Halifax, where the two vessels arrived on the morning of the 16th of April, 1890, and after stating the value of *The Mark Lane*, her cargo, and freight to be £24,200 concluded as follows:—"The plantiff's claim: (1) The said agreed sum of £5,000 as and for salvage for the services rendered as aforesaid, and costs. (2) Alternatively, such an amount of salvage as to the court shall seem right, and costs."

The defendants, the owners of *The Mark Lane*, delivered a defence alleging in substance that the statements in the statement of claim were greatly exaggerated and untrue in many respects, and in the ninth paragraph of their defence pleaded as follows:—"The defendants say that the said agreement is not binding on them, on the grounds that it was unreasonable and that the said sum of £5,000 was exorbitant, and that the master of *The Mark Lane* signed the same under duress, and because he was led to believe by the master of *The Crete* that unless he signed it *The Crete* would not take *The Mark Lane* in tow. As soon as he arrived at Halifax the master of *The Mark Lane* gave notice to the master of *The Crete* that he would not be bound by the agreement."

The action now came on to be heard before Butt, J., and two of the Elder Brethren of the Trinity House.

Barnes, Q.C., and *Aspinall*, appeared for the plaintiffs.

Sir W. Phillimore and *J. Walton*, appeared for the defendants, and referred to *The Cargo ex Woosung*, 1 P. D. 260, 24 W. R. Dig. 281; *The Medina*, 25 W. R. 156, 2 P. D. 5; and *The Silesia*, 29 W. R. 156, 5 P. D. 177, as authorities in support of the view that the agreement was one which the court would not enforce.

BUTT, J.—The values of these two steamers, though not large, are considerable. The plaintiffs are seeking to recover the sum of £5,000, the sum mentioned in the agreement set out in the statement of claim, and only in the alternative asking the court to award such an amount of salvage as it may deem just. I feel satisfied that for services such as those rendered in this case the Court of Admiralty never has given such an award as £5,000, and I think, having regard to the state of *The Mark Lane*, the distance she was towed, and that £5,000 is more than one-fifth of the total value of the salved property, the plaintiff's demand is exorbitant. I think it would be so were this a salvage agreement; but it is not—far from it. One reason why salvage awards are so large is because, if the service is unsuccessful, at whatever risk and labour it may have been performed, the salvor gets nothing. But by this agreement, in the event of *The Mark Lane* going down, the plaintiffs were still to be paid for the service rendered.

I have said that I consider the demand exorbitant. In the cases referred to by counsel the word "inequitable" has been used. But I think that what is at the root of the question is this: where it is found that a wholly unreasonable price has been insisted upon by the salvors, and an agreement agreeing to that amount has been signed, the court looks rather to the position of the parties than to the reasonableness or unreasonableness of the amount, the question being, were the parties, in fact, contracting on equal terms? It is clear that in the present case they were not. It is true that there is not in this case the amount of duress which would invalidate an agreement at common law; but in this court the same amount of compulsion or duress—call it what you will—is not necessary to induce the court to refuse to enforce an agreement. The captain of *The Crete* appears to have said in effect, though not in so many words, "If you do not sign this agreement to pay £5,000 I will leave you." His manner and his demeanour were, in my opinion, such that they led the captain of *The Mark Lane* to believe that that was what he meant to do, and he has not from first to last said that he would either have taken less or have stayed by *The Mark Lane*. The fact is that the master of *The Mark Lane* signed this agreement under compulsion, and, the amount being exorbitant, I decline to uphold the agreement. Then the question arises, what sum are the salvors entitled to receive? Considering that the weather was fine during the greater part of the time during which the services were rendered, and that there was a little risk to the salvors—no more than is necessarily incurred when a large steamer takes a still larger one in tow, and that the towage was about 350 miles, we think that £3,000 will be a liberal award. As I am asked to apportion the amount, I direct that £2,500 shall be paid to the owners of *The Crete*, £150 to the master, and £350 to the officers and crew according to their rating.

Sir Walter Phillimore applied that no order should be made as to the costs of the action.—In the case of *The Silesia*, a case on all fours with the present, the defendants having made no tender, the court followed the ruling of the Court of Appeal in *The Medina*, and ordered that each party to the suit should bear his own costs.

BUTT, J.—There has been no tender in this case, but the plaintiffs have succeeded in obtaining a large award of salvage. I shall in this case give the plaintiffs their costs.

Solicitors for the plaintiffs, *Botterell & Roche*.

Solicitors for the owners of *The Mark Lane* and her freight, *Pritchard & Sons*.

Solicitors for the owners of the cargo of *The Mark Lane*, *Waltons, Johnson, & Bubb*.

Court of Appeal.

From Chan. Div. Nov. 15.

In re WEYMOUTH AND CHANNEL ISLANDS STEAM PACKET CO. (*a.*)

Company—Winding up—Surplus assets—Shares fully paid up—Shares issued at a discount—Mode of distribution of surplus.

The original shares in a limited company incorporated in 1859 *were shares of* £10 *each, on which the whole amount had been paid up. In* 1861 *a special resolution was passed by the company, whereby the capital of the company was increased by the issue of a number of additional shares of* £10 *at a discount of* £7 *per share. The company continued to carry on business until* 1889, *when it was wound up voluntarily. After payment of all creditors a large surplus remained for distribution among the contributories.*

Held (*affirming the decision of* North, J., *reported* ante, *p.* 5), *that the holders of the fully paid-up original shares should first receive out of the surplus a sum of* £7 *per share, and that the balance of the surplus should then be divided equally among the holders of the original shares and the holders of the additional shares alike.*

In re Hodge's Distillery Co., Ex parte Maude, 19 *W. R.* 113, *L. R.* 6 *Ch. App.* 51, *approved.*

Appeal from the decision of North, J. (reported *ante*, p. 5.)

The company was registered as a limited company in 1859 under the Joint-Stock Companies Acts, 1856 and 1857, with a capital of £40,000 in shares of £10 each fully paid up.

The articles of association provided that the capital of the company might be increased, by the passing of a special resolution for that purpose by the company, and that the additional capital should for all purposes be considered part of the original capital, and subject to the same provisions with reference to calls or forfeiture or otherwise, as if it had been part of the original capital. The articles contained no provision with respect to distribution of the surplus assets among the shareholders in the event of a winding up.

By special resolutions passed and confirmed at extraordinary general meetings of the company held in May and in June, 1861, it was resolved (1) that the capital of the company be increased by the creation of 2,016 additional shares of £10 each, and that such additional shares be credited with the sum of £10 as paid up thereon upon payment by the allottees of a sum of £3 per share; (2) that the owners of these additional shares should be considered and treated with respect to dividend in the same manner, and should receive the like dividend as the holders of the original paid-up shares of £10 each; (3) that the directors should be authorized to offer such additional shares first to the present shareholders and afterwards to such persons as they might think fit; and (4) that the resolutions should be taken as additions to, and form part of, the articles of association of the company, and should be in lieu of any previous articles inconsistent with them.

Due notices of each of these meetings and of the resolutions passed and confirmed thereat had been sent to every shareholder of the company, and subsequently a notice was sent to every shareholder that the directors were prepared to allot the additional shares on the terms of the special resolutions, and a form of application for an allotment was sent along with such notice.

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

1,631 additional shares were applied for and were allotted, and certificates of the shares were subsequently sealed by the company and issued to the allottees.

The certificate of each original share, as well as the certificate of each additional share, contained a declaration that it was issued subject to the rules, regulations, and orders of the company for the time being in force.

Some of the additional shares had been from time to time transferred, and the transfers had been registered. The company continued to carry on its undertaking until 1889, when a resolution for the voluntary winding up of the company was passed.

The company had no creditors, and after all its assets had been realized there was (subject to the costs of liquidation) a surplus of £25,000 for division among the shareholders.

The liquidator had presented a petition to have it determined upon what principles and in what shares and proportions as between the holders of the original shares and the holders of the additional shares this surplus ought to be distributed, and the petition was served on persons appointed by the court to represent each class of shareholders.

North, J., held that the surplus should be applied, first, in repaying to each of the holders of original shares the sum of £7 on each share, so as to level them down to what had been paid by the holders of the additional shares, and then that the balance should be divided equally between all shareholders alike.

The holders of the additional shares appealed.

Buckley, Q.C., and *W. B. Heath*, for the appellants.—The additional shares were by agreement taken and issued at a discount of £7 per share, and though such an agreement has been held illegal as against creditors of the company in the winding up, yet it is not illegal as a mode of regulating the rights of the contributories *inter se*. Notice of the meetings at which the special resolutions were passed and confirmed, were sent to each shareholder, and also notice of the resolutions which were passed and confirmed thereat; and the additional shares were applied for, allotted, dealt with, and held for many years on the footing that by the payment of £3 per share the holder of an additional share was to be treated in all respects as the holder of an original share. We contend that the transaction amounted to an agreement on that footing between all the shareholders forming the company and those who paid the £3 per share. There is nothing in the Companies Acts to prevent an agreement being made between all the shareholders of a company as to a preferential right among themselves in respect of the capital: *In re Eclipse Gold Mining Co.*, L. R. 17 Eq. 490, 22 W. R. Dig. 72; *In re Bangor and Portmadoc Slate Co.*, 23 W. R. 785, L. R. 20 Eq. 59. [BOWEN, L.J.—But that is not the agreement in the present case, it is that and more, something which was intended to affect the rights of creditors as well.] If the agreement be bad as to one part, it does not follow it must be altogether bad. As between the particular members of the company *inter se*, the agreement is not *ultrà vires*. The contract is executed, and the money has been paid to the company on the terms of the contract. Each individual shareholder must be taken to have signed and sealed a document embodying the terms of the special resolutions passed in 1861, under which the allottees of the additional shares were to be put on the same footing as the holders of the original shares, but the effect of the order made by North, J., is that the original shareholders get the whole benefit of the improvement which arose from the increase of capital.

We contend, further, that, even if the agreement be held *ultrà vires*, the original allottees at all events, of the additional shares, ought to get back the £3 per share which they paid on the faith of the agreement contained in the special resolutions, and there ought to be an inquiry to ascertain the original allottees of the additional shares.

Chadwyck Healey, for the liquidator, and

Napier Higgins, Q.C., and *Mulligan*, for the respondents, the holders of original shares, were not called on.

LINDLEY, L.J.—This is an appeal from an order made by North, J., which is as follows:—[The Lord Justice read the order, and continued:—]

The company is a limited company registered under the provisions of the Acts of 1856 and 1857, which for present purposes do not materially differ from the Act of 1862, which replaces those Acts. The shares in the company, as originally formed, were 4,000 shares of £10 each, fully paid up. It was found desirable, subsequently, to increase the capital of the company, and accordingly resolutions to effect that purpose were passed by the company. [The Lord Justice read the resolutions, and continued:—] The effect of these resolutions was to enable persons who paid only £3 per share to get shares of £10 as fully paid-up shares.

If these resolutions were valid, the true construction of them may, possibly, be to entitle the holders of shares on which £3 only had been paid, to stand on the some footing as the holders of shares on which £10 had been paid, both with respect to the distribution of capital as well as the payment of dividend.

But the question we have to deal with is, What is the effect of the whole transaction, and what is the contract which was, in fact, entered into by those who took shares on the footing of these resolutions? Was it a contract entered into by them with the company as a body corporate, or was it a contract entered into by them with the individual shareholders, the members of the company? In my opinion it was only a contract entered into with the company, not a contract with the individual members of the company. It would be contrary to all principle to hold that a contract with a corporate body is equivalent to a contract with the individual members of the corporation.

Regarding the transaction, therefore, as a contract with the company, was it illegal and *ultrà vires*, or was it not? That point, which was, perhaps, doubtful in 1861, the date at which this contract was entered into, has been settled long since. It is now settled that such a contract with the company is illegal and *ultrà vires*. I do not say now whether or not the shareholders might not have obtained rescission of the contract by making an application for that purpose at the proper time, but, assuming that they could not now rescind, they were bound to pay up the whole amount on the shares.

It was urged that, although the contract was *ultrà vires* the company, yet that it could be regarded as *intrà vires* the contributories *inter se*. That, however, is merely asking the court to invent a contract which the parties never dreamt of entering into. That is the complete answer to the whole of Mr. Buckley's argument, every step of which proceeded on the basis that there was, in fact, such a contract as he suggested. For the same reason there is, therefore, no ground for any inquiry such as he asked for at the conclusion of his argument.

I think, therefore, that the decision of North, J., is perfectly right, and that the case of *Ex parte Maude, In re Hodge's Distillery Co.*, which he followed, governs this case.

BOWEN, L.J.—I am of the same opinion. The whole of Mr. Buckley's case is founded on there having been a contract made between the holders of these additional shares and the individual members of the company. The answer to that is manifold; first, there was no such contract in fact; secondly, no such contract could be implied by law, because the circumstances of the case are totally inconsistent with the supposition of any implied contract with the members of the company as individuals; and, thirdly, even if there were such a contract, it could only be a contract that each individual member of the company should make a contract that was *ultrà vires* the company, and such a contract could not be enforced.

The appeal, therefore, fails, and must be dismissed, with costs.

FRY, L.J.—I agree.

Appeal dismissed.

Solicitor for the appellants, *A. B. Chubb.*

Solicitors for the respondents, *Pattison, Wigg, & King.*

From Chan. Div. June 25, 1890.

In re THOMPSON.

BEDFORD *v.* TEAL. (*a.*)

Charity—Municipal corporation—Bond—Borough fund—Mortgage—Mortmain Act (9 *Geo.* 2, *c.* 36)—*Municipal Corporations Act*, 1835 (5 *&* 6 *Will.* 4, *c.* 76), *s.* 92—*Municipal Corporations Act*, 1882 (45 *&* 46 *Vict. c.* 50), *Part VII., ss.* 139-143—*Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 175.

Section 92 *of the Municipal Corporations Act*, 1835, *provides that* (inter alia) *the rents and profits of all hereditaments belonging to any corporate body shall be carried to an account to be called the "borough fund," and that such fund, saving the rights of all persons in or upon any real or personal estate of any body corporate, by virtue of any mortgage or otherwise, shall be applied to various specified purposes, including the payment of the salaries of the mayor, recorder, and police of the borough; and that, in case the borough fund shall be more than sufficient for such purposes, the surplus thereof shall be applied for the public benefit of the inhabitants of the borough. The Municipal Corporations Act*, 1882, *contains a similar provision.*

Held, that a bond of a municipal corporation creating a mortgage of the "borough fund" as constituted under either of the above Acts does not create an interest in, or a charge upon an interest in, land within the meaning of 9 *Geo.* 2, *c.* 36, *because such bond can only operate to charge the surplus* (*if any*) *of the fund remaining as moneys in the hands of the body corporate after the payments specified in section* 92 *have been made out of the fund.*

The clause in section 92 *of the Act of* 1835 *saving the rights of any person claiming under any mortgage applies only to rights existing at the date of the passing of that Act, and not to prospective rights.*

Section 175 *of the Public Health Act*, 1875, *provides that lands acquired by any local authority under that Act, and not required for the purposes for which they were acquired, shall be sold, and the proceeds of sale carried to the account of the "district fund."*

Held, that, in the absence of any evidence to show the existence of any such surplus lands, a mortgage of the "district fund" did not create an interest in, or a charge upon an interest in, land within 9 *Geo.* 2, *c.* 36.

Decision of Stirling, J. (38 *W. R.* 249), *reversed.*

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

Appeal from the decision of Stirling, J. (reported 38 W. R. 249).

The question raised by this appeal was whether or not certain corporation bonds created an interest in land within the Mortmain Act, 9 Geo. 2, c. 36.

The bonds in question were as follows:—

(1) A mortgage of the Dewsbury Corporation for £500, dated the 7th of October, 1878, made under the Batley Corporation Waterworks Act, 1873, and the Dewsbury and Heckmondwike Waterworks Act, 1876, of the share and interest of the mayor, alderman, and burgesses in the rates, rents, and moneys to be received in respect or by means of the waterworks of the Dewsbury and Heckmondwike Waterworks Board, and also as a collateral security of the borough rates and borough fund or general district rate and public water rate of the said borough. By the Act of 1876, s. 111, the corporation were empowered to charge the borough fund as a collateral security. From the evidence of the town clerk it appeared that the corporation was seised or possessed of the following hereditaments and real estate, that is to say:—"(a) The town hall now in course of construction upon freehold land acquired by the corporation for the purpose; also the borough offices of Dewsbury held by the corporation for an unexpired term of years under a lease thereof granted to the said corporation; some portions of the borough offices not required or constantly used by the corporation for their own use or that of their officers are sublet by the corporation to the School Board, the Waterworks Board, and the Chamber of Commerce of Dewsbury, as yearly tenants thereof at certain rents, which rents are paid to the treasurer of the corporation, and are by him carried to the credit of the account of, and form part of, the borough fund."

The Dewsbury borough fund was constituted by virtue of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), s. 92.*

(2) A mortgage of the Bradford Corporation for £400, dated the 1st of April, 1887, made under the Bradford Improvement Act, 1850, and in exercise of all other powers vested in the said corporation of "the borough fund of the said borough, and the rates, rents, and profits and other moneys forming such borough fund, or arising or accruing from the said borough fund."

The Bradford Improvement Act, 1850, constituted the corporation the local board of health, but it did not authorize them to charge the borough fund. The corporation were, however, authorized by the Tramways Orders Confirmation Acts, 1880 and 1883, as the local authority, to charge the borough fund with any sum not exceeding £95,000 for the purpose of the construction and maintenance of certain tramways in the borough.

The town clerk deposed that the corporation were seised and possessed of (*inter alia*) the following real or leasehold property:—the town hall of Bradford, the markets and market-places situate in Bradford acquired by the corporation under the Bradford Corporation Act, 1866, and certain surplus lands acquired by the said corporation for the purpose of effecting an enlargement of the town hall and improvements of the streets in the said borough, but which had not yet been used for that purpose, and in the meantime were let to several persons as tenants of the said corporation at yearly or other rents.

The Bradford borough fund was constituted under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 56), Part VII., the provisions of which are substantially the same as those of section 92 of the Act of 1835.

(3 and 4) Two mortgages of the Wakefield Corporation for £500, dated respectively the 10th of May, 1881, and the 9th of December, 1884, and respectively made under the Wakefield Corporation Waterworks Act, 1880 (43 & 44 Vict. c. lvii.), of the share and interest of the mayor, aldermen, and burgesses in the revenues to be received in respect or by means of the waterworks authorized by the said Act, and also, as a collateral security, of the general district rates and district fund of the said borough. By section 58 of the aforesaid Act "for securing repayment of moneys borrowed under the authority thereof the said corporation may mortgage the water revenues and the district fund and general district rate or either of them, and the provisions contained in sections 236-239 of the Public Health Act, 1875, with respect to the mortgages to be executed by a local authority shall apply in the case of all mortgages granted under the powers of this Act, and the term local authority in said provisions shall mean the corporation." With reference to the district fund the town clerk deposed that it consisted "of the income and profits accruing from the various undertakings of the corporation, the proceeds of the said district rate, contributions from the county authority and from the Government in respect of the maintenance of main roads, and the rent of a cottage the site of which, with other surplus lands, was acquired by the corporation under the Public Health Act, 1875 (38 & 39 Vict. c. 55), for the purposes of their sanitary department or undertaking."

There was, however, no distinct evidence to show either that the cottage above referred to was in fact surplus land which ought to have been sold, or that there was in fact any surplus land belonging to the corporation.

Sections 236-239 of the Public Health Act, 1875, which, by section 58 of the Wakefield Waterworks Act, 1880, were expressly incorporated therewith, merely provided that mortgages under the Public Health Act, 1875, should be made by deed, and that a register of such mortgages and of all transfers thereof should be kept, and that a receiver of the rates liable to the payment of the mortgage moneys might be appointed under certain circumstances.

Section 175 of the Public Health Act, 1875 (which section was not, however, expressly incorporated by the Wakefield Waterworks Act, 1880), enacts that "any lands acquired by a local authority in pursuance of any powers in this Act and not required for the purpose for which they were acquired shall . . . be sold . . . and the proceeds of such sale shall be applied towards the discharge, by means of a sinking fund or otherwise, of any principal moneys

* The Municipal Corporations Act, 1835, s. 92, in effect provides that the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities belonging to any corporate body shall be carried to the account of a fund to be called "The Borough Fund," and such fund, subject to the payment of any lawful debt due from such corporate body to any person contracted before the passing of the Act (September 9, 1835) and unredeemed, and saving all rights, interests, claims, or demands of all persons or bodies corporate in or upon real or personal estate of any body corporate by virtue of any proceedings either at law or in equity which have been already instituted, or which may hereafter be instituted, or by virtue of any mortgages or otherwise, shall be applied to various specified purposes, including the payment of the salaries of the mayor, recorder, and other officers, and in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied under the direction of the council for the public benefit of the inhabitants and the improvement of the borough.

borrowed by such authority on the security of the fund or rate applicable by them for the general purposes of this Act, or, if no such principal moneys are outstanding, shall be carried to the account of such fund or rate."

All the above-specified mortgages or bonds, and also bonds of the corporations of Batley, Keighley, and Leeds formed part of the estate of the testator, John Robert Thompson, who by his will gave large pecuniary legacies to various charitable institutions, which he directed should be paid exclusively out of such parts of his personal estate as might be legally bequeathed for charitable purposes.

Stirling, J., at the trial of the action, held that the bonds of all these corporations, with the exception of the Keighley bonds, constituted interests in land within the Mortmain Act (9 Geo. 2, c. 36), and, therefore, could not validly be bequeathed to charities.

The charitable legatees appealed, but their appeal was limited to the Dewsbury, the Bradford, and the Wakefield bonds, and the only questions raised were as to the effect of the charge on the "borough fund" in the case of Dewsbury and Bradford bonds, and the charge on the "district fund" in the case of the Wakefield bonds.

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the appellants.—The Dewsbury and Bradford "borough funds" respectively exist by virtue of the Municipal Corporations Act, 1835, s. 92, and the Municipal Corporations Act, 1882, which provide that out of the fund certain payments mentioned in the 92nd section of the Act of 1835 have to be made, and when these payments are satisfied power is given to the corporation to apply the surplus, if any, for the benefit of the inhabitants of the borough. The bonds of these corporations are, therefore, not charges on the borough funds generally, but only on the balances after payment of the sums specified in the schedule, and that does not confer on the mortgagee any right to go upon the land or to take rents from the tenants. It is analogous to a charge upon a railway which gives to the mortgagee an interest in the net result, and does not give the mortgagee an interest in land under 9 Geo. 2, c. 36: *Attree* v. *Hawe*, 26 W. R. 871, 9 Ch. D. 337. The saving clause in section 92 of the Act of 1835 as to rights, interests, claims, or demands of any persons in or upon any real or personal estate of any body corporate by virtue of any proceedings at law or equity which have been already instituted, or which may hereafter be instituted, or by virtue of any mortgage or otherwise, applies only to rights existing at the time of the passing of the Act, and does not give a mortgagee, in the case of a mortgage created after the Act came into operation, any right against the land. The charge here is on the floating balance, not on the sources, of the fund: *In re David, Buckley* v. *Royal National Lifeboat Institution*, 38 W. R. 162, 43 Ch. D. 27, is therefore distinguishable. The Wakefield mortgages are charged upon the district fund under the Wakefield Corporation Act, 1880. That fund is not supplied by the rents and profits of land. Section 175 of the Public Health Act, 1875, is not expressly incorporated in the Act of 1880, although other sections are, and therefore section 175 does not apply. Moreover, there is no evidence that any part of this district fund arises from the proceeds of sale of surplus lands. These mortgages, therefore, are not charges on any interest in land within 9 Geo. 2, c. 36.

Charles Browne, for the respondents, the residuary legatees under the will.—The Dewsbury and Bradford mortgages are charged on the borough fund—that is, they are charges upon that which constitutes the funds. And as this includes the rents of real and leasehold property the charges are interests in land within 9 Geo. 2, c. 36: *Brook* v. *Badley*, 16 W. R. 947, L. R. 3 Ch. App. 672. *Marsh* v. *Attorney-General*, 9 W. R. 179, 2 J. & H. 61, is disapproved in *Brook* v. *Badley*. The saving clause in section 92 of the Act of 1835 expressly preserves the rights of a mortgagee of the borough fund to enforce his security, and one of those rights would be a right against the land. [BOWEN, L.J., referred to *Arnold* v. *Mayor of Gravesend*, 4 W. R. 478, 2 K. & J. 574, and *Attorney-General* v. *Mayor of Newcastle*, 23 Q. B. D. 492, 38 W. R. Dig. 139.] The Wakefield mortgages are charged upon the district fund. Section 209 of the Public Health Act, 1875, provides for the constitution of the district fund. Section 175 of that Act, although it is not expressly incorporated in the Wakefield Waterworks Act of 1880, would apply to these mortgages: it expressly requires that surplus lands of the corporation shall be sold, and the proceeds shall be applied towards the discharge of mortgages on the district fund. These mortgages are, therefore, charged on a fund partly constituted of the proceeds of sale of real estate, and are, therefore, interests in land within 9 Geo. 2, c. 36.

F. Hoare Colt, for the trustees of the will.

COTTON, L.J.—This is an appeal from Stirling, J., with regard to certain bonds of three municipal corporations which he has held to create an interest in land within the Act 9 Geo. 2, c. 36. I do not use expression "impure personalty" or "personalty savouring of realty," for what the Act speaks of is an interest or interests in land or a charge on an interest affecting land.

The Bradford bonds and the Dewsbury bonds really come within the same class, although one is a charge on the borough fund of the corporation under the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), and the other on the borough fund under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50); that makes no practical difference, as the provisions of the two statutes as to the borough fund are substantially the same. Now, although the Dewsbury bonds and the Bradford bonds charge other things besides the borough fund, the respondents rely solely upon the fact that they charge the borough fund. They urge that the borough fund consists in part of rents arising from real estate, and that a mortgage of it is, therefore, an interest in, or a charge upon, land within the meaning of 9 Geo. 2, c. 36. Now the borough fund, no doubt, does to a certain extent arise from rents of land, but what is to be done with them when they become part of the borough fund? In my opinion the Act of 5 & 6 Will. 4, c. 76, s. 92, imposes a statutory duty upon those who administer the corporation funds to apply the borough fund for the purposes there mentioned, and although there is in that section a saving clause in favour of persons claiming under any mortgage, it is, in my opinion, only a saving of the rights of those who, at the time of the passing of the Act, had charges, with the rights existing under which, the Legislature did not think it just to interfere. A saving clause, as a general rule, is not intended to give power to a corporation or body to do something which they could not otherwise do, but to prevent the enactment from interfering with rights already acquired. On the true construction of these bonds, they do not, in my opinion, purport to charge the borough fund before the duties mentioned in section 92 are performed by the corporation. The objects of the Acts under which the corporations of Bradford and Dewsbury gave the bonds which are before us were to enable them to do what they otherwise could not do—viz., to charge beforehand that portion of the

borough fund which, in each year, would, after satisfying the liabilities imposed by section 92, remain in their hands to be applied for the benefit of the inhabitants and the improvement of the borough. If a power were not given to charge that surplus beforehand, it might be said, and, as I think, correctly, that the corporation could not, until that surplus was ascertained, determine how it was to be applied for the benefit of the borough. The funds, then, being only charges on the surplus remaining in the hands of the corporation after they have satisfied the purposes pointed out in section 92, the case comes within the principle of *Attree* v. *Hawe*, and, in my opinion, these bonds do not give the holder any interest in land within the meaning of 9 Geo. 2, c. 36. The case stands on precisely the same footing under the Municipal Corporations Act, 1882. This disposes of the Bradford and the Dewsbury bonds.

Then as to the bonds of the Wakefield Corporation. The only point laid hold of with regard to them is that they charge the district fund of the borough, and it is said that this makes a charge upon land or an interest in land within the meaning of the Act of 9 Geo. 2, c. 36. What is relied upon principally, and it seemed to me at first sight to be a strong point in favour of the respondents, is section 175 of the Public Health Act, 1875, which declares that the surplus lands—that is to say, lands that the corporation have acquired but do not require for the purposes of the Act—shall be sold and the money arising from the sale shall be applied towards discharging and paying off the money that has been borrowed on the security of the fund or rate applicable for the general purposes of the Act, or, if no principal moneys are outstanding, shall be carried to the account of such fund or rate—*i.e.*, the district fund or the general district rates. There may be a grave question, which I do not think it is necessary to answer on the present occasion, whether, where an Act of Parliament directs land to be sold, any charge on the money arising from the sale of that land can ever enable the holder of the charge to take the land. Where no charge is given except upon the proceeds of sale of land which an Act of Parliament directs to be sold and converted into money, can that charge be a charge or interest in land within the meaning of 9 Geo. 2, c. 36? That point may hereafter have to be decided, but it lies on the respondents to show that this is an interest in land or a charge upon land. How can they show that? They must show that there is land which comes within the purview of section 175, and the proceeds of which are to be applied in payment of these bonds. It does not appear from the evidence that there is any surplus land unless the cottage is to be taken as such. The cottage now seems to be employed for the purposes of the corporation, and we cannot, in the absence of distinct evidence, hold that it is land which ought to have been sold and the proceeds brought into the district fund.

Another contention was raised by Mr. Cozens-Hardy, that section 175 is not incorporated with the special Act of the Wakefield Corporation. But a further question arises, upon which, as it has not been fully argued, I give no opinion, whether this is not a general section which, without being incorporated, would apply to all lands bought by the corporation and not required for its objects.

BOWEN, L.J.—I am of the same opinion. The question with regard to all these bonds is the question which Cotton, L.J., has enunciated—viz., whether they constitute an interest in or charge on land within the statute 9 Geo. 2, c. 36. We may divide them into two classes. The Dewsbury and Bradford bonds and the Wakefield bonds. The Dewsbury bond was given under the authority of section 111 of the Dewsbury Waterworks Act, 1876, which authorizes the Dewsbury Corporation to create a collateral security on the borough fund. What does that enable them to do? The borough fund exists by virtue of section 92 of the Municipal Corporations Act, 1835, and the character of the fund is shown by that section. It is a fund which may arise partly from rents—for if the corporation has real property producing rent, the rents are to be carried to that fund. Out of that fund certain payments specified by the section, and which are vital to the existence of the corporation, have to be satisfied, and the surplus is to be applied for the public benefit of the inhabitants and the improvement of the borough. Is it, then, intended by section 111 of the Dewsbury Waterworks Act of 1876 to enable the creditor who lends money upon the collateral security of the borough fund to get a charge upon the rents of the real property of the corporation before they pass into the fund and before the statutory purposes which are created by section 92 of the Municipal Corporations Act have been satisfied? It is, to my mind, impossible to suppose that such was the intention of the Legislature. All, therefore, that is charged by the bonds, and the only thing in which an interest is created by them, is the surplus which, from time to time, may exist or may not exist, and which exists only if the fund is more than sufficient for the statutory purposes which are made a primary charge upon it by the Municipal Corporations Act. The charge is not a charge upon the corporate property, but simply a charge upon a floating balance, such as was alluded to by Fry, L.J., at the end of his judgment in *Buckley* v. *The Royal National Lifeboat Institution*. It is the primary duty of the corporation to apply this fund in satisfying the ordinary municipal wants, and it is impossible, therefore, that a receiver could be appointed of the rents. That disposes of the Dewsbury and Bradford bonds.

The Wakefield bonds were given under section 58 of the Wakefield Waterworks Act, which enables the corporation to mortgage the district fund and incorporates, with regard to the mortgage of the district fund, the provisions contained in sections 236 to 239 of the Public Health Act, 1875. The district fund is fed by realty, because the proceeds of the sale of surplus land are to be paid into it. Whether by reason of this a charge on the district fund creates an interest in or a charge upon land may be open to doubt. It is not necessary to decide the point in the present case, and I reserve to myself the full right to consider, when the proper occasion arises, the question whether it is possible to treat as an interest in land a security which only affects a fund arising in part from the sale of land which the statute directs to be sold. That question does not arise unless section 175 of the Public Health Act, 1875, is a section which we can treat as bearing on those mortgages. Mr. Cozens-Hardy says it is not incorporated with the Wakefield Waterworks Act. It is not incorporated in terms, but I, like Cotton, L.J., somewhat doubt whether it is not a general provision that would apply to these mortgages without express incorporation. But the respondents are met by another difficulty, section 175 can only be invoked by them if there *is* surplus land, and it seems to me that their case breaks down because there is no proof that there is any surplus land.

I will say nothing more except to mention that I entirely agree with Cotton, L.J., in holding that in the saving clause in section 92 the words, "by virtue of any mortgage," apply only to existing rights, and not to prospective ones. That point seems to me to have been decided by Wood, V.C., in the case of *Arnold* v. *Mayor of Gravesend*, and his view has

been lately affirmed in *Attorney-General* v. *Mayor of Newcastle*.

I agree that the judgment below must be reversed as regards the four bonds before us.

FRY, L.J.—I also find myself unable to agree with the decision of the learned judge. The questions in controversy have been ranged around two funds, the one the borough fund of a municipal corporation, and the other a district fund created under the Public Health Act, 1875, and the question in each case is whether a charge on the fund is or is not an interest in land, or a charge upon an interest in land?

Now, with regard to the borough fund, I must express my doubt whether in any case a charge on a fund which gives no right to go on anything except the money when it has gone into the fund ever can be a charge upon real estate. It appears to me that money which comes from land in the form of rent, when it has been paid into a bank or otherwise been realized in the form of cash is pure personal property, and although a charge on that money, if it gives in addition a right of going upon the land, may be a charge on realty, I at least express a doubt whether a simple charge on the money when it has fallen into the fund ever can be an interest in realty. But it is not necessary to decide that point, for in the present case it appears to me that a charge on the borough fund of a municipal corporation is only a charge on the surplus balance of a fund arising, no doubt, partly out of the rents and profits of land and partly out of other sources, which from time to time remains after numerous payments have been made out of the fund. The balance of the fund after the application of part of it to prior charges is, in my opinion, pure personalty, and the person who is entitled to that and nothing more has no interest in the land.

Mr. Browne argued that the saving clause in section 92 of the Municipal Corporations Act, 1835, which saves the rights of all persons and bodies corporate in or upon any real or personal estate of any body corporate by virtue of any proceeding instituted before or after the passing of the Act, "or by virtue of any mortgage or otherwise," gave to the mortgagees, whose titles were created subsequently to the Act, a right against the fund in priority to the purposes mentioned in the section. But it is to be observed that, according to the ordinary functions of a saving clause, it saves existing rights, and it is not an enabling clause, and does not authorize the creation of new rights. Now the right which Mr. Browne argued for is a right subsequently created. I think, therefore, that that clause has no application to the present case.

The considerations with regard to the district fund are to a great extent the same as those which apply to the borough fund, but there are two points of difference. In the first place, the district fund itself is not fed by rents and profits of land. So far it is less favourable to the argument on behalf of the respondents, but, on the other hand, there is a section which requires great attention—viz., the 175th section of the Public Health Act of 1875—because that directs that surplus lands shall be sold and the proceeds applied towards the discharge, by means of a sinking fund or otherwise, of any principal moneys that may be borrowed upon the security of the fund or rent. I shall not enter upon the construction of that section, on which many questions may arise, because it does not appear to me from the evidence that the Wakefield Corporation has any surplus land. I, therefore, shall not enter upon an inquiry whether a mortgagee might, if any surplus land existed, obtain by *mandamus* or otherwise a sale of such land, or whether, if he had such a right, that would create an interest in land. I leave those questions for further discussion if they should ever arise.

COTTON, L.J.—I think we ought to mention that the ground upon which we have decided this appeal does not seem to have been taken in the court below, and the attention of the learned judge was not directed to it.

Solicitors for the appellants, *Fowler, Perks, Hopkinson, & Co.*

Solicitors for the trustees, *Torr, Janeways, Gribble, & Oddie*, for *Cranswick*, Leeds.

Solicitors for the residuary legatees, *T. W. & T. B. Nelson*, for *Nelson, Eddison, & Luptons*, Leeds.

From Q. B. Div. May 3, 1890.

HASLEWOOD *v.* CONSOLIDATED CREDIT CO. (*a.*)

Bill of sale—Form in schedule—Principal payable by unequal instalments—Interest on unpaid instalments—Rate of interest—Alleged ambiguity—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.

A bill of sale dated March 6, 1889, *was granted to secure the repayment of a sum of* £30, *with interest thereon at the rate of sixty per cent. per annum. The grantor thereby agreed to pay the said principal sum by the following instalments:*—i.e., "*the sum of* £5 *on the 9th of March*, 1889, *the sum of* £2 *on the 6th of April*, 1889, *and the sum of* £2 *on the 6th day of every succeeding month until the 6th of February*, 1890, *and the balance of the said principal sum on the 6th of March*, 1890; *and on the said 6th day of March*, 1890, *to also pay the interest which shall have accrued at the rate aforesaid upon the said principal sum, and, in case default shall be made in payment of any of the said instalments of the principal sum, the same shall until payment continue to bear interest at the rate aforesaid.*"

Held, on the authority of Goldstrom *v.* Tallerman, 35 *W. R.* 68, 18 *Q. B. D.* 1, *that the bill of sale was in accordance with the statutory form contained in the schedule to the Bills of Sale Act*, 1882.

Decision of the Divisional Court (Lord Coleridge, C.J., *and* Lord Esher, M.R.) *reversed.*

Appeal from a divisional court of the Queen's Bench Division (Lord Coleridge, C.J., and Lord Esher, M.R.).

By a bill of sale dated March 6, 1889, H. T. Haslewood and his wife, the present plaintiffs, assigned to the defendant company the chattels specifically described in the schedule thereto by way of security for the repayment of a sum of £30 with interest thereon at the rate of sixty per cent. per annum; and the grantors thereby agreed to pay to the grantee, "the principal sum aforesaid by the instalments following, that is to say, the sum of £5 on the 9th day of March instant, the sum of £2 on the 6th day of April, 1889, and the sum of £2 on the 6th day of every succeeding month until the 6th day of February, 1890, and the balance of the said principal sum on the 6th day of March, 1890, and will on the said 6th day of March, 1890, also pay the interest which shall have accrued at the rate aforesaid upon the said principal sum, and in case default shall be made in payment of any of the said instalments of the principal sum, the same shall until payment continue to bear interest at the rate aforesaid."

On June 15, 1889, an instalment being then in arrear, the defendant company put in a distress on the

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

plaintiffs' premises, and the plaintiffs on June 25 brought an action for trespass in the Mayor's Court against the defendant company on the ground that the bill of sale was void as not being in accordance with the statutory form. The Recorder held the bill of sale to be valid, and nonsuited the plaintiffs.

The plaintiffs applied to the Divisional Court to set aside the nonsuit and order a new trial. There was also an application to the Divisional Court by the defendant company with respect to another bill of sale granted to them in the same form, but which had been held bad by a county court judge.

The following judgments were delivered by the Divisional Court (Lord Coleridge, C.J., and Lord Esher, M.R.).

Lord COLERIDGE, C.J.—It appears to me that the fair and reasonable and obvious construction of this bill of sale is, that no interest will be payable on the instalments at the time that they are paid, but that the whole interest upon the whole sum advanced is payable in a lump on the payment of the last instalment of the balance, at a particular time, and on that day the whole of the interest which has accrued during the whole of the year upon the whole of the sum advanced is to be paid.

I do not say these are the words; but I say this is the fair and reasonable construction of the words, "the interest which shall have accrued at the rate aforesaid on the said principal sum." If that is the fair and reasonable construction, it follows at once that upon considerable portions of the £30 a great deal more than sixty per cent. would have to be paid, or at least would have been agreed to be paid, because, assuming that the instalments had been kept up and that the principal sum has been gradually reduced, it is manifest that interest on the whole sum at the rate of sixty per cent., although a great deal of it has been paid off during the year, would have to be paid at the end of the time.

Now that appears to me to be the meaning, and the obvious meaning of that provision. I do not deny, and I never meant, early in the argument, to deny, that it is possible to construe the words in the way in which Mr. Reed suggested they may be construed—viz., payment at the rate of sixty per cent. upon the principal sum, that is to say, upon so much of the principal sum as is then due, and sixty per cent. upon the rest of the sum that has been due to be diminished *pro rata* by taking off the sixty per cent from the time of payment upon each instalment that has been paid during the period that has elapsed.

It is possible so to construe the words, but I do not think it is their plain and obvious meaning. Therefore, on that ground, it appears to me that the bill of sale is bad. There is a matter which my learned brother has pointed out, and which I am very far from differing from him about, but which does not appear to me to be quite so clear as the point I have already adverted to. It occurs upon a later portion of the same provision, "and in case default shall be made in payment of any of the said instalments of the principal sum" (that is, of £30, the principal sum advanced), "the same shall until payment continue to bear interest at the rate aforesaid." That is to say, as a penalty for any instalments not being paid at the time stipulated between the parties, the whole sum shall continue to bear interest at the rate aforesaid—namely, at sixty per cent. The same consequence follows from that clause that followed from the clause with which I have dealt, that there would be a stipulation that the whole of the sum advanced should bear interest at sixty per cent. The total sum might have been reduced from time to time by the payment of instalments, although those instalments might not have been paid at the particular times stipulated for between the parties. I agree with the Master of the Rolls that the true view is that "the same shall until payment" means the principal sum shall until payment; but here again I do not deny that it is open, and that it is possible to construe "the same" to mean the instalments. Although I quite admit it might be possible so to construe it, some of the consequences, though not all, would still follow; that is, such instalments as were in default for however short a time, at any rate would continue to bear interest as if they had not been paid at all. I think, therefore, on the true construction of this bill of sale in both respects, it is void as contradicting in substance the true intention of the form given in the statute, and that the grantees must fail.

Lord ESHER, M.R.—The sole question in this case is, whether the bill of sale is void or not, on the ground that it has departed beyond the departure which is allowed from the form in the schedule to the Bills of Sale Act. Now, there is a form given in the schedule, and certain things are allowed to be varied, by those parts of the form which are in italics and within brackets. The Court of Appeal has come to the conclusion that the Act of Parliament did not mean that bills of sale are to be word for word according to the form, and that if they omitted some few words which would not alter the effect at all, that would not make the bill of sale void. What they said, I believe, was this, that, if there is a variance from the form, that is from the words, but that the variance leaves the bill of sale in question to have the same legal effect as the form in the schedule; that, then, although there is a variance from the words, that is not an effective variance.

Now we have, subject to that rule, to see whether this bill is of the same legal effect as the form in the schedule, for that it differs from the form in the schedule cannot be denied. The schedule is that they will "duly pay to the said C. D. the principal sum aforesaid"—that is, the principal sum lent, "together with interest then due by equal payments" on particular days, and the only variation allowed (in brackets) is, "or whatever else be the stipulated time or times of payment." Now this bill of sale does not say "duly pay to the say C. D. the principal sum aforesaid, together with interest then due, by equal payments." Although the payments should be unequal, it would lead to the same effect as equal payments, and it seems, therefore, to me that, if the only objection to this bill of sale had been that the interest was payable on the very last day, that would not have been a defect sufficient to render it void. We must look, then, at the clause as to interest. There is the sum of £30 lent, and that is to be paid by instalments, and then it goes on, "and will on the said last day of June next also pay the interest which shall have accrued at the rate aforesaid upon the said principal sum."

Now, according to this bill of sale, no interest at all is payable until the last day. How shall we get at the interest which shall have accrued? The words are "pay the interest which shall have accrued at the rate aforesaid" (that is, at sixty per cent. per annum) "upon the said principal sum." What is "the said principal sum" there? Is it true to say "which shall have accrued upon the said principal sum" means that it is to be (if the instalments are paid at the days named) sixty per cent. for two days on the first sum, and sixty per cent. for a month and two days on the second sum, or more afterwards if it is not paid on that day, and so on? or is it that, although no interest is payable until the last day, yet that interest on the whole principal sum goes on accruing until

bad. Then it is said that the clause which stipulates for sixty per cent. upon the instalment is obscurely worded. It is, "and will pay the interest which shall have accrued at the rate aforesaid upon the said principal sum," that is obviously enough the £30, "and in case default shall be made in payment of any of the said instalments of the said principal sum, the same shall, until payment, continue to bear interest at the rate aforesaid." Now, it is said that that is capable of this construction, that you shall pay sixty per cent. upon the whole £30, even if you make default in paying only one instalment. It turns on the meaning of the word "same" as applicable to the £30. The "same," to my mind, is referable to the antecedent "instalments of the principal sum." Any other construction is at variance with the principle which underlies all transactions of borrowing money. Then we must notice this, that this bill of sale, unfortunately I think, has not stated on the face of it what the total amount of interest is which will become payable assuming the instalments are duly paid. It is capable of easy calculation, and I think Mr. Candy told us it came to £8 10s. 9d. It would be very much better if that sum were put in, because that would get rid of all possible doubt. But it is not put in. Is that a defect or such a defect as will render this bill of sale bad? That point again is covered by authority. It is covered by *In re Cleaver*, which goes to show that a bill of sale is not void as not being in accordance with the form because the actnal amount of interest which will become payable according to the contract is not expressed in figures, but is left to calculation. No doubt it would be far better if it were put in. Now I come to the last difficulty, which is that the Divisional Court has said that this bill of sale is, to say the least of it, obscure, and it can—and one of the members of the court said that in its opinion it did—properly bear a different construction. That is what has created a difficulty in our minds. How is that got over? That difficulty has had to be faced before now. That was precisely one of the difficulties met in *Goldstrom* v. *Tallerman*. In that case the Divisional Court construed the bill of sale as possibly open to this construction—that it made the interest payable upon some arrears of interest. One of the judges, I think, thought it did mean that. The other judge thought that, if it did not mean that, at all events it was so worded that it might mean it. That was precisely the position of affairs. How did the Court of Appeal deal with that? They said: "We think the Divisional Court was erroneous in that respect, that it is not reasonably open to that construction," and they did not hesitate to say so. So here I think it is our bounden duty to say that we think the construction put on this bill of sale by the Divisional Court is erroneous, and, having regard to the case which I have referred to, and which seems to me to cover every doubtful point, to hold that this bill of sale is valid, and the appeal ought to be allowed, with costs.

BOWEN, L.J.—I am of the same opinion. I put the same construction that Cotton and Lindley, L.JJ., do upon this bill of sale, and I confess that, but for the judgments of judges like the Lord Chief Justice of England and the Master of the Rolls, I should have come to the conclusion that that was the true and clear construction of the document without much hesitation; but the truth is, it seems to me, that the court below took the view they did because they did not consider *Goldstrom* v. *Tallerman*. I believe that *Goldstrom* v. *Tallerman* was not cited to them, and I believe that, if it had been cited to them, it would in the first place have put an end to one of the difficulties; and, in the second place, it would have led them to the true path of construction of this document. I attribute, accordingly, the variance of our judgment pronounced to-day from the view taken below by the Lord Chief Justice and the Master of the Rolls to the fact that we have had *Goldstrom* v. *Tallerman* before us, which they had not. I do not mean to say that I do not rely on my own view; but I think it was the absence of a reference to that case in the court below that led the court on what I venture to call a wrong line. It seems to me that, once we have that case and follow out all the logic that that case contributes to the subject, we must come to the conclusion, not only that the court below are wrong, but that it is our duty to cure the interpretation which they have put upon this deed by allowing this appeal.

Solicitors for the appellants, *Evans & Batchelor*.

Solicitor for the respondents, *John Hopkins*.

High Court of Justice.

Chan. Div. North, J. — July 11, 1890.

In re WILSON.

ATTORNEY-GENERAL *v.* WOODALL. (*a.*)

Practice—Third-party procedure—Originating summons—Rules of Supreme Court, 1883, *ord.* 16, *rr.* 48, 55; *ord.* 55, *rr.* 3—8.

The rules regulating third-party procedure are in terms inapplicable to proceedings by originating summons, and the form of procedure under an originating summons is inconsistent with the issue of a third-party notice. Accordingly a defendant to an originating summons is not entitled to serve third-party notices.

The question for decision was whether procedure by third-party notice, under rules 48 and 55 of order 16, is applicable to proceedings under order 55 by originating summons.

The originating summons was taken out by the Attorney-General for an account of certain charitable funds settled by a deed dated in 1852, the four trustees of which were all dead. The first defendant was W. O. Woodall, who was the executor of the last survivor of the four deceased trustees, and two other defendants were the two executors of Henry Fowler, another of the four deceased trustees.

W. O. Woodall obtained an order under rule 48 of order 16 giving him liberty to serve a third-party notice upon the beneficiaries under the will of Henry Fowler with a copy of the originating summons, claiming to be entitled to contribution from such beneficiaries, which service was duly effected.

W. O. Woodall also served a notice under rule 55 of order 16 on his co-defendants, the two executors of Henry Fowler, claiming contribution from them.

This was a motion by the beneficiaries under the will of Henry Fowler and his two executors who had been served with the third-party notice to set aside the order giving liberty to serve the third-party notice on the beneficiaries, and to set aside the services on the beneficiaries and on the two executors, on the ground of irregularity.

Cozens-Hardy, *Q.C.*, and *J. G. Wood*, for the motion.—Rule 48 of order 16, under which rule the order for service of the third-party notice on the beneficiaries was made, is inapplicable in terms to proceedings by

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

originating summons; and a third-party notice is inapplicable to proceedings by originating summons. The order and the service of the third-party notices are accordingly irregular, and there is no distinction for the purposes of this motion between the two cases.

Napier Higgins, Q.C., and *Haldane, Q.C.*, for W. O. Woodall.—Rule 48 of order 16 is not to be regarded as inapplicable to an originating summons, because of the mention of the words "statement of defence," "writ," and "statement of claim" therein. Third-party notices are not inconsistent with procedure by originating summons. We do not seek to distinguish between the case of the beneficiaries and of the executors.

They referred to *In re Fawsitt, Galland* v. *Burton*, 34 W. R. 26, 30 Ch. D. 231; Annual Practice, 1889-90, p. 66.

NORTH, J.—I think that this application must succeed, because of the terms of rule 48 of order 16. The directions given by that rule point to proceedings in an action following the usual course of procedure. A proceeding commenced by originating summons is an action, but it is not an action in which a defence has to be delivered, the having to do which is referred to in rule 48 as being essential. The rule provides that the notice shall, unless otherwise ordered, be served "within the time limited for delivering his defence." That points to the form of procedure in an action commenced by writ of summons, and the words at the end of the rule are, "if there be no statement of claim, then a copy of the writ of summons in the action." The words are, "the writ of summons," and there is no reference to an originating summons.

But the principal ground of my decision is outside the terms of that rule. I do not think that the form of procedure to be observed under an originating summons is of a character to fall in with the bringing in of a third party by notice. The form of procedure is, I think, inconsistent with so doing. Thus, rule 3 of order 55, which declares the nature of the relief to be obtained on originating summons, in the first place defines the classes of persons who "may take out, as of course, an originating summons returnable in the chambers of a judge of the Chancery Division," and then it defines the nature of the relief that may be obtained. The 4th rule of order 55 extends rule 3 to administration; and rule 5 declares what persons are to be served with the summons in the first instance in the several cases where an originating summons may be taken out. Rule 6 provides that the court or a judge may direct such other persons to be served with an originating summons as they or he may think fit. Rule 7 provides for such evidence in support of the application as the court or a judge may require, and for the giving of directions for the trial of questions arising thereout. Rule 8 provides that the court or a judge may pronounce such judgment as the nature of the case may require. I do not think the proceedings contemplated by those rules include the issue of a third-party notice. Under these circumstances I think the applicants are right, and I allow the motion, with costs.

Motion allowed.

Solicitors, *Field, Roscoe, & Co.*, for *Tate, Cook, & Fowler*, Scarborough; *Collyer-Bristow, Russell, & Hill.*

Chan. Div. Stirling, J. — June 3; Aug. 2, 1890.

In re NEW CHILE GOLD MINING CO. (LIMITED). (*a.*)

Company—Winding up—Wrongful forfeiture of shares—Claim to prove for damages—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 38, *sub-section* 7.

A shareholder, whose shares had been irregularly forfeited, claimed to prove in the winding up of the company for damages for the loss of his rights as a member.

Held, that section 38, *sub-section* 7, *of the Companies Act*, 1862, *did not apply to preclude the shareholder from proving in competition with the other creditors, as this sum was not due to him "in his character of a member," but rather in his character of a non-member; and his claim must be admitted by the liquidator.*

Whether sub-section 7 *of section* 38 *applies to a past member*, quære.

James Cant having claimed to prove against the assets of the New Chile Gold Mining Co. (Limited), in its winding up, for the sum of £1,650 for damages for the wrongful forfeiture by the company of 6,000 shares belonging to him, the liquidator rejected his claim, and a summons was taken out by James Cant asking that he might be at liberty to enforce it. James Cant died in July, 1889, but the proceedings were continued by his widow and administratrix.

The company was incorporated under the Companies Act, 1862, and the following were included among its articles of association:—

"(29) If any member fails to pay any call on or before the day appointed for payment thereof, the board may, at any time thereafter during such time as the call remains unpaid, serve a notice on him to pay such call, together with interest and any expenses that have accrued by reason of such non-payment, and stating that in the event of non-payment on some day and at some place (either the office of the company or a bank) named in such notice, the share will be liable to be forfeited.

"(30) If the requisitions of any notice as aforesaid are not complied with, any shares in respect of which such notice has been given may, at any time thereafter, be forfeited, by a resolution of the board to that effect, and the holder thereof shall thereupon cease to have any interest therein, and his name may be removed from the register as such holder.

"(31) Any member whose shares shall be so forfeited shall, notwithstanding the forfeiture, be liable to pay to the company all calls owing upon the shares at the time of the forfeiture, and the interest (if any) thereon.

"(35) For the purpose of giving effect to a sale of any shares acquired by the company by cancelment or allotment, forfeiture or surrender, which the board may prefer to sell rather than to cancel or reissue, or a sale of any shares in respect of which such lien, as aforesaid, exists, the board may execute under the company's seal a transfer of such shares to the purchaser thereof, and such transfer shall operate to confer the same rights upon the transferee as if it had been executed by the member in whose name the shares shall be registered, provided that the sale of any shares in respect of a lien shall not take place without a month's previous notice to the registered holder thereof.

"(36) The remedy of any shareholder for any irregularity in any forfeiture of a share, or in the enforcing of a lien or alleged lien on any share, shall

(*a.*) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

be in damages only, and the register shall be conclusive evidence of title to a share as against any person claiming as a former holder of a share which the board shall have purported to forfeit, cancel, or dispose of under the regulations of the company."

Calls were made upon the shares of James Cant at various times from December, 1884, to June, 1886; the last call being made upon the 18th of June, 1886, and becoming payable on the 31st of July, 1886. It was admitted that the call was not paid, and on the 24th of August, 1886, the shares were forfeited in pursuance of a resolution of the board. On the 28th of December they were, with the exception of three (which could not be traced), allotted to thirteen members of the company.

The shares were issued at 2s. each, and it appeared that they were at the date of the forfeiture of the value of 7s. 6d. each; it also appeared that the sum due by James Cant after the call made on the 18th of June, 1886, and which was not paid, had been deducted before making the claim of £1,650 for damages. On the 25th of June, 1888, the winding up of the company was ordered, and on the 12th of February, 1889, James Cant took out this summons.

There was no evidence to show that a proper notice had been sent to James Cant as required by the 29th article of association.

H. C. Deane, for the widow and administratrix of James Cant.—No notice having been given under the 29th article, the forfeiture of the shares was absolutely invalid, and the applicant should have leave to prove in the liquidation. For any irregularity in any forfeiture of shares the remedy is, under the 36th article, in damages only. The administratrix desires to have leave to prove for this claim in the winding up in competition with the other creditors: *In re Dale and Plant (Limited)*, 38 W. R. 409, 43 Ch. D. 255.

A. J. Chitty, for the liquidator.—The case of *In re Dale and Plant (Limited)* was quite different from the present. There was no forfeiture of the shares, or, if there was, it must be held to have been good for all purposes: *Wood* v. *Wood*, 22 W. R. 709, L. R. 9 Ex. 190. This case does not come within sub-section 7 of section 38 of the Companies Act, 1862,* and the administratrix has no right to prove in the liquidation. [He referred to *Houldsworth* v. *City of Glasgow Bank*, 28 W. R. 677, 5 App. Cas. 317—325; *In re Hull and County Bank, Burgess's case*, 28 W. R. 792, 15 Ch. D. 507; *Fry* v. *Moore*, 37 W. R. 565, 23 Q. B. D. 395; *Selwyn* v. *Garfit*, 36 W. R. 513, 38 Ch. D. 273; *In re Alma Spinning Co. (Limited), Bottomley's case*, 29 W. R. 133, 16 Ch. D. 681.] The administratrix's claim for damages can, if at all, only be considered when the rights of the contributories as amongst themselves are being adjusted; and then only for the value of the shares as at the date of their sale by the company, and not as at the date of the alleged forfeiture.

The cases of *In re London Celluloid Co.*, 36 W. R. 673, 39 Ch. D. 190; *In re North Hallenbeagle Mining Co., Knight's case*, 15 W. R. 294, L. R. 2 Ch. 321; *In re The Phosphate of Lime Co. (Limited), Austen's case*, 24 L. T. N. S. 932, 19 W. R. Ch. Dig. 54; *In re Addlestone Linoleum Co.*, 36 W. R. 227, 37 Ch. D. 191; *In re Anglo-Romano Water Co., Wright's case*, 18 W. R. 777, L. R. 5 Ch. 437; and *Hope* v. *International Financial Society*, 25 W. R. 203, 4 Ch. D. 327, were also referred to.

H. C. Deane, in reply.—If the forfeiture was irregular in any particular it was wholly invalid; and the administratrix is entitled to damages as for the value of the shares at the date of the forfeiture. [STIRLING, J.—The logical result of this application is that the administratrix ought to be put on the list of contributories. I will give her an opportunity to consider the matter and to say by this day week whether she does desire to be put on the list or not; and I will reserve my judgment till after that day.]

Aug. 2.—STIRLING, J.—This is an application on the part of James Cant and his administratrix (he having died since the summons was taken out) to be allowed to prove in the liquidation of the assets of the company in respect of a claim which arose out of his shares, which were, as he alleged, irregularly forfeited. [His lordship then referred to the articles set out above, and, after stating the facts, continued:—] In the evidence before me there was nothing to show that proper notice was sent to the applicant, pursuant to the requirements of the 29th article of association, and on that account it was contended that the forfeiture was not only irregular, but wholly invalid, and that the provisions of the 36th article were not applicable. If that argument were well founded the logical consequence would seem to be that the present holders of the shares ought to be removed from the list of contributories, and the applicant's name be restored to the register. I offered to give to both the applicant and the liquidator an opportunity of taking steps for that purpose, but neither of them has thought fit to avail himself of that offer, and consequently I must treat the shares as having been forfeited in accordance with the articles, and I must hold that an irregularity has taken place in respect of which the applicant is entitled to prove for damages under the 36th article.

But then it was said that the company is insolvent, and it was contended that the applicant is precluded by the provisions of section 38, sub-section 7, of the Companies Act, 1862, from proving in respect of his claim in competition with the other creditors of the company. [His lordship then read the section, and continued:—] I need not allude to the first six of the qualifications to the section, except to point out that they relate to the contributions of past members. But sub-section 7 provides:—[his lordship read it, and continued:—] In order, therefore, that that sub-section may be applicable, the sum sought to be proved must not only be due to a member of the company, but due to him in his character of a member "by way of dividend, profits, or otherwise."

First of all, then, I have to consider whether the applicant is a member of the company within the meaning of sub-section 7, and I confess that, having repeatedly considered the question whether a past member is to be treated as a member for the purposes of that sub-section, it appears to me to be one of very considerable difficulty. I do not, however, think it is necessary on the present occasion to express a concluded opinion as to the meaning of the sub-section,

* Section 38, with sub-section 7:—"In the event of a company formed under this Act being wound up every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the contributories amongst themselves with the qualifications following (that is to say)—(7) No sum due to any member of a company in his character of a member by way of dividends, profits, or otherwise shall be deemed to be a debt of the company payable to such member in a case of competition between himself and any other creditor not being a member of the company, but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves."

but, having regard to the last words of it—"but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves"—it would seem to mean that the sum which is sought to be proved must be such as is in its nature susceptible of being taken into account for the purpose of the final adjustment of the rights of the contributories amongst themselves; and it is difficult to see how that can be done where the person who claims is not a past member, liable to be made a contributory of the company; for in the present case the applicant ceased to be a member more than a year before the date of the winding up, and consequently there would be a difficulty in holding that sub-section 7 applied to him.

I do not, however, decide the case on that ground, because I have come to the conclusion that, even supposing the applicant to be a past member within the meaning of that sub-section, the sum in question was not due to him in his character of a member, but, as it appears to me, was, on the contrary, due to him in his character of a non-member. What he claims is not any sum payable to a member, but damages payable to him by reason of his having been deprived of the rights of a member by an irregular act on the part of the company in respect of which the contract, which contains the articles of association, entitles him to damages.

I am therefore of opinion that this claim is admissible, and must be admitted by the liquidator. The costs of the applicant must be added to his claim, and the liquidator will take his costs out of the estate.

Solicitors for the applicant, *Morley, Shirreff, & Co.*

Solicitors for the liquidator, *Linklaters.*

Chan. Div. } Stirling, J. } Feb. 28; March 1, 7, 1890.

BAIRD v. WELLS. (a.)

Club—Proprietary club—Member—Expulsion—Injunction.

Where the members of a club have a right of property in the club, any member who is improperly expelled can obtain relief by injunction. In the case of a proprietary club where the members have no right of property in the club, but have merely a licence in consideration of a certain payment to use the club, in accordance with certain rules, the remedy of a member improperly expelled is damages for breach of contract, but he cannot obtain relief by injunction.

Motion.

The plaintiff was a member of the Pelican Club, which was established in 1887 as a proprietary club. The original rules provided that general meetings for the election of a committee should be held in October or November in each year; that fourteen days' clear notice should be given to the members; that the committee should consist of not more than twenty-one members; that the proprietor should be an *ex-officio* member, but not qualified to vote; that special meetings might be called; that members should be elected by the committee; that the subscription should be fixed from time to time; and that the rules should be printed and binding upon the members. The 7th rule was that "resolutions to be proposed at special or ordinary meetings shall be given notice of, in writing, a clear week previous to the meeting," and the 17th was that "any member whose conduct in or out of the club shall be unbecoming a gentleman in the opinion of the committee, or with respect to whom any matter may have transpired which might be calculated to render his continued membership of the club injurious to its character or interests, shall, if the committee, on inquiry, find the same to be substantiated, be requested to resign; and in the case of his non-compliance he shall be subject to expulsion."

The first general meeting was held on the 29th of October, 1887. No general meeting was held in 1888, but on the 6th of December in that year, the committee then being reduced to twelve, nine persons were appointed to fill up the vacancies. A general meeting for the purpose of considering certain proposed new rules was held on the 2nd of April, 1889, but the notice convening it did not state the matters which were to be taken into consideration, as required by the 7th rule.

At the meeting it was resolved "that the election of the present committee be confirmed; that the elections and work of the committee be confirmed," and the rules were read and amended, and finally confirmed. The new rules provided for an increase in the size of the committee, and an alteration in the mode of election; and the former 7th rule was entirely omitted.

On the 23rd of December, 1889, a prize fight took place at which the plaintiff was present. Unseemly proceedings occurred, in which it was alleged that an official of the club was implicated. In the course of an investigation by the committee into the conduct of that official charges were made against the plaintiff of having hired roughs and used violent language. In consequence of these charges the plaintiff was summoned to attend before the committee on the 7th of January, 1890. The plaintiff in reply addressed a letter to the committee which he handed to the secretary on the 7th of January. The letter was as follows:—

"My Lord and Gentlemen,—I attend at your request before you to-day in order to answer any question that you may put to me touching my conduct in connection with the late fight between Slavin and Smith. I point out to you the great loss and damage that would accrue to me, socially and otherwise, if an adverse decision is arrived at upon a hasty and partial investigation; and I request that before arriving at any such decision I may be supplied with an accurate statement of the complaint that you make against me, that I may examine into the same with a view of ascertaining the true facts and placing them before you. I may add, that I have not, either directly or indirectly, done anything that necessitates an inquiry into my conduct."

The plaintiff was examined before the committee, which acquitted him on the charge of hiring roughs, and resolved that his language, although unbecoming that of a gentleman and a member of the club, and consequently deserving of regret, was not such as, in their judgment, to call for the application of the 17th rule.

On the 8th of January, 1890, the general meeting of the club was held. The Marquis of Queensberry then moved:—"That the examination into Mr. Baird's conduct should be reopened and continued by the committee from the point it left off." An amendment was proposed:—"That the conduct of Mr. Baird be referred back to the committee for further consideration, and that they be instructed to report to a general meeting to be convened one month from this date." The amendment was carried, after discussion. The chairman stated that the committee had resolved to resign in a body, and that a general meeting would be held in a fortnight's time to elect a "better lot." The report of the proceedings did not state that the meeting was adjourned, but notices of an adjourned

(a.) Reported by L. S. BRISTOWE, Esq., Barrister-at-Law.

meeting were posted up and sent to the members. The further or adjourned meeting was held on the 22nd of January, and it was then proposed, and carried unanimously, that the committee be invited to return to office *en bloc*. The committee then proceeded to deal with the plaintiff's case, and at a meeting on the 29th of January it was resolved, "That in view of the report made by the committee to the general meeting, and of the vote of the members thereon, Mr. G. Baird be requested to resign his membership of the club in conformity with rule 17"; and on the 10th of February the committee resolved that the plaintiff should be expelled from the club. The plaintiff thereupon commenced the present action against the proprietor and secretary of the committee of the club, to restrain them from interfering with his use and enjoyment of the club as a member thereof, and he now moved for an *interim* injunction.

Sir Charles Russell, Q.C., Sir Horace Davey, Q.C., and *Ernest De Witt*, for the plaintiff, contended that a committee who expelled a member from a club were bound to show that they had carried out the rules and had acted in accordance with the ordinary principles of justice: *Fisher* v. *Keane*, 11 Ch. D. 353, 27 W. R. Dig. 32; *Labouchere* v. *Earl of Wharncliffe*, 28 W. R. 367, 13 Ch. D. 346; that the committee in the present case were not legally constituted, and had not proceeded with due formalities, and their action was, therefore, *ultrâ vires;* and that the plaintiff was accordingly entitled to the relief sought.

Hastings, Q.C., and *Levett*, for the defendants.—An injunction can only be granted upon the ground that some right of property possessed by the member had been infringed. The Pelican being a proprietary club, the plaintiff had no right of property in it; he had merely a license to use the premises: *In re St. James's Club*, 2 De G. M. & G. 383—387; *Hopkinson* v. *Marquis of Exeter*, 16 W. R. 266, L. R. 5 Eq. 63—66; *Rigby* v. *Connol*, 28 W. R. 650, 14 Ch. D. 482; *Lyttelton* v. *Blackburne*, 45 L. J. Ch. 219—223, 24 W. R. Dig. 49; *Millican* v. *Sulivan*, 4 Times L. R. 203; and *Wood* v. *Leadbitter*, 13 M. & W. 838. Even, however, assuming that the court had jurisdiction to grant an injunction in this case, the decision of the committee, which, even if not duly elected, was a *de facto* committee, and before whom the plaintiff had had a fair trial, could not be overruled.

Sir H. Davey, Q.C., in reply, referred to *Tayler* v. *Waters*, 7 Taunt. 374; *Maddison* v. *Alderson*, 31 W. R. 820, 8 App. Cas. 467.

March 7.—STIRLING, J.—This is a motion to restrain the defendants from excluding the plaintiff from the use and enjoyment of the Pelican Club, of which the plaintiff was threatened to be deprived in consequence of a decision of the committee of the club. In cases similar to the present the court, as has been repeatedly held, does not undertake to act as a court of appeal from the decisions of the committees of clubs: *Fisher* v. *Keane; Labouchere* v. *Earl of Wharncliffe; Dawkins* v. *Antrobus*, 29 W. R. 511, 17 Ch. D. 615. The only questions which this court can entertain are, first, whether the rules of the club have been observed; secondly, whether anything has been done contrary to natural justice; and, thirdly, whether the decision complained of has been come to *bonâ fide*. I propose to inquire into these matters in the first place, reserving for consideration hereafter a further question—viz., whether the decisions to which I have referred apply to a club constituted as the present is. [His lordship, having referred to the rules and the evidence, continued:—] What was done on the 6th of December, 1888, and also the proceedings of the 2nd of April, 1889, were entirely irregular. If the election of the committee was to be confirmed and new rules were to be adopted proper and distinct notice should have been given to the members. No such notice was given, and consequently the proceedings were not binding on the members who were not present. Those proceedings took place in April, 1889, and the transactions complained of were in January, 1890. Were the acts of the meeting of the 2nd of April, 1889, assented to by the plaintiff or other members of the club in the interval—a considerable interview—between the two dates? It was admitted by the secretary on cross-examination that copies of the new rules were not sent to the members, and there is no evidence that the plaintiff knew what had been done, or assented to be bound by the new rules or by the acts of the committee so elected. I come now to the transactions which gave rise to the present proceedings. [His lordship stated them, and continued:—] The plaintiff has filed no affidavit upon this motion, and his counsel do not now seriously complain of the proceedings at the meeting of January 7, 1890. I think it may fairly be inferred from the account given by the secretary, in the absence of any other evidence, that the committee were justified in concluding that the plaintiff was not prepared to dispute the substantial accuracy of the accounts given to them as to the language made use of by him, and I also think that if the committee had there and then resolved that the plaintiff had rendered himself liable to the penalty imposed by the 17th rule, I could not have held that such a decision was other than *bonâ fide* in the sense in which those words are used in the cases on this subject. The committee, however, did not come to that conclusion. [His lordship then read the finding and resolution of the committee, and proceeded:—] I understand that the committee acquitted the plaintiff as to the charge of hiring "roughs," and that they held that his language, although unbecoming that of a gentleman and a member of the club, and consequently deserving of regret, was not such as, in their judgment, to call for the application of the 17th rule, and to justify them in excluding him from the club. [His lordship then referred to what took place on the 8th of January, 1890, and continued:—] I think that the meaning was that a new trial should take place. There was great confusion at the meeting, and the report is not clear as to what occurred, but according to the final paragraph the chairman stated, after the amendment had been carried, that the committee had resolved to resign in a body, and that a general meeting would be called in a fortnight's time to elect a "better lot." There was no formal adjournment of the meeting, but a notice of an adjourned meeting to be held on the 22nd of January, 1890, was posted at the club and sent to every member. On the 22nd of January a meeting was held, and at it the Marquis of Queensberry rose and expressed his regret that his resolution at the last general meeting should have come into conflict with his brother committeemen. He proposed to make a statement with regard to Mr. Baird. It was then proposed that the election of a committee should be proceeded with, and a member proposed that the old committee should be invited to return to office *en bloc*, and that proposition was carried unanimously. It was that committee which proceeded to deal further with the case. If the proceeding on the 22nd of January was a new election it was irregular. The notice did not specify the object of the meeting, and it was not sent at a sufficiently early date—fourteen days' clear notice according to the rule was not given; for although the notice was posted at the club on the same day, the circular to the members was not issued until the 11th of January, 1890. It was said, however, that the pro-

ceeding amounted merely to non-acceptance of resignation. There are difficulties as to that view, because at that meeting, according to the new rules, five members were to retire; however, I treat it in that way. Still, the committee remained that which was elected on the 2nd of April, 1889, and, as I hold, irregularly elected. Was the decision binding on the plaintiff? All the cases lay down that the rules must be observed. It was held in the case of *Labouchere* v. *Earl of Wharncliffe* that the decision of a meeting of which proper notice was not given according to the rules was not binding on the plaintiff, although he appeared before it without protest. That being so, it seems to me that the present plaintiff cannot be bound by the decision of an irregularly elected committee. The rules of the club as to the election of a committee are certainly of not less importance than those which relate to the length of notice to be given of a general meeting, and I hold on the evidence now before me that the plaintiff had no knowledge of and did not waive the irregularity. Subsequently, at a meeting of the committee held on the 29th of January, 1890, the Marquis of Queensberry, who had taken a prominent part at the meeting on the 8th of January, read a statement, of which his lordship's notes have been put in evidence on behalf of the plaintiff. He urged that the committee should inquire further into matters which had been mentioned prior to the 7th of January, but were not referred to on that day, on which alone the plaintiff attended the committee. If that course, which seems to have been that intended by the general meeting, was to be taken, the committee were, in my opinion, bound to call the plaintiff before them and give him an opportunity of answering the matter thus for the first time brought forward. The Marquis of Queensberry said, however, and I accept his statement, that the committee refused to do what he wished in that respect. What was done appears only in the minutes, and according to them it was resolved, "That in view of the report made by the committee to the general meeting, and of the vote of the members thereon, Mr. G. Baird be requested to resign his membership of the club in conformity with rule 17." It thus appears that the same committee which on the 7th of January came to the conclusion—and as I assume *bonâ fide*—that the offence of which the plaintiff was guilty did not call for expulsion from the club, determined on the 29th of the same month, without taking any further evidence, and without hearing the plaintiff, that the penalty imposed by rule 17 ought to be put in force against him.

No member of the committee has made any affidavit explaining the grounds on which that conclusion was arrived at, and in the absence of such evidence I am not satisfied that the resolution of the 29th of January represents the fair and unbiassed judgment of the committee. The Marquis of Queensberry, who on the 8th of January is reported to have stated that he was entirely satisfied with the result of the committee's inquiry, appears to have urged upon the committee that, even if the plaintiff did not hire the roughs who were present at the fight, he so acted as to render himself responsible for their conduct. That view of the plaintiff's conduct was not dealt with in the report of the committee; it does not seem to have presented itself to that body on the 7th of January, and if it did not present itself to the committee it was hardly likely to occur to the mind of the plaintiff. It is true that one question put to the plaintiff, according to the evidence of the secretary, seems to show that some attention was directed in that way; but, notwithstanding that, upon the materials before me, I think that that charge was not so formulated or so prominently brought forward on the 7th of January that it ought to be made the ground of the decision of the committee unless the plaintiff had an opportunity of meeting it. The resolution of the 29th of January may be susceptible of another meaning. It is quite consistent with the terms of it that some members of the committee, or even the majority of them, may have adhered to their original opinion, but thought that they were bound to give effect to the personal feeling of the members of the club as expressed in the vote of the following day. In my judgment they could not be justified in so doing. The question was one for the decision of the committee who had heard the evidence, and not for a general meeting of the members who, as opposed to the committee, had not; and though the committee might take advice on the matter before them they were bound to form and act on their own opinion. I do not forget that a further resolution was passed on the 10th of February, 1890. That was done under legal advice; and to that resolution, in the state of the evidence before me, I cannot attach any weight. In truth, however, it appears to be consistent with the prior resolution, and to be open to the same objections. I am, therefore, of opinion, first, that the decision complained of was not that of a committee duly elected according to the rules of the club, and, secondly, that it is open to serious question whether the resolution of the 29th of January can be regarded as representing the unbiassed judgment of the committee after fairly hearing the plaintiff.

The question then arises whether this case falls within the class of cases in which the court grants relief by way of injunction. In all the cases of this nature in which up to the prsent time an injunction has been granted the club has been one of the ordinary kind—*i.e.*, it has been possessed of property (such as a freehold or a leasehold house, furniture, books, pictures, and money at a bank) which was vested in trustees upon trust to permit the members for the time being to have the personal use and enjoyment of the club-house and effects in and about it. But the interest of the members is not confined to that purely personal right. The members might, if they all agreed, put an end to the club, and in that case they would be entitled, after the debts and liabilities of the club were satisfied, to have the assets divided among them. In the present case the club, as such, has no property. The club-house and furniture belong to the defendant Wells, and by him the subscriptions are taken. He is not a trustee, but the owner of the property. If the club were dissolved at any moment there would be nothing whatever to divide among the members. Now the interference of the court in the cases which have hitherto occurred has been based on the rights of property of which the member had been improperly deprived.

The general principle was laid down by Lord Cranworth in the case of *Forbes* v. *Eden*, L. R. 1 H. L. Sc. 568, where he said, "Save for the due disposal and administration of property there is no authority in the courts of either England or Scotland to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs." And the same principle was stated at greater length by the late Master of Rolls in the case of *Rigby* v. *Connol*. In that case the plaintiff sought to restrain the defendants from excluding him from the benefits of a trades union of which he was a member. Sir George Jessel said, "The first question that I will consider is, what is the jurisdiction of a court of equity as regards interfering at the instance of a member of a society to prevent his being improperly expelled therefrom. I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he

is unjustly deprived by such unlawful expulsion. There is no such jurisdiction that I am aware of reposed in this country, at least in any of the Queen's courts, to decide upon the rights of persons to associate together when the association possesses no property. I cannot imagine that any court of justice could interfere with such an association if some of the members declined to associate with some of the others. That is to say, the courts as such have never dreamt of enforcing agreements strictly personal in their nature; in such cases no court of justice can interfere so long as there is no property the right to which is taken away by the person complaining. If that is the foundation of the jurisdiction, the plaintiff, if he can succeed at all, must succeed on the ground that some right of property to which he is entitled has been taken away from him. That this is the foundation of the interference of the courts as regards clubs I think is quite clear." Then his lordship referred to certain cases, and came to the conclusion that the plaintiff was not entitled to any relief.

Here, as I have pointed out, there are no funds vested in trustees or settled to be disposed of by the members of the Pelican Club in accordance with the rules of that association, and the question is whether the plaintiff, as a member of that club, has any right of property for the protection of which the court will interfere by way of injunction, and in my judgment he has not. The position appears to me to be this: Each member is entitled by contract with the defendant Wells to have the personal use and enjoyment of the club in common with the other members so long as he pays his subscription, and is not excluded from the club under rule 17. That right is, as it seems to me, of a personal nature such as, if infringed, may give rise to a claim for damages, but not such as the court will enforce by way of specific performance or injunction. The contract in its legal nature closely resembles contracts for providing board and lodging in a particular house, as when the head of a household admits a boarder into his family for a fixed period, or the proprietor of a private boarding-house agrees to provide for a term board and lodging for one boarder in common with others; as to which *Wright* v. *Stavert*, 8 W. R. 413, 2 E. & E. 721, may be referred to. The contracts in these cases fall, in my opinion, under the head of agreements strictly personal in their nature, and, consequently, in neither of them would the court interfere by way of injunction at the instance of the boarder. So, also, in my judgment, is it in the present case. It was contended that damages might be an insufficient remedy by reason of a decision being given which affects the character and position in society of the plaintiff, and does not satisfy the requirements of the law. In no case, so far as I am aware, has the existence of such circumstances been treated as affording ground for the granting of an injunction to restrain the proceedings of a voluntary society, and, indeed, upon the principle laid down in the case of *Forbes* v. *Eden*, it might well happen that decisions which gravely affect some members of a voluntary society and do not satisfy the requirements of the law, might be arrived at by the committee or other like body without being open to be questioned in any civil court or giving rise to any right of action whatever. Under these circumstances I make no order on the motion.

The plaintiff appealed against this decision, and the appeal came on on the 23rd of April. It was then stated by his counsel that as the judgment of Stirling, J., had been in his favour as regarded the irregularity of the defendants' proceedings, the plaintiff did not desire to continue in the club, and would consent to the appeal being dismissed, with costs.

Appeal dismissed accordingly.

Solicitors, *Lumley & Lumley; Lewis & Lewis.*

Prob. Div. & Adm. Div. } July 8, 15, 1890.
Probate. }

In the Goods of A. C. GRANET DE LA RUE. (*a.*)

Probate—English will disposing of property in this country—Executors—Swiss independent will—Swiss law—Administration by State—Objections to incorporation—Form of grant.

A testator possessed of property in this country and in Switzerland made a will according to the English law disposing of his property here only, and by it declared that it was to take effect concurrently with, and independently of, a prior will dealing with his Swiss property only. On the application of the executors of the English will for probate of it only, it was proved that, if the Swiss will were incorporated in the probate, the executors would have no power to deal with the Swiss property, there being no executors appointed under the Swiss law, and if they attempted to deal with it they might come into conflict with the officers of the Swiss courts whose duty it would be to administer the Swiss estate.

The court granted probate to the executors of the English will only upon their filing a certified copy of the Swiss will in the registry, and directed a note to be made on the English probate that such copy had been so filed.

In the Goods of Astor, 24 *W. R.* 539, 1 *P. D.* 150, *followed and explained.*

Motion for a grant of probate of the English will of Augustin Charles Granet de la Rue, deceased, to the executors without incorporating a Swiss will made by the same testator.

The testator died on March 29, 1890, at Meggen, in Switzerland, possessed of property in Great Britain, Switzerland, and Italy. On August 14, 1889, he made a will according to the English law disposing of his property in this country. The will declared that it was for the purpose only of disposing of his estate, real and personal, situate in Great Britain and Ireland, and that it was to take effect concurrently with and independently of another will made by the testator on July 6, 1889, relating to his property in Switzerland and Italy only.

July 8.—*Deane*, in support of the motion.—The application is identical with that made in *In the Goods of Astor*, 24 W. R. 539, 1 P. D. 150, and the proposal is to follow the decision in that case by filing a certified copy of the Swiss will in the registry and adding a note to the English probate that such copy has been so filed.

HANNEN, P.—I am afraid of giving rise to complications which one is unable to foresee with regard to this method of dealing with testamentary papers. In the case of the late Mr. Astor I was influenced by the enormously bulky will. In this case that element is not present. It is obviously of importance to anyone interested in the estate to see the whole of the testamentary documents.

If this will be not a long document, as I understand it is not, I should like to know what practical objection there is to incorporating it.

Deane.—If the executors take probate here of the

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Swiss will, they will be amenable to the Swiss courts and yet not able to interfere with the estate comprised in the Swiss will, as there are no executors under the Swiss law.

HANNEN, P.—Let that be proved by affidavit and I will make the same order as in *In the Goods of Astor*.

July 15.—*Deane* produced an affidavit of a Swiss advocate and legal adviser to the Swiss consulate stating that if this court were to grant probate of the two wills to the executors of the English will, such executors would by the law of Switzerland, have no power to interfere with the goods of the testator within the jurisdiction of the Swiss courts, and if the executors attempted to deal with such goods with the object of carrying out the provisions of the Swiss will, they might come into conflict with the officers of the Swiss court whose duty it is to administer the estate of the testator dealt with by the Swiss will.

HANNEN, P.—I make a similar order to that in *In the Goods of Astor*, granting probate of the English will alone to the executors upon their filing in the registry a certified copy of the Swiss will, and a note will be added to the probate that such copy has been so filed.

Solicitors, *Johnson, Budd, & Johnson.*

See also *In the Goods of Callaway*, 38 W. R. 528, 15 P. D. 147.

Court of Appeal.

From Q. B. Div. Nov. 3.

REG. v. SOUTTER. (a.)

Local government — Vestry — Election of vestryman— Qualification—Occupation of club premises as secretary —Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 6.

The qualification of a candidate for the office of a vestryman was that he was rated in respect of the house in which he resided at £19 per annum, and that he was rated jointly with another person in respect of the premises of a certain club, of which he was secretary, at £55 per annum. The qualification required for the particular parish under section 6 of the Metropolis Local Management Act, 1855, *was the being rated upon a rental exceeding £25 per annum in respect of the occupation of premises within the parish.*

Held (affirming the decision of the Queen's Bench Division, ante, *p.* 8), *that, since he was not in occupation of the club, his qualification was insufficient.*

Appeal from the decision of a divisional court (Pollock, B., and Grantham, J.) reported *ante*, p. 8, where the facts are fully stated.

At an election of vestrymen for the parish of Bermondsey Soutter was a successful candidate. A rule *nisi* was obtained against him in the nature of a *quo warranto*, on the ground that he was not properly qualified under section 6 of the Metropolis Local Management Act, 1855, which requires that the vestry shall consist of persons rated or assessed to the relief of the poor upon a rental of not less than (in this particular parish) £25 per annum, and provides that no person shall be capable of acting or being elected as one of such vestry unless he be the occupier of a house, lands, tenements, or hereditaments in such parish, and be rated or assessed as aforesaid upon such rental as aforesaid. It further provided that a joint occupation and a joint rating of premises should be sufficient to qualify if the amount of the rental, when divided by the number of joint occupiers, would give the requisite sum.

It appeared that Soutter was rated at £19 per annum in respect of the house in which he resided, and that he also was rated jointly with one other person in respect of the premises of a certain club of which he was secretary, and which were of the rateable value of £55 per annum. The Divisional Court held that he was not rated in respect of the club premises so as to bring up his qualification to the amount required, and made the rule for a *quo warranto* absolute.

Mr. Soutter appealed.

Cluer, for the appellant.

Lynden Bell, for the respondent.

The arguments used and the cases cited were the same as in the court below.

Lord ESHER, M.R.—I think we must decide this case on the assumption that Soutter was jointly rated in respect of the club premises. But he did not occupy those premises, and then comes in the decision of my brother Lopes in *Mogg* v. *Clark*, 15 Q. B. D. 82, 33 W. R. Dig. 136, with which I entirely agree, which says that in order to be qualified under this section a person must not only be rated for, but also be the occupier of, the property. A man may, of course, occupy more than one set of premises in a parish by his servants or others, and he may add together the rateable value of those premises in order to make up his qualification. But the plain intention of the Legislature was that in order to qualify himself he must occupy the premises for which he is rated. Therefore, although our judgment may be not quite on the same ground as that of the Divisional Court, I think that this appeal must be dismissed.

LINDLEY, L.J.—I am of the same opinion. I think the true construction of the section was that given by Lopes, L.J., in *Mogg* v. *Clark*.

LOPES, L.J.—I decided this point in 1885, and coming again to the consideration of the point without any predilections on the subject I think that the decision in *Mogg* v. *Clark*, which case was upheld in the Court of Appeal on another point (34 W. R. 66, 16 Q. B. D. 79), was right.

Solicitor for the appellant, *H. N. Philcox.*

Solicitor for the respondent, *R. H. Ward.*

From Q. B. Div. Oct. 24, 25.

In re BRAZILIAN SUBMARINE TELEGRAPH CO. (LIMITED). (a.)

Conflict of laws—Power of attorney—Construction.

Where an authority is given in a foreign country to an agent to transact business for his principal in other countries, it must be construed, in the absence of any evidence of a contrary intention, according to the law of the place where the business is to be transacted.

Appeal from the decision of Day, J.

On May 17, 1880, M. Chatenay, who resided and carried on business in Brazil, executed and recorded in Brazil in the Portuguese language a notarial act (which was in substance a power of attorney) which

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

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gave power to P. Broë, of London, on behalf of M. Chatenay, of Rio, "to purchase and sell shares in public companies and public funds . . . in conformity with his letters of credit and following his letters of orders and particular advices, which, if necessary, shall be considered as part hereof." Without receiving any specific order from Chatenay, Broë disposed of fifty shares which Chatenay held in the Brazilian Submarine Telegraph Co. (Limited). Upon discovering this Chatenay applied under the Companies Acts for an order restoring his name to the register of the company as owner of the shares. The matter came before a divisional court, who directed an issue as to whether the construction of the document was to be according to Brazilian or English law. This came on to be tried before Day, J., who certified that it must be construed according to English law.

The company appealed.

Finlay, Q.C., *Graham*, and *Calvert*, for the appellants.—According to the Brazilian law this notarial act gives Broë an unlimited power to deal with all shares independently of any letters of advice. The document, being executed in Brazil and in the language of the country, must be construed according to the law of that country. It is not an authority to be executed only in England, but in all countries.

They cited *Jacobs* v. *Credit Lyonnais*, 32 W. R. 761, 12 Q. B. D. 589; *Maspons y Hermano* v. *Mildred*, 30 W. R. 862, 9 Q. B. D. 530; *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115; *Duchess di Sora* v. *Phillips*, 10 H. L. Cas. 624, 11 W. R. H. L. Dig. 6.

H. D. Greene, Q.C., and *Alexander Young*, for the respondent.—According to English law this is only a limited authority dependent on the letters of credit. [Lord ESHER, M.R.—We have not to decide that now. We have only to say which law is applicable to the construction of the document.] That point has never been exactly decided: Story's Conflict of Laws, 7th ed., s. 286, p. 337; but Day, J., adopted the view there expressed, that it must be construed, in the absence of counter proofs, as intended to be executed according to the law of the place where the business is to be transacted.

Lord ESHER, M.R.—In this case a person residing and carrying on business in Brazil wrote in the language of that country what he intended to be an authority to an agent to act for him. We have now to discover exactly what his intention was at the time he wrote it, and the question is how that is to be ascertained. The authority being given in Brazil, and in the Portuguese language, the intention of the parties is to be ascertained by evidence of competent translators and experts, including, if necessary, Brazilian lawyers, as to the meaning of the language used. If, according to such evidence, the intention of the parties appears to be that the authority should be acted upon in foreign countries, it follows that the extent of the authority in any country in which the authority is to be acted upon is to be taken to be according to the law of the particular country where it is acted on The authority must first be translated, and must be given its equivalent in English business language. Then the court, having got the exact language, has to construe it. The business sense of all business men is that if a contract is to be carried out in a particular country it must, unless a contrary intention is expressed, be subject to the law of that particular country. In the present case, therefore, if this authority is to be carried out in England, and in so far as it is to be carried out in England it is subject to English law. This seems to me a mere expansion of the judgment of Day, J., and therefore I think that the appeal must be dismissed.

LINDLEY, L.J.—This is an appeal from a certificate by Day, J., to the effect that the construction of this document was governed by English law. The construction of a power of attorney includes two things: first, the actual meaning of the words used, and, secondly, their legal effect. The meaning of the words is in all cases a question of fact; their legal effect is, of course, a question of law. In this case, the document being in Portuguese, we must have recourse to translators and experts in order to ascertain the exact meaning of the words used—to get a correct translation. That being done, it appears that this is a power to buy and sell shares in all countries. Therefore, when it is to be executed in England, it must be executed according to English law. It appears to me that this is the meaning of Day, J.'s order, when it is properly understood, and I think, therefore, that this appeal must be dismissed.

LOPES, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellants, *Bircham & Co.*

Solicitors for the respondent, *Flux, Son, & Co.*

From Chan. Div. July 14, 1890.

NORTHAMPTON (MARQUIS OF) *v.* POLLOCK. (*a.*)

Mortgage — Redemption — Attempt to fetter equity of redemption—Policy of insurance.

C. charged a reversionary interest in real estate, to which he was entitled contingently on his surviving N., with the repayment, with interest thereon, of a sum of £10,000 advanced to C. by the trustees of an insurance society, and also with the repayment of the premiums of a policy for £34,500, which, in pursuance of the contract between C. and the trustees, was effected by the trustees on the life of C. as against that of N.

The contract also contained stipulations that, in the event of C. not having paid to the trustees the whole of the sums due by him before the death of N., the policy should belong absolutely to the trustees; that, in the event of C. paying the trustees before the death of N. the whole of the sums due to them, the trustees should forthwith assign the policy to C.; and that, in the event of C. predeceasing N. without having paid all principal moneys, interest, and costs due to the trustees, the policy should belong absolutely to them.

C. died in the lifetime of N. without having paid anything to the trustees, and C.'s legal personal representative now claimed to be entitled to redeem the policy.

The premiums on the policy had been paid by the trustees.

Held by the Court of Appeal (Bowen, L.J., *dissenting*), *that the contract as regards the policy was part of one whole mortgage transaction; that the stipulations which provided that, in certain events, the policy should belong absolutely to the trustees were invalid, as clogging the equity of redemption, and, therefore, that C.'s representative was entitled to redeem the policy.*

Decision of North, J. (38 *W. R.* 346), *affirmed.*

Appeal from the decision of North, J. (reported 38 W. R. 346.)

On the 26th of May, 1879, Earl Compton (since deceased) executed a bond in the form of a Scotch mortgage, whereby he became bound to repay to the defendant Pollock and the other trustees of the National Life Assurance Society a sum of £10,000 advanced to him by them, and also to pay the

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

premiums on a policy of £34,500 to be effected by the defendants, and to be payable in the event of Earl Compton predeceasing his father, the Marquis of Northampton. The Scotch estates to which the earl was entitled in remainder were by this instrument charged with the repayment of the sum advanced and the premiums.

By an agreement of even date with the said bond (May 26, 1879), and made between the defendants (therein referred to as the first party thereto) and Earl Compton (therein referred to as the second party thereto) it was (*inter alia*) provided as follows:—

"1. The first party shall effect a policy or policies of assurance on the life of the second party as against that of the said most noble marquis, his father, to the extent of £34,500, with such assurance company as they may select, and on such terms as by them shall be deemed advisable.

"2. The interest payable on the said advance of £10,000, and the premiums payable on the said policy or policies of assurance, shall be allowed to accumulate for a period of five years, that is to say, till the term of Whitsunday, 1884, and compound interest with half-yearly rests at the rate of 5½ per cent. per annum shall be charged thereon.

"3. On the expiry of the said period of five years, it shall be in the power of the first party, in the event of the said advance of £10,000, premiums of assurance, interest, and others accummulated as aforesaid, not having been paid to them by the second party as aforesaid, forthwith to exercise their full powers and privileges conferred on them hereunder or under the said land and disposition in security, and in the event of their not exercising their powers and privileges, they may continue to pay the said premiums and interest as before provided, and the principal sum, premiums, interest, and others, may be allowed to accumulate as aforesaid, and that so long as the said first party may think proper to do so, and the first party shall be entitled to use all diligence against the person or estate of the second party for payment of the interest or premiums paid by them after the expiry of the period of the said five years, and that without prejudice to the powers and privileges in regard to any sum due by the second party or otherwise. And a statement certified by the first party shall be sufficient evidence of the amount due by the second party as at the date of said certified statement.

"4. In the event of the second party not having paid to the first party the whole sum due by him to them before the death of the said most noble marquis his father, then the policy or policies of assurance effected by the first party as aforesaid shall belong absolutely to the first party, and neither the second party nor his representatives shall have any claim or right thereunder in any manner of way, and the first party shall be entitled to exercise their full powers and privileges under the said bond and disposition in security as if no such policy or policies had been effected.

"5. In the event of the second party paying the first party before the death of the most noble marquis his father the whole sums due to them, the first party shall be bound forthwith to assign the said policy or policies of assurance to the second party, but that always at his own expense.

"6. In the event of the second party predeceasing his father without having paid to the first party the whole of the sums due to them, the first party shall prepare a certified statement of the amount due to them as at the date of the death of the second party, and they shall be bound to impute to the amount the whole sums of money they may receive in respect of the policy, and in the event of the said sums so received exceeding the amount due under the said statement, to account for and pay over the excess to the representatives of the second party. And in the event of the sums so received being inadequate to meet the amount brought out in the said statement, then the first party shall have full right to exercise the powers conferred on them under the said bond to recover from the estate of the second party the balance due."

A subsequent agreement, dated June 6, 1879, was entered into between the same parties, which, after reciting that the sixth clause of the former agreement did not accurately state the terms on which the £10,000 was advanced, and reciting that the agreement was that in the event of Earl Compton predeceasing his father without having repaid the principal moneys, interest, and costs due to the defendants, the said policy and the sums assured thereby should belong absolutely to the defendants, provided as follows: That in the event of Earl Compton predeceasing his father without having paid all principal moneys, interest, and costs due to the defendants under the said bond and disposition in security, then and in such case the said policy and all moneys thereby secured should belong absolutely to the defendands.

The £10,000 was accordingly advanced by the defendants to Earl Compton, and the defendants effected a policy of assurance in their own office on the life of Earl Compton against that of the Marquis of Northampton for the sum of £34,500.

The premiums were paid by the defendants by means of writing up the debt of the borrower in the books of the insurance society.

Earl Compton died on the 5th of September, 1887, intestate, in the lifetime of his father, without having paid to the defendants any part of the sum of £10,000 and without having paid any interest thereon, or any premiums on the policy of assurance.

The Marquis of Northampton, as administrator of Earl Compton, brought this action claiming a declaration that the defendants were only entitled to the policy of assurance and the sum or sums assured thereby as a security for the sum of £10,000 with interest thereon at the rate of 5½ per cent. per annum, and for the amount of the premiums on the said policy paid by them, with interest thereon at the rate aforesaid. And the plaintiff offered to pay to the defendants any sum that might be found due to them, after deducting any sums received by them.

The plaintiff, in his reply, further raised as a point of law that the agreement of the 14th of June, 1879, so far as it purported to vary the minute of agreement recited in it, or to limit the right of redemption in the said policy to the lifetime of Earl Compton was not valid in law, and did not bind the plaintiff.

By an order, dated the 4th of July, 1889, it was ordered that the point of law raised by the reply should be tried before the court, prior to the hearing of the merits of the case.

North, J., held that the whole transaction was a mortgage transaction, and that the plaintiff was entitled to redeem the policy notwithstanding the express stipulation that in the events which had happened the same should belong to the defendants (see the report 38 W. R. 346).

The defendants appealed.

Sir Horace Davey, Q.C., Rigby, Q.C., and *E. Beaumont*, for the appellants.—The only question is whether the agreement of June 14, 1879, is invalid on the ground of its being an attempt to fetter an equity of redemption. The policy never was property belonging to the mortgagor, Earl Compton; it was created solely for the purposes of this special agreement, and the rights

of the parties with respect to the policy must be governed by that agreement: *Potter* v. *Edwards*, 5 W. R. 407; *Mainland* v. *Upjohn*, 37 W. R. 411, 41 Ch. D. 126; the cases as to "once a mortgage always a mortgage" do not apply. The cases as to policies which were the property of the mortgagor, such as *Goodman* v. *Grierson*, 2 Ball & Bea. 274; *Scottish Union Insurance Co.* v. *Queensberry*, 1 Bell App. Cas. 183, have no application to the present case. In cases where the payment of the premiums has been thrown on the mortgagor, the courts no doubt have held that the inference to be drawn was that the policy was the mortgagor's property: *Drysdale* v. *Piggott*, 4 W. R. 773, 8 De G. M. & G. 546; *Freme* v. *Brade*, 6 W. R. 739, 2 De G. & J. 582; but such inference cannot be drawn when there is an express stipulation to the contrary, as there is here. The policy in this case was not taken out by Earl Compton, but by the defendants, and the policy "owes its being" to the special agreement, and it is only under the agreement that Earl Compton's representatives could have any claim at all to the policy.

Howard v. *Harris*, 1 Vern. 33, and *Bonham* v. *Newcomb*, 1 Vern. 232, were also referred to.

Crackanthorpe, Q.C., and *Reginald Winslow*, for the plaintiff.—The fact of the making of the subsequent agreement of June 14 shows that the policy was not originally considered to be the property of the defendants. The creation of the policy was part of the mortgage transaction. The policy was redeemable by Earl Compton at any time during his life, and only ceased to be redeemable by his death in his father's lifetime. The ownership of the policy must be determined by the liability for payment of the premiums: *Falcke* v. *Scottish Imperial Insurance Society*, 35 W. R. 143, 34 Ch. D. 234; *Leslie* v. *French*, 31 W. R. 561, 23 Ch. D. 560. *Potter* v. *Edwards* only decides that a bargain may be made giving a mortgagee a bonus on his advance, not that the right of redemption can be done away with. No stipulation can render a mortgage irredeemable: *Courtenay* v. *Wright*, 9 W. R. 153, 2 Gif. 337; *Toomes* v. *Conset*, 3 Atk. 261; *Jennings* v. *Ward*, 2 Vern. 520; *Spurgeon* v. *Collier*, 1 Eden. 55; *Broad* v. *Selfe*, 11 W. R. 1036; and *James* v. *Kerr*, 37 W. R. 279, 40 Ch. D. 449. [BOWEN, L.J., referred to *Protector Endowment Loan Co.* v. *Grice*, 28 W. R. 427, 5 Q. B. D. 592]. The debt is not extinguished, and cannot be regarded as extinguished without nullifying at least two clauses in the agreement. The cases of *Scottish Union Insurance Co.* v. *Queensberry*; *Knox* v. *Turner*, 18 W. R. 873, L. R. 5 Ch. App. 515; *Gottlieb* v. *Cranch*, 4 De G. M. & G. 440; and *Bruce* v. *Garden*, 18 W. R. 384, L. R. 5 Ch. App. 32, which were relied on by the defendants, are cases of conditional purchase, in which the relation of debtor and creditor did not subsist from the first, and they are not applicable to the present case.

They referred also to *Holland* v. *Smith*, 6 Esp. 11; *Morland* v. *Isaacs*, 3 W. R. 397, 20 Beav. 389; *Williams* v. *Owen*, 5 My. & Cr. 303; and *Wallingford* v. *Mutual Society*, 29 W. R. 81, 5 App. Cas. 685.

Rigby, Q.C., in reply.—Though the bond was in the form of a Scotch mortgage, yet in fact it was only to operate as such if Earl Compton became the owner in possession of the Scotch heritable property, but if Earl Compton died before his father, it was to become null and void; I contend, therefore, that at the time the agreement was entered into there was no existing effective mortgage. The policy was in reality a wager on one life against another life. The policy at the time of its creation was of uncertain value, which could only be determined by subsequent events. It was not like a policy steadily increasing in value by the payment of premiums. The agreement of June, 1879, did not altogether do away with clause six of the original agreement, it only modified that clause to a certain extent—viz., by providing that the excess of the policy moneys were to belong to the trustees absolutely; but still the trustees remained liable to render an account and to impute in that account the whole of the sums received by them in respect of the policy, as provided for in clause six of the original agreement.

COTTON, L.J., after stating the facts and referring to the bond and the agreement of May 26, 1879, continued:—Then the defendants (who are called "the first party" in that agreement) covenant to effect a policy or policies of insurance to the extent of £34,500 on the life of Earl Compton (who is called the second party) as against his father—*i.e.*, if the earl died in the lifetime of his father the sum secured by the policy would have to be paid.

The money payable under that policy is the sum now in contest between the parties. The premiums and the interest for the first five years were to be allowed to accumulate, and after that time the defendants were to be entitled to use all diligence to recover payment against the person or estate of the earl of the interest or premiums paid by them. The suspension of their claims for premiums and interest during that time in no way prevents them suing afterwards; it was in no way a release of the covenant to pay. [The Lord Justice then read the 4th clause of the agreement, and proceeded:—] That is a curious provision, for if the earl's father died in the earl's lifetime, then there would be no force at all in the policy, because it was to be paid if the earl died in his father's lifetime. [The Lord Justice then read the 5th clause of the agreement, and continued:—] That, so far as it goes, is clear. But some difficulty is raised by the subsidiary agreement of June 14, 1879. As to this, I think we ought to take the subsidiary agreement as entirely substituted for the former agreement. The agreement of June 14, 1879, recites the 6th clause of the previous agreement, and then it goes on as follows: "and whereas such last mentioned clause does not accurately state the terms upon which the said advance of £10,000 was agreed to be made, it having been agreed that the policy or policies to be effected upon the life of the said Earl Compton against that of his father, the Marquis of Northampton, and in the event of his death before his father without having repaid all the principal moneys, interest, and costs then due" to the defendants "the said policy or policies and the sums thereby assured should belong absolutely to" the defendants: "Now these presents witness that in consideration of the said advance being made to the said Earl Compton it is hereby agreed and declared by and between the parties hereto that in the event of the said Earl Compton predeceasing his father, the Marquis of Northampton, without having paid all principal moneys, interests, and costs to" the defendants "under or by virtue of the bond in the said recited agreement mentioned, that then and in such case the policy or policies and all moneys thereby secured shall belong absolutely to" the defendants "or the survivor or survivors of them, or the executors or administrators of such survivor, their or his assigns. And it is further agreed that in consideration of the premises, the said Earl Compton shall, whenever called upon so to do, execute any further or other assurance for the purpose of carrying out at his own expense this agreement."

Those were the instruments of agreement between

the parties, and what do they mean, having regard to the last clause in the later agreement?

This is not the case of a policy being effected by the lender simply for his own security, but it is a policy effected under a contract with the borrower—the borrower contracting that he will pay the premiums, or that, if he does not, he shall be liable to be sued for them. Although this policy was effected in the office of the defendants, we must, in my opinion, consider it as if it were a policy effected by them in another office. They might if they pleased have effected the policy either in their own or in any other office. Quite independently of the later agreement, and without reference to the clause in the first agreement bearing on this point, what would have been the rights of the parties if that had been done? The earl or his representatives would have been entitled when the money was paid to say, "account to me for that and pay over to me any balance there may be beyond the sum which I borrowed from you." That is clearly laid down in *Drysdale* v. *Piggott*. The present case is different from a case where there is no contract between the parties, but where the lender chooses himself to insure the borrower's life. There he does that simply for his own benefit, and he can whenever he likes drop the policy or renew it when he likes, but he does that simply as being his own property and for his own benefit. But in the present case, unless effect is given to that last agreement between the parties (and, of course, there is no question as to what is the effect of it) the earl's representatives would have been entitled to get the balance of this sum of £34,500, which was much more than enough to pay the money lent and the premiums paid on the policy, and would be entitled to call on the defendants to account for it. But it is said that that is altered by that last clause. It is hardly necessary to quote authorities to show that courts of equity never will allow the equity of redemption to be cut off, except by lapse of time or by the order of the court. The mortgagor must be foreclosed if he does not redeem. Lord Hardwicke says that in plain terms in *Toomes* v. *Conset*: "This court will not suffer, in a deed of mortgage, any agreement in it to prevail that the estate shall become an absolute purchase in the mortgagee in any event whatsoever." He gives some reasons for that, which may not now be the only reasons, but that is the principle of courts of equity.

How is the present case to be distinguished from that? It is said that this is not like the case of a mortgage of property of the borrower; that it is not the property of Earl Compton, and that it is not a case of preventing him redeeming that which was his own. But is that so? As I pointed out, but for this last clause he would be entitled to an interest in the policy. He had such an interest in it, that, although the legal estate was in those who lent the money, yet he could call on those who had got the policy money to account and to pay over to him any residue.

Mr. Rigby said that the subsidiary agreement (which I last read) does not contain the whole of the 6th clause of the original agreement, and he contends that the true construction of it is, that the only change that is effected is that the policy moneys—or the balance of the policy moneys—shall belong to the insurance office, and not to Earl Compton's representatives. I cannot agree with that contention; and if that is not so, then this difficulty arises, that the defendants could take the whole of the money and also exercise their rights under their bond if any part of this sum of £10,000 or any part of the premiums are not paid, because the agreement is to be without any prejudice to the securities which they already have—the security of the bond.

That of course was rather startling, so it was said that the defendants never would or could sue if only a small sum still remained due and owing. It was also said that the earl would have every reason to get back the policy and to pay off the money, which he could do during the lifetime of his father, and then put an end to the whole matter. But the question is what are the rights of the parties purported to be given by this deed? As I understand it, the later agreement really contains the whole of the agreement between the parties as regard the policy moneys in the events which have happened.

Although it is true that in the original agreement there was an express clause that the balance of the policy moneys should belong to the earl and that he should be liable to be sued in the event of the policy moneys not being sufficient, yet there is nothing to confine the right to sue to the event—which has not happened—of the policy moneys being insufficient. As it is, the policy moneys are amply sufficient to pay all, and the contention of the defendants must be that they are not bound to account for the policy moneys to the earl or his representatives; and furthermore, as the agreement expressly stipulates it is to be without prejudice to the rights of the defendants under the bond, that they can sue the earl—for that must be the consequence of their contention, although they do not say so. They have lost the security of the real estate, but the bond still remains, a good security against the personal estate and effects of the earl, and that which his personal representatives may have from him. But the principle of the courts of equity is not to allow the equity of redemption to be clogged. The whole basis of a mortgage is that the estate is, in law, the absolute property of the mortgagee, yet the courts of equity have always treated it as being intended and being only as security for the money advanced, and have held that whenever the mortgagor offers to pay the principal, interest, and costs, then the mortgagee must reconvey the estate which by law is absolute in him and which by express bargain between the parties has become absolute when the equity of redemption arises.

Although this is not property which formerly belonged to the earl, yet by the effect of the contract and the way in which the premiums were applied, it did belong to the estate of the earl, and in my opinion it ought in equity to be regarded merely as a security for the money, and we ought not to allow any stipulation which would enable the defendants to take the policy moneys without being liable to pay the balance of them to the earl. In my opinion, therefore, this clause cannot be allowed to interfere with what would otherwise be the rights of the parties.

It is quite true that in cases where the policy is effected by the mortgagee, then it belongs to him. But in the present case, from the way in which this policy was created, I am of opinion that the mortgagor had as much interest in it as if it had been a policy originally belonging to him; by the terms of its creation the earl had an interest in it—*i.e.*, he had the right to get the surplus of it after paying all the moneys which he had borrowed.

One of the cases cited by Mr. Rigby (*Potter* v. *Edwards*) was a case where there was an agreement that, although a smaller sum was advanced, the mortgage should only be redeemable on payment of a sum of £1,000. But in that case the court nevertheless treated it as a security, and the question whether £1,000 was a reasonable sum to be paid when only £700 had been advanced was a mere question as to whether there had or had not been a hard and unfair bargain on the borrower; but when that question was decided in

to be extinguished, and in case the question were to arise I think the court would so have held.

In conclusion, I have found no case that is in point. The present problem is not governed by authority. My view is that, as regards this policy, the transaction was not one of mortgage, but of a wagering and speculative bargain to replace a mortgage which, in the event that has happened, would have been defunct, a bargain in which it was clearly intended and expressly agreed that the policy in the contingency that has occurred never was to become Lord Compton's. The rule of equity applied by North, J., does not, therefore, in my opinion, become appropriate. My brothers, however, think differently, and as their knowledge and experience are better than mine, I see no reason to be dissatisfied that I am in a minority, and that their view prevails.

Appeal dismissed.

Solicitors, *Wilde, Berger, & Moore; H. T. Boodle.*

App. Bankruptcy. July 4, 1890.

Ex parte SKEGG.
In re SKEGG. (*a*.)

Bankruptcy—Undue preference—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 28, *sub-section* 3 (f); *s.* 48.

Where a bankrupt has, within three months preceding the receiving order, given an undue preference to any of his creditors, the court may punish him by refusing or suspending an order for his discharge under section 28, *sub-sections* 2 *and* 3 (f), *of the Bankruptcy Act,* 1883, *though he has not been guilty of a fraudulent preference within the meaning of section* 48.

A debtor, on whose premises there were three mortgages, having been served with three writs in separate actions brought by the three mortgagees to recover their mortgage debts, handed the two writs issued by the second and third mortgagees to the solicitors of the first mortgagee, who thereupon entered appearances for him to those two writs, and signed judgment by default in the action by the first mortgagee.

Held, that such conduct on the part of the debtor was an undue preference within section 28, *sub-section* 3 (f).

Appeal by the bankrupt from an order of Mr. Registrar Linklater suspending the bankrupt's discharge for two and a half years.

The debtor, who was a licensed victualler, mortgaged his premises to the Lion Brewery Co., and subsequently executed two further mortgages in favour of other persons. The Lion Brewery Co. commenced an action against the debtor on his covenant to repay the debt due to them on their mortgage, and served him with the writ of summons. Two days after this service he was served with writs in similar actions commenced by the second and third mortgagees. He took these two writs to the solicitors of the Lion Brewery Co., and asked them to do what was necessary for him. They entered an appearance on his behalf to each of these writs, but no appearance was entered to the writ issued by the Lion Brewery Co., who thereupon obtained judgment by default. The third mortgagee also obtained judgment under order 14, and the sheriff took possession of the debtor's goods under writs of *fi. fa.* issued by the Lion Brewery Co. and the third mortgagee. A petition in bankruptcy having been presented against the debtor by the third mortgagee and a receiving order made thereon, the proceeds of the sale were paid to the official receiver, and no benefit was derived from the execution by either of the creditors. The debtor was adjudicated bankrupt.

On the bankrupt applying for his discharge the registrar made an order suspending the discharge for two and a half years on the ground (*inter alia*) that the bankrupt had within three months preceding the date of the receiving order, when unable to pay his debts as they became due, given an undue preference to one of his creditors, within the meaning of section 28, sub-section 3 (*f*), of the Bankruptcy Act, 1883.

The bankrupt appealed.

Herbert Reed, for the appellant.

No one appeared in opposition to the appeal.

Lord ESHER, M.R.—The registrar has suspended the bankrupt's discharge on the ground that he has been guilty of three of the offences mentioned in section 28, sub-section 3, of the Bankruptcy Act. The only question which has been seriously argued on the appeal is whether the bankrupt has been guilty of giving an undue preference to one of his creditors within the meaning of sub-section 3 (*f*).

In Mr. Yate Lee's book on Bankruptcy (3rd ed., p. 154) an opinion is expressed that "undue preference" in section 28 appears to be the same thing as the "preference" mentioned in section 48, which is commonly called fraudulent preference. In my opinion that is not so. Section 48 makes certain acts and transactions void if they have been done or entered into by the bankrupt with the motive of giving one creditor a preference over the others. Section 28 does not make anything void; it deals with the consideration by the court of the conduct of the bankrupt on the hearing of an application by him for an order of discharge, and includes many things which could not be made void after an adjudication of bankruptcy. The objects of the two sections being different, it is not unlikely that the word "preference" should have different meanings in each. What the court has to consider when acting under section 28 is the general conduct of the bankrupt, whether it is such as to induce the court readily to grant him a discharge. Now, when a debtor finds himself in the position mentioned in sub-section 3 (*f*), unable to pay his debts on the eve of bankruptcy, and knows that he is in that position, in my opinion the only honest course for him to take is not to interfere in any way between his creditors so as to give one any preference over the others. If he does interfere so as to give any creditor a preference over the others, he is, in my opinion, guilty of giving that creditor an undue preference.

It is clear, to my mind, that in this case the bankrupt took the two writs to the solicitors of the Lion Brewery Co., not, as was suggested, because he did not know any other solicitors in London, but because the Lion Co. were his principal creditors, in order that they might be able to levy execution before the others. I am of opinion that the appeal must be dismissed.

LINDLEY, L.J.—I think that "undue preference," in section 28, includes more than is comprised in section 48. The object of section 48 is to make void certain transactions in order to preserve a bankrupt's property for his creditors generally. The object of section 28 is to empower the court to punish a bankrupt by refusing to give him a discharge if, on taking his conduct into consideration, the court should think he was not entitled to it. If the court thinks he has unduly preferred one of his creditors, then, although there may be no transaction which

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

can be set aside under section 48, the court may punish him under section 28.

BOWEN, L.J.—When the debtor was insolvent he gave a notice to his principal creditor which enabled him to obtain a preference over the other creditors. Any conduct on the part of a debtor which has this effect is, in my opinion, conduct at which the court ought to strike. I do not agree with the argument that a debtor does not, within the meaning of sub-section 3 (*f*) of section 28, give an undue preference to a creditor unless he does one of the specific acts mentioned in section 48. It is quite possible for a man to give one of his creditors a preference over the other without there being any transaction such as mentioned in section 48. And if he does so, the court can punish him under section 28. That is what the registrar has done here, and, in my opinion, the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the bankrupt, *Nash, Field, & Withers.*

High Court of Justice.

Chan. Div.
Kay, J. } Oct. 31.

MAKINS *v.* PERCY IBOTSON & SONS (LIMITED). (*a.*)

Company—Mortgage—Debenture—Receiver and manager.

In a debenture-holder's action for foreclosure, where the debentures included all the property and uncalled capital of the company, all the shares which had been issued were fully paid up, and almost all the shares and the whole of the debentures belonged either to the plaintiff or the proposed manager, the court, with the consent of the company, appointed the managing director of the company to be receiver and manager of the property and business of the company, on the undertaking of the plaintiff to provide money for working expenses, to be responsible for the receipts of the receiver till he should give security, and to realize the property as soon as possible.

Motion.

By the writ in the action the plaintiff claimed, as a debenture-holder, a declaration that he was entitled to a first charge on all the property of the company, an account, foreclosure or sale, and to have a receiver and manager of the company's property appointed.

The question on the motion was whether he was entitled to the *interim* appointment of a manager of the property and business of the company.

By the memorandum of association the objects of the company were stated to be (*inter alia*) "to borrow upon mortgage, or raise money in such other manner as the company shall think fit, and in particular by the issue of debentures charged upon all or any of the company's property (both present and future) including its uncalled capital," and by the articles of association the directors had power to borrow money for the purposes of the company on similar conditions.

The debentures were ten in number and for £1,000 each, carrying interest at five per cent. They were worded as follows:—"The company hereby charges with such payments all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being." There were also two other debentures in similar form for £1,500 and £500.

The principal moneys were to become immediately payable on default for six months in the payment of interest and notice in writing to the company calling in such principal moneys.

Default was made in payment of interest and notice given within the above condition, but the plaintiff was informed that the company were unable to pay.

The capital of the company was £20,000, divided into 6,000 preferred shares and 14,000 deferred shares. The whole of the preferred shares and the whole of the debentures belonged to the plaintiff, and only 6,505 of the deferred shares had been issued. Of these, 6,000 belonged to H. P. Ibotson, who had been managing director of the company since its foundation, and 500 to the plaintiff. All the shares which had been issued were fully paid up. It was stated that there was a large quantity of raw material which it was desirable to manufacture so as to be in a position to sell the business as a going concern.

The notice of motion asked that Henry Percy Ibotson might be appointed, without his being required to give security, to manage the real and personal property and the business of the defendant company comprised in the debentures in the writ in the action mentioned, and to receive the rents and profits and produce of the said business until further order of the court.

Renshaw, Q.C., and *Hamilton*, for the motion, referred to *Gardner* v. *London, Chatham, and Dover Railway Co.*, 15 W. R. 325, L. R. 2 Ch. 201; *Peek* v. *Trinsmaran Coal and Iron Co.*, 24 W. R. 361, 2 Ch. D. 115; *Boyle* v. *Bettws Llantwit Colliery*, 2 Ch. D. 726, 24 W. R. Dig. 70; *In re Pound, Son, & Hutchins*, 38 W. R. 18, 42 Ch. D. 402.

Farwell (*amicus curiæ*), referred to *Campbell* v. *Lloyd's Bank*, 58 L. J. Ch. 424, 37 W. R. Dig. 96.

Eustace Smith, for the company, consented to the order being made.

KAY, J.—By this motion I am asked to appoint a receiver and manager of all this company's property, both present and future. No specific mention is made in the memorandum of association or in the debentures, of the goodwill of the business; the debentures are in the very same words as the memorandum of association—namely, "all its property, both present and future, including its uncalled capital." Now I am asked to appoint not merely a receiver, but a receiver and manager of the business, this being a joint-stock trading company. The first question is, Is this within the jurisdiction of the court? Supposing a mortgagee entered into possession of property of this kind, could he carry on the business of the company? It is clear he could not. But that does not completely answer the question, because he would not be an officer of the court. Were it not for authority I should hesitate very much before, on a debenture like this, I appointed a receiver and manager. The object of such an application as this is to enable the business of the company to be carried on, and supposing the receiver and manager did so fairly, his acts would bind the company. So that the result is that if the business turned out to be a losing one, the uncalled capital, if any, would have to be called up. In my opinion that would be a very strong thing to do, and if this had been the first case of the kind I should have hesitated very much to accede to such an application. The matter came before a very experienced judge, the late Master of the Rolls, in *Peek* v. *Trinsmaran Coal and Iron Co.*, and there, although there was no opposition, there being an

(*a.*) Reported by H. C. ROPER, Esq., Barrister-at-Law.

[illegible]

[illegible]

[illegible] in the winding up of the [illegible] Rowland Alston, Esq., Barrister-at-Law.

[illegible]

[illegible] and [illegible] for the liquidator stated the facts.

[illegible] and [illegible] for Pullman.—Pullman paid off his mortgage in advance in [illegible], together with all amounts due under the rules, and [illegible] the statutory receipt and his deeds. If he had waited for the full period to run out it is clear he should have been no longer a member, as rule 36, which applies to that case, gives express power to re-enter. Payment in advance must have the same effect.

[illegible], Q.C., and [illegible], for Charnock.—Charnock withdrew under rule 29, and was paid the value of his shares, including a bonus.

These were treated as test cases.

CHITTY, J.—Pullman was a borrowing member. He gave a mortgage to the society, and subsequently paid it off under the rules, and a statutory receipt

was indorsed by the society. Charnock, on the other hand, was an investing member who has withdrawn, as he was entitled to do, under rule 29. No fraud has been suggested. They both, therefore, ceased, to all intents and purposes, to be members. They could not have claimed any profit under the triennial adjustment provided for by the 40th rule, nor were they liable for any loss. It is an ordinary case of stated account. It would be impossible to work a society like this if the accounts were liable to be ripped up in this way. The question is entirely one of contract between the members and the society, and under this contract Pullman and Charnock have got their *quietus* and are discharged.

The questions raised on the summons of Johnson and Greenwood, who were depositors, involved the validity of certain borrowings made by the society. The only points actually submitted arose on the 24th rule above cited, which was practically identical with section 15, sub-section 2, of the Building Societies Act, 1874.

The first question was—(1) Whether, for the purposes of rule 24, "the amount for the time being secured to the society by mortgages from its members" includes:

(*a*) Moneys secured to the society by mortgages from persons who were only borrowers and had no other connection with the society.

(*b*) Moneys secured to the society by mortgages from persons who were members of the society but not advanced to such persons in respect of their shares.

Romer, *Q.C.*, and *W. Baker*, for the official liquidator, stated the points.

Byrne, *Q.C.*, and *Levett*, for Johnson and Greenwood.

CHITTY, J., without requiring any argument, answered (*a*) in the negative, and (*b*) in the affirmative.

The next question was—(2) Whether, for the purposes of rule 24, moneys borrowed by the society and lent to persons who were not members ought to be included in "the total amount borrowed."

Byrne, *Q.C.*, and *Levett*, for Johnson and Greenwood.—These rules only apply as between the society and its members. Outside lendings must be set off against outside borrowings before rule 24 can be applied at all.

CHITTY, J.—There is no real question here to be decided. There is a limited power to borrow given by the 24th rule, and the right way to read the rule is to look at the state of account at the time of the proposed borrowing. "The total amount borrowed and not repaid" means the total amount for the time being owing in respect of loans from anybody, and this is not to exceed two-thirds of the amount secured by mortgages from members. The first term is the total amount to be borrowed—*i.e.*, from anyone. The second term, with which it is to be compared, is the total amount secured by mortgages from a particular class—viz., members of the society. Consequently the right way to read and work the rule is simply this: The question being at a particular time whether the officers can borrow, they have to look to their securities—*i.e.*, their mortgages from members—and the rest of the calculation is easy. Suppose the amount secured by mortgages from members is £10,000. Then two-thirds of this—viz., £6,666 13s. 4d.—is the superior limit of their borrowing power, and if they have already borrowed, say £5,000, no matter from whom, they can borrow the difference — viz., £1,666 13s. 4d. in addition. There is no mystery about the rule, it is in plain terms, and I am not at liberty to alter it.

Solicitors, *Burn & Berridge*, for *J. R. Farrar*, Halifax; *J. H. Bridgford*, for *Jebb, Booth, & Helliwell*, Halifax.

Chan. Div. } Kekewich, J. } June 28; July 16, 1890.

LEWIS v. LEWIS. (*a*.)

Practice—Compromise—Counsel—Order by consent—Application to withdraw consent.

An order by way of compromise was consented to by counsel in intended pursuance of terms agreed to by his client, but, owing to a misapprehension, not strictly following the terms agreed to;

Held, not binding on the client, although an order by way of compromise consented to by counsel under the authority implied by his employment is binding on the client.

Matthews v. Munster, 36 *W. R.* 78, 20 *Q. B. D.* 141, *distinguished.*

Motion.

This was a motion on behalf of the plaintiffs for leave to withdraw their consent to an order made on the 7th of June, 1890, and for liberty to renew their original notice of motion for an injunction to restrain the defendant from using the word "Lewis's."

The application was made under the following circumstances:—The original motion came on before Kekewich, J., on the 17th of May, 1890, when it was ordered to stand over till the 7th of June. In the meantime negotiations for a settlement were carried on between the solicitors for the respective parties, and on the 24th of May, 1890, the defendant's solicitors wrote to the plaintiffs' solicitors as follows:—"Our client is anxious for peace, and therefore will concede the use of the word 'Lewis's,' either alone or jointly with any initials, and will consent to a perpetual injunction restraining him from using the word as above indicated, and will pay the taxed costs. Our client is naturally anxious to avoid further costs being incurred, and with this object perhaps you will be good enough to wire your clients the purport of the above on the receipt of this letter."

On the 27th of May the plaintiffs' solicitors wrote to defendant's solicitors acknowledging the receipt of the above letter, and suggesting that, to prevent question, minutes should be prepared and agreed to before the matter was mentioned in court again. Accordingly, on the 5th of June the plaintiffs' London agents submitted to the defendant's London agents draft minutes of the suggested order, which, so far as material, were in the following terms:—"This court doth by consent order and adjudge that the defendant, his agents, &c., be perpetually restrained from using in the course of any trade or business carried on by the defendant the name 'Lewis's' or 'Lewis,' or any other name so nearly resembling the plaintiffs' name of 'Lewis's' as to be calculated to deceive," &c. These minutes were objected to by the defendant's solicitors, and on the morning of the 7th of June the terms of the proposed order had not been agreed to. On that day, before the motion came on for hearing, counsel for the respective parties met and discussed them, and ultimately the following order was agreed upon between them, and

(*a*.) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

indorsed on their briefs:—"By consent perpetual injunction to restrain the defendant from trading under the style of 'Lewis's,' and also from using the word 'Lewis's' in his advertisements or otherwise in the course of his trade or business without prefixing the initials J. M., or the names James or Mossop or both. defendant to pay plaintiffs' costs of action." The plaintiffs' country solicitors, on seeing the proposed order, immediately objected to it, on the ground that it did not carry out the proposal of the letter of the 24th of May, and stopped the drawing up of the order. Counsel for the plaintiffs had previously seen that letter, but it was not before him on the 7th of June and he had forgotten it.

Plaintiffs now moved for leave to withdraw their consent to the order so made.

Warmington, Q.C., and *John Cutler*, for the plaintiffs.—Admitting that the consent of counsel was given to the order, we are entitled to withdraw our consent as having been given under a mistake, and not in accordance with the agreement of May 24: *Harvey* v. *Croydon Union Rural Sanitary Authority*, 32 W. R. 389, 26 Ch. D. 249.

Chadwyck Healey, for the defendant.—There was no concluded agreement—the offer contained in the letter of May 24 not having been accepted by the plaintiffs. Counsel were, therefore, on June 7 in their ordinary position, with an implied power of compromising actions on behalf of their clients. There was nothing to lead the defendant to believe that the plaintiffs' counsel was exceeding his authority, and, that being so, the court will not disturb the compromise which has been made: *Matthews* v. *Munster*, 36 W. R. 178, 20 Q. B. D. 141; *In re West Devon Great Consols Mine*, 36 W. R. 342, 38 Ch. D. 51.

KEKEWICH, J.—I regret that the case has come before me, because a discussion of this kind cannot but affect, to some extent, a valuable power which is placed in the hands of counsel—that of compromising cases. I mean valuable not to them, but to the clients. And I regret that I must allow this application, because, although with my small knowledge of the case I ought not to say that I am satisfied, I cannot but think that the order indorsed on counsels' brief and the judgment consented to is a good settlement of the action. However, this case does, in my opinion, fall within the exception mentioned in what must now be treated, as far as the Chancery Division is concerned, as being the leading authority on the subject—viz., *Harvey* v. *Croydon Union Rural Sanitary Authority*. From that decision, as it seems to me, the decision in *Matthews* v. *Munster* does not depart in the slightest degree. In *Matthews* v. *Munster* what the court had to consider was a compromise entered into by counsel without any instructions or authority other than such as may be implied in the employment of counsel. The judges there took care to point out that the counsel did not act on express instructions as to a compromise. In this case, however, it is obvious—whether counsel had the letter of May 24 before them or not—that they were endeavouring to the best of their ability to give effect to the intention of the parties to compromise. Knowing that the parties wished to compromise, and having some general notions on the subject, counsel endeavoured to put them into the best form, and for my own part I think they succeeded. But I do not think it possible to say that such a compromise is necessarily binding on the party who had not assented to those particular terms. I think that in that way the case entirely differs from *Matthews* v. *Munster*. Here there was, I think, a misunderstanding as to the intention of the parties, and so I must allow the withdrawal of what, though called a consent, was in reality a consent given under a misapprehension, and, therefore, in law no consent at all.

I am not satisfied that any good result will come of this application, so I will not deal with the costs now, but reserve them till the motion is disposed of.

On the action coming on for trial, without pleadings, on July 16, Kekewich, J., granted an injunction restraining defendant from using the word "Lewis's," either alone or jointly with any initial, as a trade name or in advertisements, &c.

Solicitors, *Norris, Allens, & Chapman*, for *North, Kirk, & Cornett*, Liverpool; *Shaw, Tremellen, & Kirkman*, for *Forshaw & Parker*, Preston.

Q. B. Div. (Denman, J.) Nov. 4.

STANLEY v. POWELL. (a.)

Trespass—Accidental injury—Shooting—Negligence.

In the absence of negligence a man who accidentally shoots another is not liable in an action of trespass.

This was an action for damages for injuries caused by the defendant's shooting the plaintiff, and was tried at Maidstone before Denman, J., and a special jury. The facts and arguments sufficiently appear in the judgment.

Kemp, Q.C., and *Payne*, for the plaintiff.

Dickens and *Willes Chitty*, for the defendant.

DENMAN, J.—This case was tried before me and a special jury at the last Maidstone Assizes. In the statement of claim the plaintiff alleged that the defendant had negligently, wrongfully, and unskilfully fired and wounded the plaintiff in the eye, and that the plaintiff in consequence had lost his sight and suffered other damage. The defendant denied the negligence alleged. After the evidence on both sides, which was conflicting, had been heard, I left the three following questions to the jury:—1. Was plaintiff injured by a shot from defendant's gun? 2. Was defendant guilty of negligence in firing the charge to which that shot belonged as he did? 3. Damages (in any event). The undisputed facts were that on the 29th of November, 1888, the defendant and several others were out pheasant shooting, some being outside and others inside of a wood which the beaters were then beating up. The plaintiff was employed by one Greenwood (the owner of the shooting, and who was one of the party) to carry cartridges and any game that might be shot. Several beaters were driving the game along a plantation of saplings towards an open drive. The plaintiff stood just outside a gate which led into a field outside the plantation at the end of the drive. The defendant was walking along in that field a few yards from the hedge which bounded the plantation. As he was going forward a pheasant rose inside the plantation. The defendant fired one barrel at the bird, and, according to the evidence for the defendant, struck it with his first shot.

There was a considerable conflict of evidence as to details, but the jury must, I think, be taken to have adopted the version of the facts sworn to by the defendant's witnesses. They swore that the bird, when struck by the first shot, began to lower and turn back towards the beaters, whereupon the defendant fired

(a.) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

his second barrel and killed the bird, but that a shot glancing from the bough of an oak which was in or close to the hedge, and striking the plaintiff, must have caused the injury complained of. The oak in question, according to the defendant's evidence, was partly between the defendant and the bird when the second shot was fired, but it was not in a line with the plaintiff, but, on the contrary, so much out of that line that the shot must have been diverted to a considerable extent from the direction in which the gun must have been pointed in order to hit the plaintiff. The distance between the plaintiff and the defendant in a direct line when the second barrel was fired was about thirty yards. The case for the plaintiff was entirely different, but I think it must be held that the jury took the defendant's account of the matter, for they found the second question left to them in the negative. Before summing up the case to the jury I called the attention of the parties to the doctrine which seemed to have been laid down in some old cases, that, even in the absence of negligence, an action of trespass might lie, and it was agreed that I should leave the question of negligence to the jury, but if necessary the pleadings were to be deemed to be amended so as to raise any case or defence upon the facts, with liberty to the court to draw inferences of fact, and that the damages should be assessed contingently. The jury assessed them at £100. I left either party to move the court for judgment, but it was afterwards agreed that the case should be argued before myself on further consideration, and that I should give judgment, notwithstanding that I had left the parties to move the court as though I had originally reserved it for further consideration before myself. Having heard the arguments, I am of opinion that by no amendment that could be made, consistently with the finding of the jury, could I properly give judgment for the plaintiff.

It was contended on his behalf that this was a case in which an action for trespass would have lain before the Judicature Acts, and this contention was mainly founded on certain *dicta* which, until considered with reference to the cases in which they were uttered, seem to support that contention; but no decision was cited, nor do I think that any can be found, going so far as to hold that if A. is injured by a shot from a gun fired at a bird by B., an action for trespass will necessarily lie, even though B. is proved to have fired the gun without negligence, and without intending to injure the plaintiff. The jury having found that there was no negligence on the part of the defendant, the most favourable way in which it is now possible to put the case for the plaintiff is to consider the action as brought for a trespass, and to consider that the defendant has put upon the record a defence denying negligence and specifically alleging the facts sworn to by his witnesses, which the jury must be considered to have found proved, and then to consider whether those facts, coupled with the absence of negligence established by the jury, amount to an excuse in law.

The earliest case relied upon by the plaintiff was one in the Year-book (21 Hen. 7, p. 28a), which is referred to by Grose, J., in the course of argument in *Leame* v. *Bray*, 3 East, 593, to be mentioned presently, in these words:—"There is a case put in the Year-book (21 Hen. 7, p. 28a), that where one shot an arrow at a mark which glanced from it and struck another, it was holden to be a trespass." On turning to the case in the Year-book it appears that the passage in question was a mere *dictum* of Rede, who was at the time (1506) either a judge of the King's Bench or Court of the Common Pleas, in a case of a very different kind from that now in question, and it only amounts to a statement that an action of trespass may lie even where the act done by the defendant is unintentional. The words relied on are, "Mes ou on tire a les buts et blesse un homme coment que est incontre sa volont; il sera dit un trespassor incontre son entente." But in that very passage Rede makes observations which show that he has in his mind cases in which that which would be *primâ facie* a trespass may be excused.

The next case in order of date relied upon for the plaintiff was *Weaver* v. *Ward*, decided in 1617, and reported in Hobart, p. 134. There is no doubt that that case contains *dicta* which *per se* would be in favour of the plaintiff, but it also contains the following summing up of the law applicable to cases of unintentional injury by acts which are *primâ facie* trespasses:—"Therefore, no man shall be excused of a trespass except it may be judged utterly without his fault," showing clearly that there may be such cases. That case, after all, only decided that when plaintiff and defendant were skirmishing as soldiers of the trainband, and the one *casualiter et per infortuniam et contra voluntatem suam* (which must be translated accidentally and involuntarily) shot the other, an action of trespass would lie unless he could show that such involuntary and accidental shooting was done under such circumstances as utterly to negative negligence. Such cases may easily be supposed in which there would be no two opinions about the matter, but other cases may—as the present case did—involve considerable conflicts of evidence and opinion which until recently a jury could only dispose of.

The case of *Gibbons* v. *Pepper*, 1 Lord Raymond 38, decided in 1695, merely decided that a plea showing that an accident caused by a runaway horse was inevitable was a bad plea in action of trespass—because if inevitable that was a defence under the general issue. It was a mere decision on the pleading, and laid down nothing as regards the point raised in the present case. The case of *Gibbons* v. *Pepper* is also reported in 4 Mod. 405, and the concluding words of the judgment, which show clearly the *ratio decidendi* of that case, are these:—"He should have pleaded the general issue, for if the horse ran away against his will he would have been found not guilty, because in such a case it cannot be said with any colour of reason to be a battery in the rider." The more modern cases of *Wakeman* v. *Robinson*, 1 Bing. 213, and *Hall* v. *Fearnley*, 3 Q. B. 919, lay down the same rule as regards the pleading point, though the former case was also relied upon as an authority by way of *dictum* in favour of the plaintiff, and the latter may fairly be relied upon by the defendant, for Wightman, J., in his judgment explains *Wakeman* v. *Robinson* thus:—"The act of the defendant—viz., driving a cart at the very edge of a narrow pavement on which the plaintiff was walking so as to knock him down—was *primâ facie* unjustifiable, and required an excuse to be shown. When the motion was first made I had in my recollection the case of *Wakeman* v. *Robinson*. It was there agreed that an involuntary act might be a defence on the general issue. The decision, indeed, turned on a different point, but the general proposition is laid down. I think the omission to plead the defence has deprived the defendant of the benefit of it and entitled the plaintiff to recover." But in truth neither case decided whether, where an act such as discharging a gun is voluntary, but the result injurious, without negligence, an action of trespass can, nevertheless, be supported as against a plea pleaded and proved, which the jury find to be established to the effect that there was no negligence on the part of the defendant. The case of *Underwood* v. *Hewson*, 1 Strange, 596, decided in 1723, was relied on for the plaintiff. The report is very short:—"The defendant was uncocking a gun and the plaintiff

standing to see it, it went off and wounded him, and at the trial it was held that the plaintiff might maintain trespass. Strange *pro defendente*." The marginal note in Nolan's edition of 1795—not necessarily Strange's own composition—is this, "Trespass lies for an accidental hurt," and in that edition there is a reference to Buller's N.P. On referring to Buller (p. 16), where he is dealing with *Weaver* v. *Ward*, he writes as follows:—"So it is no battery if one soldier hurts another in exercise; but if he plead it he must set forth the circumstances so as to make it appear to the court that it was inevitable and that he committed no negligence to give occasion to the hurt, for it is not enough to say that he did it *casualiter et per infortuniam contra voluntatem suam*, for no man shall be excused of a trespass unless it be justified entirely without his default—and therefore it has been holden that an action lay where the plaintiff, standing by to see the defendant uncock his gun, was accidentally wounded."

On referring back to *Weaver* v. *Ward* I can find nothing in the report to show that the court held that in order to constitute a defence in the case of a trespass it is necessary to show that the act was inevitable. If inevitable, it would seem that that was a defence under the general issue, but a distinction is drawn between an act which is inevitable and an act which is excusable, and what *Weaver* v. *Ward* really lays down is that "no man shall be excused of a trespass except it may be judged utterly without his fault." *Day* v. *Edwards*, 5 T. R. 648, in 1794, merely decides that where a man negligently drives a cart against the plaintiff's carriage, the injury being committed by the immediate act complained of, the remedy must be trespass, and not case.

But the case on which most reliance was placed by plaintiff's counsel was *Leame* v. *Bray*. That was an action of trespass in which the plaintiff complained that the defendant with force and arms drove and struck a chaise which he was driving on the highway against the plaintiff's curricle, which plaintiff's servant was driving, and by means thereof the servant was thrown out and the horses ran away, and the plaintiff, who jumped off to save his life, was injured. The facts stated in the report include a statement that "the accident happened owing to the defendant, on a dark night, driving his carriage on the wrong side of the road, and the parties not being able to see each other, and that if the defendant had kept his right side there was ample room for the carriages to have passed without injury." The report goes on to state:—"But it did not appear that blame was imputable to the defendant in any other respect as to the manner of his driving. It was, therefore, objected for the defendant that, the injury having happened from negligence and not wilfully, the proper remedy was by an action in the case and not of trespass *vi et armis*, and the plaintiff was thereupon nonsuited."

On the argument of the rule to set aside the nonsuit, the whole discussion turned upon the question whether the injury was "immediate from the defendant's act or consequential only from it," and in the result the nonsuit was set aside. But it clearly appears from the report that there was evidence upon which the jury might find negligence, and, indeed, the defendant's counsel assume it in the very objection which prevailed with Lord Ellenborough when he nonsuited the plaintiff. There is nothing in any of the judgments to show that if in that case a plea had been pleaded denying any negligence, and the jury had found that the defendant was not guilty of any negligence, but (for instance) that the accident happened wholly through the darkness of the night rendering it impossible to distinguish one side of the road from the other, and without negligence on either party, the court would have held that the defendant would have been liable either in trespass or in case.

All the cases to which I have referred were before the Court of Exchequer in 1875 in the case of *Holmes* v. *Mather*, 23 W. R. 861, L. R. 10 Ex. 261, and Bramwell, B., in giving judgment in that case, dealt with them thus:—"As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough. If the act that does an injury is an act of force *vi et armis* trespass is the proper remedy (if there is any remedy) where the act is wrongful either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons no action is maintainable, though trespass would be the proper form of action if it were wrongful; that is the effect of the decisions." This view of the older authorities is in accordance with a passage cited by Mr. Dickens from Bacon's "Abridgement—Trespass" (p. 706), with a marginal reference to *Weaver* v. *Ward*, where the word "inevitable" does not find a place. "If the circumstance which is specially pleaded in an action of trespass does not make the act complained of lawful (by which I understand justifiable even if purposely done to the extent of purposely inflicting the injury, as, for instance, in a case of self-defence), and only makes it excusable, it is proper to plead this in excuse, and it is in this case necessary for the defendant to show not only that the act complained of was accidental, but likewise that it was not owing to neglect or want of due caution."

In the present case the plaintiff sued in respect of an injury owing to defendant's negligence, and there was no pretence for saying that it was intentional so far as any injury to the plaintiff was concerned. It was argued, nevertheless, inasmuch as the plaintiff was injured by a shot from the defendant's gun, that was an injury owing to an act of force committed by the defendant, and therefore an action would lie. I am of opinion that this is not so, and that to any statement of claim which the plaintiff could suggest the defendant must succeed, if the defendant pleaded the facts sworn to by the witnesses for the defendant in this case, and the jury believing those facts, as they must be taken by me to have done, as regards negligence. In other words, I am of opinion that, if the case is regarded as an action on the case for an injury by negligence, the plaintiff has failed to establish that which is the very gist of such an action. If, on the other hand, it is turned into an action of trespass, and the defendant is (as he must be) supposed to have pleaded the plea denying negligence and establishing that the injury was accidental in the sense above explained, the verdict of the jury was equally fatal to the action. I am, therefore, of opinion that I am bound to give judgment for the defendant.

Solicitor for the plaintiff, *Fawssett*.

Solicitors for the defendant, *Smith, Stenning, & Croft*.

Q. B. Div. (Lord Coleridge, C.J., and Wills, J.) June 20, 1890.

FENTON v. BLYTHE.
COLLARD (CLAIMANT). (a.)

Bill of sale—Registration—Non-re-registration—Avoidance ab initio—*Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 41), *s.* 11—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 8.

A bill of sale, duly registered, had been granted in 1884. *It was not, however, re-registered within five years as required by section* 11 *of the Bills of Sale Act*, 1878.

Held, that, having regard to sections 3 *and* 8 *of the Bills of Sale Act*, 1882, *the effect of non-re-registration was to render the bill of sale void as between the parties to it, and not merely void as against the persons enumerated in section* 11 *of the Act of* 1878.

Appeal from his Honour Judge Eddis, sitting at Clerkenwell County Court.

This was an interpleader issue arising out of the following facts:—The claimant Collard had advanced money to the defendant on the security of two bills of sale having reference to the same goods, but at different times and in different places. The first bill of sale had been executed on the 27th of September, 1884, and had been duly registered within seven days, but the defendant had failed to renew the registration of it at the expiration of the five years as required by section 11 of the Bills of Sale Act, 1878. The same parties subsequently executed a second bill of sale upon the same security. Upon a seizure by the sheriff at the instance of the plaintiff, an execution creditor, and at the hearing of the issue as remitted to the county court, it was contended, on behalf of plaintiff, that the second bill of sale was void on the ground that the grantor was not "the true owner" of the goods as required by section 5 of the Amendment Act, 1882, since he had previously parted with the property in the goods under the first bill of sale; that the first bill of sale, although not re-registered, remained in force as between the grantor and grantee, but that, it being void as against strangers for want of such re-registration, the execution creditor was entitled to seize the goods. It was also contended, on behalf of the plaintiff, that, if the first bill was void, the consideration in the second bill was not truly stated, and that it was, consequently, also void. The judge decided against the plaintiff on the second ground.

W. J. Noble, for the execution creditor.—The decision of the judge amounts to a judgment in favour of the plaintiff, since his finding that the consideration was truly stated in the second bill becomes immaterial if he has found that the first bill was in existence as between the parties. In that case the goods were not the property of the grantor at the time of the second bill, and as regards the first bill it is void as against the execution creditor for want of re-registration.

Edward Pollock, for the claimant.—By section 11 of the principal Act, 1878, "the registration of a bill of sale must be renewed once at least everyfive years; and if a period of five years elapses from the registration or renewed registration without renewal . . . the registration shall be void." If not so renewed the bill of sale becomes void. The principal Act must, by section 3 of the Amendment Act, 1882, be read with the Amendment Act, and though by that section it is not to apply to a bill of sale duly registered before the commencement of the latter Act, yet here the first bill of sale was registered subsequent to the latter Act. It is void for want of renewal of registration. Therefore the second bill is good, and the judge has found in the claimant's favour upon that ground.

Noble, in reply.—The first bill of sale was "duly attested and registered under the principal Act within seven clear days after the execution thereof," as required by section 8 of the Amendment Act, 1882. No other section in the latter Act affects it. Section 11 of the principal Act simply enacts that the registration, not the bill itself, shall be void if not renewed. The bill remains a valid security between the parties, and is only void against strangers. It is void, therefore, against the present execution creditor, but he is entitled to argue that it is a good and existing security as between the parties to it, and for that very reason it invalidates the second bill of sale between the same parties on the same security.

Lord COLERIDGE, C.J.—The point taken is an ingenious one, and for a time I was myself beguiled by its ingenuity under the impression that the first bill of sale had been registered under the principal Act previous to the Amendment Act. But that is not so. Now the two Acts are expressly stated in section 3 of the latter Act to be treated as one Act so far as is consistent with their tenor. The Amendment Act is to be read into the principal Act, and in that process may absorb one or other of what would otherwise be distinct provisions of the earlier Act. Under the principal Act the bill of sale was to be registered within seven clear days of its execution, otherwise it was void as against certain persons, though not as between the parties executing it. Then comes section 11 of that Act, which requires re-registration, or the same consequences, as from absence of registration originally, must ensue. This bill in question, however, was made subsequent to the Amendment Act of 1882. In a sense it was registered under the principal Act of 1878, because section 8 of the Amendment Act so enacts, but then section 3 of the latter Act enacts that this Act "is, so far as is consistent with the tenor thereof, to be construed with the principal Act." By this latter Act it is provided that bills of sale are to be void as against everybody if not registered, and just as non-registration makes a bill of sale void under this Amendment Act, so does non-re-registration. The Acts are not to be construed together so much as to be read together, one into the other. Under the principal Act the bill has to be registered within seven days, and if kept back for five years to be re-registered; under the Amendment Act a bill is made void as against everybody if non-registered, and must, therefore, be void if non-re-registered. I think the judge was right, and this appeal must be dismissed.

WILLS, J.—I am of the same opinion. Assume that the Amendment Act of 1882 was not in existence, then it is perfectly clear that the effect of absence of re-registration under section 11 of the principal Act of 1878 is simply to put parties back into the same position as they would be under that Act if the bill had not originally been registered; that is to say, the bill would be void only as against strangers, but a good security as between the parties. Then comes the Amendment Act, 1882, enacted with the express purpose of sweeping away all these distinctions and making bills of sale absolutely void as against everybody if not registered. If a bill of sale be not then re-registered it must be treated just as if it had never been registered, with the effect that it is void as against everybody under the provisions of the Amendment Act. A bill of sale made after that Act must be either good altogether or bad altogether under the

(a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

provisions of that Act unless you can bring the bill altogether under the earlier Act, but you cannot use different sections of the different Acts to bolster up a bill of sale in one respect, whilst it is deficient under another.

Appeal dismissed.

Solicitors for the appellant, *Geare, Son, & Pease*, for *Fairburn*, Sheffield.

Solicitor for the respondent. *W. Burchell.*

Prob. Div. & Adm. Div. Probate. } May 20, 1890.

In the Goods of MARY HORNBUCKLE. (*a.*)

Probate—Married woman—Will of real estate—Exercise of power of appointment and devise—Appointment of executors—Right to probate—Existing grant of administration.

A married woman, having a power of appointment over, and being absolutely entitled to, real estate subject to the exercise of such power, by her will appointed and devised the same, and appointed executors. She had no personal estate, and her will did not purport to dispose of any. Her husband obtained a grant of administration to her estate, on the ground that she had died intestate, except as to realty. One of the devisees under the will applied for probate, the executors other than the husband having renounced or died.

Held, that the devisee was entitled to the grant, but that the court could not make a grant to him until the existing grant to the husband was revoked.

Motion for a grant of administration with the will annexed of the estate of Mary Hornbuckle, deceased, to one of the devisees under the will.

By deed executed December 23, 1863, Mary Hornbuckle was seised of and entitled to certain real estate with a power of appointment to the use of such persons as she might appoint, and in default of appointment "to the sole use and benefit of the said Mary Hornbuckle, her heirs and assigns, and for her own use and benefit, free from any control of her husband."

By her will, dated December 24, 1863, she devised this estate to her husband and children, and purported to act not only in pursuance of the power of appointment before referred to, but in pursuance of all powers enabling her so to do; and she appointed three executors, Francis Hornbuckle, her husband, and two others, one of whom renounced, and the other died. The will did not dispose of any personal property, and the deceased had none. She died in March, 1864, and in July, 1864, a grant of administration was made to Francis Hornbuckle, her husband, on the ground that she had died intestate, except as to realty.

E. Ford, in support of the application.—Inasmuch as the testatrix was possessed of the real property absolutely, she was in the position of a *feme sole*, and a will made by a man or *feme sole* disposing of realty only, has been held entitled to probate if it contains an appointment of executors: *In the Goods of Jordan*, 16 W. R. 407, L. R. 1 P. & D. 555. The case of *O'Dwyer* v. *Geare*, 1 S. & T. 465, 8 W. R. Prob. Dig. 7, is distinguishable, as there the testatrix had only a power of appointment. See also *Brownrigg* v. *Pike*, 30 W. R. 567, 7 P. D. 61. If the existing grant to the husband is considered an objection, this motion should stand over in order that an application may be made to revoke such grant.

Searle, for F. Hornbuckle, referred to *In the Goods of Jane Barden*, L. R. 1 P. & D. 325, 15 W. R. Prob. Dig. 19. The testatrix ought to have exercised the power of appointment to herself in order to bring this case within *In the Goods of Jordan*. Moreover, there cannot be two grants, the court has made one to the husband already, and that grant cannot be revoked on motion, it must be by action.

BUTT, J.—I do not see that anything will be gained by allowing this motion to stand over, although the cases show that where a man or *feme sole* dies devising by will real property only, but appointing an executor, that executor is entitled to have the will proved; that would have no application in the case of a married woman merely appointing under a power given by deed. But in this case the testatrix not only had such power, but also a vested interest in the real property apart from that power, and she really exercised, not only what rights she had under the power, but the rights she had beyond it. She was, therefore, *qua* this property in the position of a *feme sole*. But for one circumstance I should, therefore, be prepared, on the authority of the cases cited, and especially having regard to the decision of Hannen, P., in *In the Goods of Tomlinson*, 30 W. R. 61, 6 P. D. 209, where he points out the real principle on which the court should act, to hold the applicant entitled to probate of this will. But there is this difficulty, that administration of this estate has already been granted to the husband. Under the circumstances it appears to me impossible to make a grant to anyone else while that grant remains unrevoked. The application must be refused.

Grant refused.

Solicitors for the applicant, *Pitman & Sons.*

Solicitors for F. Hornbuckle, *Dangerfield & Blythe.*

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. Admiralty. } May 15, 1890.

"THE STAKESBY." (*a.*)

Shipping—Damage—Regulations for Preventing Collisions at Sea, art. 11—Fixed stern light.

Article 11 of the Regulations for Preventing Collisions at Sea provides that "a ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light." This article is not necessarily infringed where it is proved, in an action of damage, that a vessel required to show a white stern light under its provisions has shown from her stern to a vessel overtaking her a fixed white light.

This was an action of damage brought by the owners of the barque *Dilbhur*, of 1,280 tons, against the screw steamer *Stakesby* and her freight to recover the damage sustained by *The Dilbhur* on the night of the 2nd of March, 1889, when that vessel was in the North Sea in tow of the steamtug *Cruiser*, and was run into and damaged by *The Stakesby*.

The action was now heard before the President and two of the Elder Brethren of the Trinity House.

Barnes, Q.C., and *Raikes*, for the plaintiffs.

Sir W. Phillimore and *Aspinall*, for the defendants.

The following cases were cited:—*The Palinurus*,

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

36 W. R. 768, 13 P. D. 14; *The Imbro*, 37 W. R. 559, 14 P. D. 73.

It appeared from the evidence that at the time of the collision a white light was fixed at the stern of *The Dilbhur* in such a position that it would be visible to vessels having a good look out and overtaking *The Dilbhur* from astern within the area over which her side lights were not visible; and that when risk of collision was involved *The Dilbhur* was "being overtaken" by *The Stakesby* within the meaning of article 11 of the Regulations for Preventing Collisions at Sea, which article provides that "a ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light."

On the question whether *The Dilbhur*, having carried a fixed stern-light, infringed the 11th article of the Regulations for Preventing Collisions at Sea, and was consequently to be deemed to be in fault for the collision, under the 17th section of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), the President delivered the following judgment:—

HANNEN, P.—A question has been raised whether there has been an infringement of article 11 of the Regulations for Preventing Collisions at Sea on the part of *The Dilbhur*.

I observe that Butt, J., in his judgment in *The Imbro* refers to my decision in *The Palinurus*, but, from my recollection of that case, I do not think I had this point present to my mind, and I do not think I have given any decision upon it. Two things occur to me. First, that it cannot be that the mere fixing, of the white light spoken of in article 11 of the Regulations for Preventing Collisions at Sea is an infringement of the rule, because that would lead to this result, that the rule could only be complied with by a waving of the light; but there is nothing in it pointing to anything of that sort. The question one has to consider is, whether or not, in the state of navigation in the place where the collision occurred, it was proper that there should be a permanent light exhibited to overtaking vessels. It appears that there were a number of vessels about, and I am advised by the Trinity masters that it was not improper to have a permanent stern light on this vessel to be a guide to the vessels which were passing. It has also to be remembered that several vessels had previously passed, which would also need the assistance of a stern light. This opinion is in accord with my view. I am, therefore, of opinion that there has not been in this case an infringement of the article I have referred to. I should be inclined to construe this article thus: That the flashing of a light, which is a thing done on a sudden, is sufficient; but not, therefore, that the exhibition of a fixed light is an infringement of the article. The circumstances here justified something more than the mere flashing of a light. I should also add that there was such a bad look out on *The Stakesby* that it was not the difference between a flashing and a fixed light which conduced to the collision. If there had been a good look on *The Stakesby* the stern light and the tug's light would have been seen sooner than they were. I therefore pronounce *The Stakesby* alone to blame.

Solicitors for the plaintiffs, *Farlow & Jackson*.

Solicitors for the defendants, *Thomas Cooper & Co*

Court of Appeal.

From Chan. Div. Nov. 5, 6, 20.

TAYLOR v. RUSSELL. (a.)

Mortgage—Priority—Tacking.

A subsequent mortgagee, who, at the time he advanced his money, had no notice of any prior equitable mortgage, can, by getting in the legal estate, even after notice of the existence of a prior equitable mortgage, thereby protect himself against any claim for priority on the part of such prior equitable mortgagee, provided that the legal estate has been obtained without the violation of any trust or equity in regard to the prior equitable mortgagee against whom the legal estate is set up. The fact that the conveyance of the legal estate constituted a breach of trust as against some third person does not prevent the holder of the legal estate getting the benefit of its protection in an action for a declaration of priority brought against him by the prior equitable mortgagee.

Harpham *v.* Shacklock, 30 *W. R.* 49, 19 *Ch. D.* 207, *explained and distinguished.*

Decision of Kay, J. (*reported* 38 *W. R.* 663), *reversed.*

Appeal from the decision of Kay, J., reported 38 W. R. 663.

The facts of the case as stated in the judgment of the Court of Appeal are as follows:—In the year 1862 certain land was, under the will of one Robert Surtees, limited to legal uses in strict settlement, under which Robert L. Surtees and Henry Edward Surtees were successively tenants for life. The testator had conferred on his trustees, Maude and Wilkinson, powers of sale and mortgaging, and of revoking and appointing uses to carry any sale or mortgage into effect. In 1862 Messrs. Maude and Wilkinson mortgaged certain lands to Sir Francis D. Legard to secure £9,000. These lands included the property in question, together with much other property; and by some accident the deeds of the property in question remained in the custody of the Surtees trustees. It appears that the fact that the land in question was included in this mortgage was entirely forgotten, and accordingly, by a deed of the 30th of January, 1883, Wilkinson, the surviving trustee of the Surtees will, together with Henry Edward Surtees, the tenant for life, conveyed the land in question to one Toward for valuable consideration, and Wilkinson covenanted in the usual terms that he had done no act whereby the land was incumbered except by a lease mentioned in the conveyance. On completion Toward received the title deeds of the land in question. Toward, having procured this conveyance, set himself to concoct a forged deed purporting to convey the same land to himself, in order to enable him to effect two separate mortgages of it, one under the genuine and one under the forged title; accordingly he produced a document which bore date November 3, 1882, and purporting to be made between Mr. Smithson and the defendant Russell, as trustees of the will of one Samuel Smithson, Mr. Smithson as tenant for life under that will, and Toward himself. It recited a title under the will of Smithson, and it purported to convey the land in question for valuable consideration. The parties named in this forgery were real persons. There had been a Samuel Smithson, a testator who was seised of an estate near the land in question. Smithson and Russell were the trustees of that will, and Smithson was the tenant for life under it. Armed with this forged instrument, Toward obtained £2,500 from the plaintiffs on the security of a mortgage of February

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

15, 1883, by which Toward, deducing title from Smithson's trustees, conveyed the land to the plaintiffs; at the same time he deposited with the plaintiffs the forged deed of November 3, 1882. In this way the plaintiffs became possessed of a good equitable estate under Toward. Subsequently Toward borrowed money from a bank on a mortgage of the same land, deducing the true title. The subsisting incumbrance was, on October 20, 1887, paid off by the defendant Russell, and Toward thereupon executed to him a mortgage deducing the true title, and deposited with him the genuine title deed of January 30, 1883. In the year 1888 Toward absconded, and, his misdeeds coming to light, the defendant applied to Colonel Duncombe and Mr. Cayley, the trustees of Sir Francis Legard's will, in whom was then vested the mortgage of 1862, to convey to him the legal estate in the land in question, and an arrangement was come to between the Legard trustees, Mr. Wilkinson and Mr. Jennings, then the Surtees trustees, and the defendant, to the effect that the Legard trustees, who were satisfied of the sufficiency of the other mortgaged property to answer their claim, should convey the legal estate in the land in question to the Surtees trustees upon the express condition that the Surtees trustees would immediately thereafter convey the same to the defendant Russell. This arrangement was carried into effect by two deeds, the first, dated November 21, 1888, by which the Legard trustees conveyed the land in question unto and to the use of Wilkinson and Jennings in fee simple to the uses upon the trusts and subject to the powers of the Surtees will, the tenant for life under the Surtees will being a party to this deed; the second, dated November, 26, 1888, by which Wilkinson and Jennings conveyed the land to the defendant Russell, who thus at last acquired the legal estate which had hitherto been outstanding.

The plaintiffs having brought this action to realize their mortgage security, and the property in question not being sufficient to satisfy both the plaintiffs' and the defendant's mortgages, the plaintiffs claimed that they were entitled to priority over the defendant on the ground that their mortgage was prior in point of time, and that the defendant could not rely on the legal estate because it had been got in through a breach of trust.

The defendant relied, first, on the possession of the legal estate; and, secondly, apart from that, that the plaintiffs had been guilty of such negligence in taking their mortgage as to justify their postponement to the mortgage of the defendant.

Kay, J., decided in favour of the plaintiffs on both points. He held that the plaintiffs had not been guilty of such negligence as to make them responsible for the fraud subsequently committed by the mortgagor upon the defendant; and that the defendant had only got possession of the legal estate by availing himself of a breach of trust committed against the plaintiffs by the persons conveying the legal estate to the defendant.

The defendant appealed.

Scott Fox, for the appellant.—First, even before November 26, 1888, the date of the conveyance of the legal estate to the defendant, the defendant had a better equity than the plaintiffs, because the plaintiffs were guilty of negligence in omitting to require Toward to produce proper evidence that the property which he conveyed to them by the deed of February 15, 1883, was identical with the property passing under Smithson's will, and also in not requiring production of the earlier title deeds, as to which the forged deed of November 3, 1882, contained a covenant for production. In a contest between two mere equitable incumbrancers it is not necessary, in order to cause postponement of the earlier of the two, to prove the same amount of negligence as must be shown to postpone a legal mortgagee: *Waldron* v. *Sloper*, 1 Drew. 193; *Worthington* v. *Morgan*, 16 Sim. 547; *National Provincial Bank* v. *Jackson*, 34 W. R. 597, *per* Cotton, L.J., at p. 600, 33 Ch. D. 1, at p. 13. This latter case was overlooked by Kay, J., in his judgment, but it has been followed by North, J., in *Farrand* v. *Yorkshire Banking Co.*, 37 W. R. 318, 40 Ch. D. 182. [FRY, L.J., referred to *Bickerton* v. *Walker*, 34 W. R. 141, 31 Ch. D. 151.] But, in fact, the negligence of the plaintiffs was gross enough to have justified their postponement even if they had been legal mortgagees: *Peto* v. *Hammond*, 30 Beav. 495, 11 W. R. Ch. Dig. 119; *Northern Counties of England Fire Assurance Co.* v. *Whipp*, 32 W. R. 626, 26 Ch. D. 482. Secondly, the defendant having got in the legal estate, he is entitled to hold it until his incumbrance is discharged: *Blackwood* v. *London Chartered Bank of Australia*, 22 W. R. 419, L. R. 5 P. C., at p. 111; *Bates* v. *Johnson*, 7 W. R. 512, 1 John. 304. The fact that the legal estate has been got in by a voluntary conveyance makes no difference, for the equity to hold it arises, not by reason of anything being paid for the getting in of the legal estate, but by reason of its being got in without any breach of trust: *Goleborn* v. *Alcock*, 2 Sim. 552; *Churchil* v. *Grove*, 1 Chan. Cas. 35; *Holt* v. *Mill*, 2 Vern. 279; *Pilcher* v. *Rawlins*, 20 W. R. 281, L. R. 7 Ch. App. 259. Legard's trustees were not satisfied mortgagees or bare trustees, and therefore *Harpham* v. *Shacklock*, 30 W. R. 49, 19 Ch. D. 207, does not apply, *Dodds* v. *Hills*, 2 H. & M. 424, 13 W. R. Ch. Dig. 57. Surtees' trustees only got the legal estate in pursuance of a bargain by which they were bound to transfer it to the defendant, and they never held the legal estate as trustees for the plaintiffs.

He also referred on this second point to *Sadler* v. *Bush*, 2 Vern. 30; Coote on Mortgages, 5th ed., p. 932.

Levett (*Haldane*, *Q.C.*, with him), for the respondents, the plaintiffs.—A mortgagee is, except as incident to his security, a trustee of the estate for the mortgagor, and cannot deal with the estate except by sale, or transfer to the mortgagor, and in no other way can he divest himself of the estate: *Matheson* v. *Clarke*, 3 Drew. 3; and therefore Legard's trustees had no right to voluntarily transfer the estate in the way they did; the moment that Legard's trustees agreed to release this part of the property from their mortgage debt, that moment they became with respect to it satisfied mortgagees, and, therefore, trustees for the plaintiffs: *Cholmondeley* v. *Clinton*, 2 J. & W. 1, at p. 185. It was a breach of duty on the part of Wilkinson, the surviving Surtees trustee, to be a party to any bargain which prejudiced Toward or the plaintiffs, who claim through Toward, because Wilkinson had covenanted to convey to Toward free from incumbrance, and when Wilkinson got the legal estate from Legard's trustees he was bound to hold it for the benefit of Toward—*i.e.*, for the plaintiffs who now represent Toward. Again, the Surtees trustees were only trustees with power of sale or mortgage for the purposes declared by the will of Surtees, and it was therefore a breach of trust on their part to take a conveyance of the legal estate in fee from Legard's trustees for the purpose of transferring it to the defendant. The defendant knew the position of the Surtees trustees, and cannot benefit by what he knew to be a breach of trust: *Harpham* v. *Shacklock*; *Mumford* v. *Stohwasser*, 22 W. R. 833, L. R. 18 Eq. 556. The plaintiffs were not guilty of wilful or unjustifiable negligence. The title of Smithson with respect to property quite close to the property now in question had been investigated only a short time

before, and the plaintiffs were desirous of saving expense, and, therefore, did not insist on a reinvestigation of title. The defendant must show such wilful neglect on the part of the plaintiffs as to estop the plaintiffs from relying on the priority of their equitable mortgage: *Cory* v. *Eyre*, 1 De G. J. & S., at p. 167; *Dixon* v. *Muckleston*, 21 W. R. 178, L. R. 8 Ch. App. 155.

Scott Fox replied.

Nov. 20.—The following written judgment of the COURT (Sir JAMES HANNEN and BOWEN and FRY, L.JJ.) was read by

FRY, L.J.—The plaintiffs in this action have obtained from Kay, L.J., when a justice of the High Court, a declaration that a mortgage security vested in them is entitled to priority over a mortgage vested in the defendant. The defendant has appealed. The questions for decision arise from the conjoint operation of an honest blunder and a fraud. [The Lord Justice then stated the facts, as above, and proceeded:—] The defendant, being the legal owner of the property, is entitled to priority over the plaintiffs, who are merely equitable owners, unless the plaintiffs have some equity to deprive the defendant of that benefit. It has not been argued that the defendant has assisted in, or connived at, any fraud, or constituted Toward his agent, so as to become responsible for his fraud, but it is argued that the defendant procured the conveyance of the legal estate under circumstances which preclude him from claiming the benefit of it in a court of equity. In considering this question we must bear in mind that the defendant seeks no assistance from equity; he takes his stand on his legal title, and the plaintiffs must fail unless they show an equity to deprive the defendant of his legal right.

It has been argued, in the first place, that the plaintiffs, having an equitable estate prior in time to that of the defendant, had a right, and a better right than the defendant, to call on Wilkinson to assign the legal estate; that on November 21, 1888, this right attached; and that the defendant, taking the legal estate with knowledge of this equitable claim of the plaintiffs, cannot set it up against them.

It is not necessary to consider whether, if Wilkinson and his co-trustee had obtained the legal estate free from any trust or condition, this contention ought to prevail; but they did not so obtain it; it came to them from the diligence and exertions of the defendant, and it came to them clothed with a trust or subject to a condition to convey it to the defendant. Even if they ought never to have so taken the legal estate (which we see no reason to affirm), they could not, when they had taken it, refuse to perform the conditions on which they took it without a gross violation of confidence and breach of good faith, of which no equity could, in our judgment, require them to be guilty. Furthermore, it is clear that notice of the existence of an equity prior in date to that of the person who obtains the legal estate does not prevent that person from claiming its benefit when such notice is received, not before, but after, the creation of the equitable estate of him who gets in the legal estate. "There is nothing more familiar," said Lord Selborne, in expressing the opinion of the Judicial Committee of the Privy Council in the case of *Blackwood* v. *London Chartered Bank of Australia* "than the doctrine of equity that a man who has *bonâ fide* paid money without notice of any other title, though at the time of the payment he, as purchaser, gets nothing but an equitable title, may afterwards get in a legal title if he can, and may hold it, though during the interval between the payment and the getting in the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself." "In every case," said Lord Hatherley, in *Bates* v. *Johnson*, "down to *Peacock* v. *Burt*, 4 L. J. N. S. Ch. 33, which is probably one of the most striking of the kind, it has been held that when once a subsequent incumbrancer, who, by advancing his money without notice of prior mesne incumbrances, stands in an equally good position with them in every respect except as regards time, gets in the legal estate, he has a right to avail himself of that legal estate until the whole of his incumbrance is discharged."

An argument substantially the same as that which we have already discussed was presented by the plaintiffs' counsel in a slightly different form. Wilkinson, by the deed of January 30, 1883, covenanted with Toward and his assigns that he had not incumbered; in fact, he had incumbered, and it is urged that when he got in that incumbrance, and had the legal estate vested in him, he was bound to use it to make good, in favour of the plaintiffs as assigns of Toward, the erroneous representation contained in his covenant. We cannot accede to this argument. Wilkinson may or may not be liable to damages on his covenant, but he could never be called on to make it good by conveying to the plaintiffs an estate which he had consented to take on an express trust for the defendant; and, furthermore, the defendant, as well as the plaintiffs, was an assign of Toward, and seems to have had an equal equity with the plaintiffs to require Wilkinson to make good his statements. It was, in the next place, urged on us that the Surtees trustees, by taking a conveyance of the legal estate to themselves and by executing the deed of November 26, were committing a breach of trust and acting in excess of their power to mortgage. The terms of this power are not before us, nor the position of the Surtees family or the interests of its members under the will; but it is before us that the transactions complained of were carried into effect by deeds, to one of which the tenant for life was a party. But, assuming that these acts were such as those who claim under the will of Mr. Surtees could complain of, it appears to us that they afford no assistance to the plaintiffs. A man may come to equity and successfully say to a defendant, "You have obtained the legal estate in breach of an equity which I possess or of a trust under which I claim, and you shall not set it up accordingly"; but a plaintiff cannot rely on some breach of trust towards third persons who assert no title to the estate and take no part in the litigation. The plaintiff to deprive the defendant of the benefit of the legal estate must rely on an equity of his own, not on that of a stranger. Some language of the late Master of the Rolls in *Harpham* v. *Shacklock* was pressed upon us as inconsistent with this view. He there said that "nothing is better settled than that you cannot make use of the doctrine of *tabula in naufragio* by getting in a legal estate from a bare trustee after you have received notice of a prior equitable claim."

The doctrine to which the learned judge referred, we understand to have been that more fully explained by Lord Eldon in *Maundrell* v. *Maundrell*, 10 Ves. 259—260, to the effect that where there is a term in gross the expressed object of which has been satisfied, the term is, according to the doctrine of equity, held upon trust for the successive equitable interests according to their priorities. It follows that if a subsequent equitable owner gets in the term with notice of the prior equity he gets it in subject to the equity of the prior equitable owner, and, consequently, is restrained from setting it up against such owner by reason of an equity vested, not in a third person, but in that prior equitable owner himself. The case of *Harpham* v. *Shacklock*, in which the late Master of

the Rolls used the language referred to, is no exception to this principle. In that case the defendants got in the legal estate and set it up against the plaintiff, who had an equity to prevent their so doing; for the legal estate was in one Peck, who had assigned his security to the defendant Shacklock, and not having surrendered the legal estate held it as trustee for Shacklock, and Shacklock, having received the plaintiff's money to pay off Peck, was a trustee for the plaintiff, so that the plaintiff, and not a stranger, had an equity to prevent the defendants setting up the legal estate. "If there is a mortgage of the inheritance," said Lord Eldon in *Maundrell* v. *Maundrell*, 10 Ves., at p. 270, "and a prior mortgagee of whose title the other has no notice, if the subsequent mortgagee can get in a term satisfied, or, according to the later cases, not satisfied, by an assignment to trustees for him, he can protect himself against the prior incumbrancer, unless there are circumstances that give that incumbrancer a better right to call for an assignment." On authority, therefore, as well as principle, we are of opinion that a trust or equity to affect the conscience of him who has got in the legal estate must be a trust or equity not in favour of some third person who may have no care or desire to insist upon it, but a trust or equity, in favour of the person against whom the legal estate is set up. The defendant was a perfectly innocent holder of the equitable estate; he clothed himself with the legal estate without notice, in our opinion, of any equity in the plaintiffs to prevent his so doing, and we see, therefore, no reason to deprive him of the benefit he has acquired. Taking this view of the case, it becomes needless for us to enter upon a discussion as to any question of negligence, or as to the relative equities of the plaintiffs and defendant. We allow the appeal.

Solicitors, *C. & S. Harrison & Co.; Iliffe, Henley, & Sweet.*

From Q. B. Div. Nov. 17.

BELL & CO. v. ANTWERP, LONDON, AND BRAZIL LINE. (*a*.)

Practice—Writ—Service out of jurisdiction—Contract—Place of payment—Ord. 11, *r.* 1 (e).

A contract which may be performed either within the jurisdiction or outside it is not a contract "which, according to the terms thereof, ought to be performed within the jurisdiction" within the meaning of ord. 11, *r.* 1 (e).

Appeal from the decision of a divisional court (Cave and Day, JJ.) setting aside an order of the judge at chambers giving leave to serve notice of writ out of the jurisdiction.

The plaintiffs were shipowners at Newcastle-on-Tyne. The defendants were a Société Anonyme carrying on business in Antwerp and having no place of business in England. The action was brought on a charter-party by which the defendants chartered the plaintiffs' ship to proceed to a loading berth in London or Antwerp and there take on board a cargo and proceed therewith to Rio de Janeiro or Santos and deliver the same where ordered afloat according to the custom of port. The charter-party provided that all lighterage should be at charterer's or consignee's risk and expense, charterers indemnifying owners from any and all lighterage on cargo at ports of discharge, bill of lading or any law or custom to the contrary notwithstanding, and that the freight (a lump sum of £5,850) should be paid as follows: £1,500 if required by charterers on unloading and right delivery at port or ports of discharge (so much as might be payable on bills of lading to be taken without recourse to the charterers), and the balance in London by charterers seven days after departure of the vessel from the last port of loading. There was a stipulation that thirty-five running days, Sundays excluded, were to be allowed the charterers for loading and discharging the cargo, and that demurrage if incurred was to be at the rate of £40 per day.

The plaintiffs sued for indemnity against lighterage expenses paid by them and demurrage incurred at the ports of discharge.

W. S. Robson and *J. P. Aspinall*, for the plaintiffs.—The court has power to allow service out of the jurisdiction under ord. 11, r. 1 (*e*), since payment ought by the terms of the contract to be made within the jurisdiction. The shipowners reside and carry on business in England, and the charterers must pay them in England for the lighterage and demurrage. Where there is no agreement as to the place of payment in a contract between persons one of whom is out of the jurisdiction, it must be taken to be part of the contract that payment should be made within the jurisdiction: *Robey* v. *Snaefell Mining Co.*, 36 W. R. 224, 20 Q. B. D. 152. Regard must be had to the surrounding circumstances in order to see whether the contract is one to be performed within the jurisdiction: *Reynolds* v. *Coleman*, 35 W. R. 813, 36 Ch. D. 453.

James Fox, for the defendants.—There is no authority to give leave to serve this notice of writ. Neither of the stipulations sued upon are contracts which must necessarily be performed within the jurisdiction.

Robson replied.

Lord ESHER, M.R.—In this case the plaintiffs, who are shipowners residing in England, bring an action against the Antwerp, London, and Brazil Line, which is a foreign company carrying on business abroad, and having no place of business in this country. The action is brought on certain parts and stipulations in a charter-party entered into by the company with the plaintiffs. There is a stipulation as to lighterage and indemnity, which is a separate contract by itself, and on which the plaintiffs may sue separately. There is another stipulation as to the payment of demurrage, and on that also the plaintiffs may sue as a separate contract. It is absurd to say that the charter-party itself is a contract to be performed in England, but the question is whether either of these separate stipulations is a contract "which, according to the terms thereof, ought to be performed within the jurisdiction" within the meaning of ord. 11, r. 1 (*e*). I will take the alleged contract for indemnity for the lighterage first. The ship was chartered to sail to Rio, which she accordingly did. The lighterage was undoubtely incurred at Rio. The particulars show that the claim in the present action is not for freight, but for lighterage, or for the indemnity from such lighterage when paid by the shipowner. The lighterage itself had, of course, to be paid at Rio and to Rio people, and if it was to be paid by the shipowner he would be obliged to pay it there. Then comes the question of the indemnity. It is said that the charterers have undertaken to indemnify the shipowner against such payment. Looking at the question apart from the rule, if the charterers are bound by such an indemnity where are they to pay the shipowner? Directly the lighterage was paid, the shipowner, if the indemnity is good, would have his cause of action perfect. The instant that it had been paid the money would be due. It might have been paid to him at Rio, but it was not. There is no place named at which it is to be

(*a*.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

payable, and, therefore, in such a case the debtor is bound to pay to the creditor his debt on demand. It is true that, unless by the terms of the contract a demand is a condition precedent, the creditor need not demand it at all except by bringing his action, and then he may say that the debtor owes him money and ought to come to him and pay him wherever he happens to be. If a debtor is bound to pay on demand, a creditor is not obliged to go to him to his ordinary place of business to make the demand. He may make the demand wherever he finds his debtor, and the debtor is bound to pay him then and there. The payment may therefore take place anywhere.

Now, to consider the bearing of ord. 11, r. 1 (*e*), upon this case. The action is brought against foreigners resident and carrying on their business abroad, and the court is asked for leave under the rule to serve them abroad with notice of the writ. The rule allows the court to give such leave if the prescribed conditions are fulfilled. The question, therefore, is whether this is a contract which ought to be performed within the jurisdiction. The court cannot break from the terms of the rule. In *Reynolds* v. *Coleman*, it is decided that it is enough if it appears from the terms of the contract, and the facts existing when the contract was made, that the contract was to be performed within the jurisdiction, and that it is not necessary for it to be stated in express terms in the contract that it is so to be performed. We must, however, construe the contract before us according to the ordinary rules. It is a contract to be performed whenever a demand for its performance is made. Therefore it cannot be said to be a contract which ought necessarily to be performed within the jurisdiction, and so it does not fall within the rule. The same is the case with regard to the contract to pay demurrage at the port of discharge. The demurrage became due directly the delay occurred, and it also was payable wherever it was demanded. Contracts which can be performed either in or out of the jurisdiction are not contracts "which ought to be performed within the jurisdiction" within the meaning of the rule.

The decision, therefore, of the Divisional Court was right, and the appeal must be dismissed.

LOPES, L.J.—I entirely agree, and I think that I need add little to the judgment of the Master of the Rolls. There is nothing to show where the performance of these contracts is to take place. It may be either within or outside the jurisdiction. I should say myself that the inference was that payment should take place at Rio, but, however that may be, it is clear that they are not contracts "which ought to be performed within the jurisdiction" within the meaning of the rule.

KAY, L.J.—I only wish to add a word as to the meaning of the rule. It has reference *primâ facie* to contracts which, by the express terms thereof, must be performed within the jurisdiction, but I entirely agree with Cotton, L.J., in *Reynolds* v. *Coleman*, that regard must be had not only to the express terms of the contract, but also to the surrounding circumstances, to see whether this is so or not, and that it is not necessary for the contract itself expressly to state that such is the case. But in the present case it is plain that neither of these contracts were such as must necessarily be performed within the jurisdiction, and therefore the rule has no application.

Appeal dismissed.

Solicitors for the appellants, *Maples, Teesdale, & Co.*, for *Leitch, Dodd, Bramwell, & Bell*, Newcastle-on-Tyne.

Solicitors for the respondents, *Parker, Garrett, & Parker.*

From Q. B. Div. Oct. 30, 31; Nov. 1.

MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF SALFORD v. LEVER. (*a*.)

Principal and agent—Bribery of agent—Action against briber to recover excess price fraudulently obtained—Right of briber to plead satisfaction by agent—Form of agreement between corporation and fraudulent agent in satisfaction of their claim against agent—Ultrà vires.

Where an agent, under the influence of bribes, persuades his principal to pay a price for goods obtained from a contractor, advancing the bribe, in excess of the price at which the contractor was in fact willing to sell, the principal has a right of action against both agent and contractor, whether jointly or severally, for two distinct and independent frauds, and it is immaterial upon which right of action he first sues. The fact that the principal, before action against the contractor, had entered into an agreement with the agent, whereby, on condition of the agent depositing securities to cover the amount of the bribes retained by him, the principal undertook to take action at the agent's request against the contractors who had advanced the bribes, and to credit the agent with the sums so recovered from the contractors by discharging his securities from liability to that amount, cannot be pleaded as a defence by the contractor, because such an agreement does not amount to the release of a joint tortfeasor, but only to the postponement of the principal's independent right of action against their agent; and (per Lord Esher, M.R.) *that, in the case of a corporation, such an agreement, binding the corporation to sue at the request of their agent, was* ultrà vires.

Appeal by defendant from Divisional Court (Denman, Charles, and Vaughan-Williams, JJ.) refusing to order a new trial.

The facts of this case and the agreement under consideration are fully set out in the argument in the court below (38 W. R. 771).

Lawson Walton, Q.C. (*Lockwood, Q.C.*, with him), for the appellant, the defendant.—The agreement between the corporation and Hunter was a release of a joint cause of action against Hunter and Lever. The learned judge had misdirected the jury, because the corporation had been cheated, not by one and then the other of the parties, but by their joint operation, and as the corporation had released one of the two parties the other was equally entitled to the release. The release was given before a defence was put in in this action. If satisfaction has been made in the case of one the joint tort is satisfied. The corporation could have realized the securities given by Hunter on the 31st of December, 1889, and that was before this defence was put in. They have practically been paid for their loss, and cannot recover it over again from Lever. Lever could plead accord and satisfaction of the claim against him at any rate of £1,500 paid by him to Hunter, and recovered by the corporation from Hunter under the terms of the agreement. The point that the agreement was *ultrà vires* was not raised at the trial by the corporation. It is not *ultrà vires*, because the corporation were bound to try and recover the amounts of which they had been defrauded, and it was not against public policy to do so. Hunter is practically suing in this action because the amount recovered is to go to the credit of his securities. If the damages which the corporation can recover are the sums which found their way into Hunter's hand, they have taken possession of these damages under the securities lodged with them by Hunter, and

(*a*.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

the defendant can claim for an account of these to be rendered in respect of their claim against him.

He cited Co. Litt. 232 a; *Brinsmead* v. *Harrison*, 20 W. R. 784, L. R. 7 C. P. 547; *Bird* v. *Randall*, 3 Burr. 1345; *Cocke* v. *Jennor*, Hob. 66; *Hilman* v. *Uncles*, Skinner, 391; and *Buckland* v. *Johnson*, 2 W. R. 565, 15 C. B. 145.

Henn Collins, Q.C., and *C. Gould*, for the respondents, the plaintiffs.—What passed between the corporation and Hunter in no way affected their rights against Lever. They had a separate cause of action against Lever either for damages for fraud or for money had and received. The mere fact that the damages could be assessed at 1s. a ton, and so amounted to the same sum as that had and received, was immaterial. If Lever had given a piece of plate to Hunter instead of the 1s. per ton the corporation could bring an action against Lever, and could also recover the plate, or its value, from Hunter as something received by him as their agent and retained from them. There is a right of action against Hunter for the bribe received and retained by him, and a right of action against Lever for money had in excess of what was really charged. The agreement did not amount to a release of Hunter, but was only a postponement of the right of the corporation to sue him. If out of a transaction, some part of which was a common fraud, there arose a separate independent right against Lever, nothing in the document of release, if it amounted to a release, could bar that independent right. The corporation did not wish to get out of their agreement with Hunter by arguing it was *ultra vires*.

They cited *Bagnall* v. *Carlton*, 26 W. R. 243, 6 Ch. D. 371; *Emma Silver Mining Co.* v. *Grant*, 11 Ch. D. 918, 27 W. R. Dig. 43; *Parker* v. *McKenna*, 23 W. R. 271, L. R. 10 Ch. App. p. 118.

Lawson Walton, Q.C., replied.

Cur. adv. vult.

Nov. 1.—Lord ESHER, M.R.—In this case the Corporation of Salford brought an action against the defendant, a coal dealer. In form the action was one of tort. What tort? The defendant, having coals to sell, bargains with the corporation through their agent, Hunter. Hunter's position as agent for the corporation would be one towards which contractors of all kinds would look. The defendant knew that it was Hunter's duty to buy coals for the corporation at any price at which he or fellow coal merchants could be induced to sell. He negotiates with Hunter for a price at which he himself chose to sell; it is immaterial whether that is the market price or not, so long as it left him the profit he desired. Hunter, however, tempts him to secure the contract by saying that he will not buy at the price defendant is willing to sell, unless the defendant will help him, Hunter, to cheat the corporation out of 1s. on every ton of coal. The plan is for the defendant to put down 1s. a ton more in his bill than the price at which he is willing to sell at a profit, but that shilling is to be returned by the defendant to Hunter, who puts it in his pocket as what is called a "commission." The word "commission" in trade covers a multitude of sins. Here it means fraud. The defendant sold coals to the corporation at the price he had chosen, including his own profit, but by the arrangement he further enabled Hunter to put down a false figure for the price, and to send in the bills covering the extra shilling, subsequently returned to Hunter by the defendant as commission or bribe. If this shilling per ton was obtained from the corporation by fraud, as undoubtedly it was, the defendant is liable to pay it back to them. What was the measure of the frauds? It is the damage of 1s. per ton. Whether that be sued for as damages, or as money had and received, it is all the same as regards the liability of the defendant. The form of action is wholly immaterial. Unless something has been done to oust the corporation from their primary rights against the defendant they are entitled to recover from him this shilling per ton fraudulently obtained from them, even although it has in fact been paid over by him to his confederate. It has been in his pocket. The defendant is liable—I will add, unfortunately liable—because he was tempted to commit this fraud by a man superior to him in position, and the authorized agent of an influential corporation. But the defendant urges that the corporation are ousted from the exercise of their primary right of action against him, first, on the ground that the money went into the hands of their own agent, and has been partly recovered from the agent by them; and, therefore, that they cannot recover the same money over again from him. Without reference, for the moment, to the validity of the agreement mentioned in this case, we must begin by asking what have the corporation got from Hunter? And on what ground? He, as their agent, received a bribe in the performance of his duties as agent. There is nothing so fraudulent as the taking of a bribe by an agent in order to carry out a breach of his duty to his principal. The law strikes direct at such a fraud. Whether it is called a bribe, commission, or what not, an agent must restore to his principals what he has received by a fraud on them. But that is a wholly separate and distinct fraud of Hunter's, as agent. Hunter might have received the money without any fraud on the part of a contractor who might have thought that he was entitled to this commission. The action of such other person is immaterial to the right of the principals to sue their agent for his fraud, whether it be by way of damages, or as money had, or on whatever plea. The foundation of their claim against him is the separate and distinct fraud by him as their agent. But how does this prevent the same principals from suing another person, not as their agent, for fraud committed by him against them? That other person cannot say, "You must not sue me until you have sued your own agent." Which action is taken first is immaterial, because there are two distinct frauds. The agent here happens to be guilty of both—of fraud against his principals and of a combination fraud by conspiring with another independent person to defraud them, but that does not affect the right of action in this case. Leaving out the question of the agreement, then, the defendant here cannot diminish the damages or absolve himself from liability by reason of the prior recovery by the plaintiffs, as principals, from their agent of bribes received in the carrying out of an independent fraud.

But the second question arises, Has the corporation entered into an agreement which prevents them suing the defendant in respect of the combined fraud by him and Hunter? It is a clear rule that if a principal releases one of two joint tort-feasors it acts as a release of the other. That is well known law. Whether such release can be pleaded under the form of award and satisfaction is immaterial. Now here it may be answered, first, that there is no agreement by the corporation to release Hunter, because this undertaking, whatever it is, between them and Hunter is not signed by them or sealed with the corporation seal. The plaintiffs declined to argue in support of this objection, but I am not sure that it is not the duty of the court to raise this objection, since it cannot be said that a fraudulent accessory ought to be assisted by the court in any way over legal difficulties. I say, then, that there is no real agreement here between the corporation and

Hunter, because it is not a document sealed with the corporation seal. But, secondly, supposing the agreement to be sufficiently valid, does it produce the effect which the defendant relies upon? Supposing this agreement to mean that the corporation undertake to bring an action against the defendant at the request of Hunter and at his expense, so that practically Hunter is bringing the action under the name of the corporation, that is no compromise by the corporation of their rights against Hunter. It would not amount to a release. It would be an absolute agreement to sue the defendant upon these terms entered into by the corporation officials on their behalf. But, taking this agreement to amount to that and to be binding, the corporation are bound by its terms to bring the action against the defendant, and whatever the agreement may say, they would be primarily liable for the costs if the action should fail. They would be giving away their independence of action and pledging the ratepayers to pay costs only on the chance of their subsequent recovery from Hunter. Under the circumstances I, speaking for myself, am of opinion that the agreement is wholly *ultrà vires*. The corporation had no mandate to enter into such an agreement, and I say that, even if it could be said to be a binding agreement under seal, it would be *ultrà vires*. But, even if under seal and not *ultrà vires*, is this agreement a release of Hunter? It is not, nor does it pretend to be, a release of Hunter, and, if it did, I say again, it is not a valid one under seal, for certainly that objection must be raised at this point, if not pressed at first. It is not a release of Hunter, but merely an agreement to suspend the action open to the corporation against him. It leaves a way open to them to bring any action they like against him afterwards. It is only a postponement of their right of action against him, and cannot prevent them from suing the defendant. On almost every ground, therefore, there is no such defence open to the defendant as he has urged. The result of this, I know, is to do what I ventured to say in the course of the case I felt great objection to bring about. If money is recovered from this or other defendants, the corporation cannot pay it over legally to Hunter, but the coal dealers, who have been tempted or over-persuaded by Hunter through his position as agent for the corporation, practically have to bear the burden. They may be ruined and driven into bankruptcy, but the securities of Hunter must remain wholly or to a large extent untouched, and therefore Hunter will, in reality, take the money recovered in this way by the corporation, and, with the exception of what they may get from him as subject-matter of the bribe offered to him, he will, on coming out of prison, be in the same position financially as he was before.

LINDLEY, L.J.—I am of the same opinion. Apart from the agreement produced in this case, the action is really an undefended one. It is an action brought by the corporation against a certain coal merchant for charging them 1s. per ton in excess of the market price—that is to say, the price at which he chose to sell his coal. This excess they are entitled to recover, whether as money had and received, or in any other way. It is not disputed that there would be any difficulty in shaping the action in that or any other appropriate form. But the defence is substantially based on the agreement entered into by the corporation with Hunter. That agreement can only be understood by estimating the position of the respective parties to it at the time. The corporation, on discovering certain facts, prosecute Hunter, their agent, for forgery and perjury, for which he is convicted, but they recover none of the money of which they, and, through them, the ratepayers, had been swindled. The amount was £10,000 at least. They were bound to take any possible steps open to them to recover some or all of this amount. Whether they could have got it all back from Hunter direct, I do not know. But they could not get it back from the various coal merchants inculpated, including the defendant, without Hunter's assistance. They accordingly make this agreement with Hunter. He is to deposit securities to the amount of £10,000, and to put the corporation by his information in a position to recover the actual £10,000 or a large amount of it. On that condition the corporation undertake to sue the several coal merchants at Hunter's expense, and to credit to Hunter's account, *i.e.*, to release his securities to, the amount which they recover from the coal merchants. By this agreement the corporation stand to recover £10,000, either from Hunter by realizing his securities, or from the coal merchants against whom they bring actions at Hunter's expense. I am not prepared to say that such an agreement is illegal or *ultrà vires* under the circumstances. True, it is not under seal and cannot therefore be held binding upon the corporation. It is only an ordinary undertaking between Hunter and the particular members of the corporation. It has, however, been treated in the case as one by which the corporation are content to abide. But does that affect in any way the defendant's obligation? Not at all. The corporation have a right to recover the 1s. a ton from the defendant whether given to Hunter as a bribe or retained by the defendant. It would be paradoxical to say that their right of action on two distinct frauds depended upon whom they sued first. If the corporation sued defendant first, as they have done, and afterwards chose to sue Hunter, that would not affect their right against Hunter. Nor can defendant plead by way of defence that, because his co-conspirator, as the corporation's agent, has to account to the corporation, they are thereby debarred from suing him. If the corporation had released Hunter from the liability for which he is jointly liable with the defendant that would be arguable, but the defendant has no real defence unless he can prove this action to be in substance, and not merely in form, an action by one thief against another. Here the corporation would never have got defrauded without the assistance given by the defendant to Hunter's proceedings. Their action is not in substance or in form to recover sums to be handed over to Hunter. They cannot part with the sums recovered by this and similar actions to Hunter, even if they wished to do such a thing. The action is one by defrauded principals to recover for themselves the amounts of which they have been defrauded through the action of the defendant, as well as of their agent. This appeal must be dismissed.

LOPES, L.J.—I give no opinion whether this agreement be *ultrà vires* or illegal as contrary to public morality. Nor am I prepared to say that the conduct of the corporation in entering into such an agreement, if valid, was improper. Such matters would require further consideration, and are immaterial to the decision of this appeal. I assume the agreement to be a good and valid one. That assumption does not in any way affect, in my opinion, the right of action in the corporation against Lever. It is, in fact, not admissible in evidence by Lever as being irrelevant to the issue between the present parties. The effect of that agreement with Hunter cannot be pleaded as accord and satisfaction of the claim of the corporation against Lever. It does not amount to the release of a co-tort-feasor. As the Master of the Rolls said, the right of action in the corporation against their agent,

Hunter, and against Lever are for separate and distinct frauds. Their right of action against Hunter is for secret profit or concealed bribes out of their pockets. Their right of action against the present appellant and other coal merchants, who have similarly acted, is for the excess of price which he charged to cover the amount he subsequently paid over to Hunter in connivance of Hunter's fraud. It is said that the two actions cannot co-exist. That argument cannot be supported when the frauds are distinct. The illustration given by the counsel for the corporation disposes sufficiently of that argument. Suppose, said Mr. Henn Collins, that the bribe had been in the shape of a piece of plate instead of this 1s. per ton, there could have been no doubt that the corporation could have first sued Hunter and then the defendant, or *vice versâ*. It is immaterial which right of action is first sued on. I may add that I agree with the judgments as delivered by Denman and Charles, JJ.

Appeal dismissed.

Solicitors for the appellant, *Trass & Jarmain*, for *Samuel Brown*, Salford.

Solicitors for the respondents, *Godfrey, Rhodes, Firth, & Co.*, for *Godfrey, Rhodes, & Evans*, Halifax.

From Q. B. Div. June 19; July 29, 1890.

CULLERNE *v.* LONDON AND SUBURBAN GENERAL PERMANENT BENEFIT BUILDING SOCIETY. (*a.*)

Building society—Liability of director—Advance of money on security of scrip—Building Societies Acts, 1836 (6 *&* 7 *Will.* 4, *c.* 32), *s.* 4, *and* 1874 (37 *&* 38 *Vict. c.* 42), *ss.* 13, 15.

A., the director of a building society, was party to a resolution that advances should in future be made to members on the deposit of their scrip. In pursuance of this resolution, advances were from time to time made on this security, but A. was not a party to any of the resolutions to make such advances: a loss having been sustained by the society in consequence of these advances,

Held, that, under the Building Societies Acts, the resolution authorizing the advance was invalid, but that, since the real cause of the loss was the advance, and not the resolution authorizing it, A. was not liable to the society for the loss.

Appeal from a judgment of Mathew, J.

The action was brought to recover a sum of money which the plaintiff had deposited with the defendant society. They counter-claimed in respect of certain sums of money which they alleged had been lost to them by being improperly advanced by the directors, of whom the plaintiff was one, to members upon the security of deposits of certificates of their shares. There was a further counter-claim to recover damages for a loss incurred by the society, and alleged to be due to the negligence of the plaintiff in making an advance out of the funds of the society on insufficient mortgage security. The claim was not disputed, and the only question was as to the liability of the plaintiff on the counter-claim.

The society was registered under the Building Society Act (6 & 7 Will. 4, c. 32), and the rules were certified by the registrar.

The society was also registered under the Building Societies Act, 1874 (37 & 38 Vict. c. 42). By the rules, the object of the society was declared to be to raise by the subscriptions of its members, and in shares of £50 each, payable by monthly instalments of 10s. per share, a fund, out of which each member should receive the amount or value of his share for the erection, or purchase, of a dwelling-house or dwelling-houses, or other real or leasehold estate. By rule 8 the funds of the society were to be advanced to the members, or invested in such manner, on such terms, and upon such mortgage of freehold, copyhold, or leasehold tenure, as the board should determine. The plaintiff was a director of the society from its formation, and in December, 1876, he was present at a meeting of the board when a resolution was passed that advances should, in future, be made to members, on deposit of their scrip, at the rate of six per cent. per annum; and in February, 1883, he was party to a resolution that not more than four-fifths of the amount paid up on any share should in future be advanced. In pursuance of these resolutions advances were from time to time made out of the funds of the society to members on the security of their shares, and losses amounting to £791 were sustained by the society thereby. The plaintiff was not a party to any of the resolutions to make the advances. The other ground of counter-claim related to an advance of £500 on the security of some leasehold cottages, on which transaction the society incurred a loss.

The learned judge gave judgment for the plaintiff on the claim and counter-claim. The defendants appealed.

Buckley, Q.C., and *Theobald*, in support of the appeal, cited *In re Railway and General Light Improvement Co.*, 28 W. R. 541; *In re Oxford Benefit Building and Investment Society*, 35 W. R. 116, 35 Ch. D. 502; *Evans* v. *Coventry*, 5 W. R. 436, 8 De G. M. & G. 385; *Salisbury* v. *Metropolitan Railway Co.*, 18 W. R. 974; *Joint-Stock Discount Co.* v. *Brown*, 17 W. R. 1037, L. R. 8 Eq. 381; *Phosphate of Lime Co.* v. *Green*, L. R. 7 C. P. 43, 20 W. R. C. L. Dig. 16; *Trevor* v. *Whitworth*, 36 W. R. 145, 12 App. Cas. 409; and *Flitcroft's case*, 31 W. R. 174, 21 Ch. D. 519.

F. Marshall and *T. Marchant Williams, contrà.*

Cur. adv. vult.

July 29, 1890.—The judgment of the COURT (Lord ESHER, M.R., and LINDLEY and LOPES, L.JJ.), was read by

LINDLEY, L.J.—In this case the defendant society seeks by a counter-claim to make the plaintiff, one of the directors, responsible for losses which the society has sustained, first, by reason of advances made to members on the security of their shares in the society, and secondly, by reason of advances made on the security of some cottages of insufficient value.

To deal with the last loss first. A sum of £500 was advanced on the security of a mortgage of ten cottages, which were let at rentals considerably greater than the instalments by which the loan and interest had to be repaid. The cottages were inspected by one of the directors of the society, and he reported the security sufficient. But he does not appear to have considered what the houses were worth if put up for sale, and the advance was, no doubt, injudicious. The transaction, however, was clearly *intra vires*, and was perfectly honest. The most that can be said about it is that there was an error of judgment on the part of the directors. But this is not enough to make them liable for the loss. The learned judge who tried the case acquitted the plaintiff of all culpable negligence in this matter, and I see no reason to differ from him. Indeed, rule 29, indemnifying the directors, is clearly applicable to

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

this part of the case. On this point, therefore, the society fails.

The other loss complained of is of a very different character. The society was formed in 1866, and was registered in 1879 under the Building Societies Act of 1874. The rules of the society were certified to be in conformity with the law by the registrar of building societies. One of those rules, viz., the 8th, is so worded as to admit of more constructions than one, and the directors unfortunately appear to have regarded it as authorizing advances to members on the security of their shares in the society. Accordingly, in December, 1876, a resolution was passed by the directors authorising such advances, and in February, 1883, another resolution was passed limiting the amount to be advanced to four-fifths of the amount of the borrowing member's shares. The plaintiff concurred in both these resolutions. Advances were accordingly made by the directors to members on no other security than their shares, and the evidence warrants the inference that the plaintiff knew that this was frequently done. The plaintiff, however, was no party to the particular advances mentioned in the counter-claim, and the loss of which is sought to be recovered from him. The learned judge held that he was not responsible for this loss on the ground that no negligence on his part was proved. The society, however, contend that, however this may be, the plaintiff is responsible for the loss on the ground that the advances were altogether *ultrà vires*, and are attributable to the illegal resolutions which authorized them.

On looking carefully at the statutes by which these societies are governed—viz., 6 & 7 Will. 4, c. 32, s. 4, and the previous statutes there referred to—viz., 10 Geo. 4, c. 56, ss. 2, 13, 30, and 31, and 4 & 5 Will. 5, c. 40, s. 9—it certainly does appear that building societies can only advance money on the security of landed property, freehold, copyhold, or leasehold. The later Act, 37 & 38 Vict. c. 42, ss. 13 and 25, is to the same effect, except that the public funds are added. The 8th rule must be construed with reference to these enactments, and if it authorizes advances on other securities, or on no security, it must to that extent be regarded as contrary to law, and invalid. The resolutions founded upon that rule, and authorizing advances other than on the security mentioned in the statutes, must also be treated as of no validity. No director, therefore, who has in fact advanced money of the society upon any other security than land, can avail himself either of the rule or of the resolutions as a defence to an action by the society for the restitution of the money so advanced. Nor does rule 29, relating to the indemnity of the directors, extend to acts which are *ultrà vires*, and beyond the powers which the society itself could confer upon them. It does not, however, also follow that because the resolutions of December, 1876, and of February, 1883, are contrary to law, and are invalid, the plaintiff is responsible for what other people did on the faith of them. It probably is true that if no such resolutions had been passed no such advances as they authorized would have been made; but the real cause of the loss sustained by the society is the improper advance; the resolution was not the *causa causans* of the loss, but only a *causa sine quâ non*. If the resolution alone had been passed nothing would have happened; it would have had no result. A new wrongful act by independent persons was the real cause of the loss. The resolution, therefore, was not the real cause, not the *causa causans*. It must be borne in mind that the resolutions in question were not orders given to subordinate officers for them to carry out; the resolutions merely expressed the views of the directors as to their own powers under the society's rules, and their views, of what should be done as regards advances. The resolutions no doubt introduced the practice of making advances without proper security; but no one was bound to act in any particular case in conformity with them, and every director ought to have known that the resolutions were *ultrà vires*. They were bad on the face of them. Everyone acquainted with the statutes would have seen that they were bad without any further inquiry. The plaintiff ought not to have passed the resolutions, and his co-directors ought not to have acted on them. I am not aware of any authority which goes the length of deciding that under these circumstances the plaintiff is liable for what they have done. They were not his servants or agents; their authority was as great as his; their knowledge the same as his; and, even assuming that he misled them upon a point of law, this does not make him liable to the society for the loss of money which they advanced and not he.

The cases to which Mr. Buckley referred do not decide the point now under consideration. In *In re Oxford Benefit Building and Investment Society* the directors declared dividends out of capital, and, in effect, directed the payment of them. They acted on the resolutions they passed, and were held liable for what they did, and not for what they only resolved to do. I have carefully looked at the decree in *Evans* v. *Coventry*, and I infer that the directors there held liable, not only passed resolutions that were *ultrà vires*, but also acted on them. The decree as to the increased remuneration of the directors (pp. 844 and 845) only charges each director with what he received. The decree as to dividends paid out of capital (p. 845) appears to me only to charge the directors who declared the dividends, and, in effect, ordered them to be paid. The decree as to the purchase of shares (p. 846) only charges those directors who concurred in the purchases—*i.e.*, as I understand, who made them or ordered them to be made.

In *Joint-Stock Discount Co.* v. *Brown* the directors who were held liable had done much more than the plaintiff did in this case. They were all parties to what James, V.C., characterized as the fatal resolution, that the shares improperly bought should not be sold for less than a certain sum. They were thereby implicated in the whole transaction which produced the loss.

In *Salisbury* v. *Metropolitan Railway Co.* directors were held liable to make good dividends wrongly paid out of capital; but the point which has to be considered in the present case did not arise there.

Reliance was placed by the counsel for the plaintiff on the judgment of Wickens, V.C., in *Pickering* v. *Stephenson*, 20 W. R. 654, L. R. 14 Eq. 322, and followed in *Studdert* v. *Grosvenor*, 34 W. R. 754, 33 Ch. D. 528. But if a director acting *ultrà vires* —*i.e.*, not only beyond his own power, but also beyond any power the company can confer upon him —parts with money of the company, I fail to see on what principle the fact that he acted *bonâ fide* and with the approval of a majority of the shareholders can avail him as a defence to an action by the company to compel him to replace the money. I never could understand that part of the Vice-Chancellor's judgment; nor can I understand it now. I think he was wrong.

For the reasons stated I am of opinion that the plaintiff is not liable, and that the appeal ought to be dismissed, with costs.

The Master of the Rolls and my brother Lopes concur in this judgment.

Appeal dismissed.

Solicitors for the plaintiff, *Minshalls, Parry-Jones, & Co.*

Solicitors for the defendant, *Whitehouse & Etherington.*

High Court of Justice.

Chan. Div. Kay, J. — Nov. 8.

In re MACGOWAN.
MACGOWAN *v.* MURRAY. (*a.*)

Costs—Scale fee—Negotiating sale—Conditional offer—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order under Act, Schedule I., Part. I., r.* 11.

To entitle a solicitor to charge the scale fee for negotiating a sale, the negotiation must be a complete negotiation resulting in a binding contract, and must have been carried through by the solicitor himself without assistance.

A contract for the sale of property, the subject of an action, conditional upon the sanction of the court being obtained, does not entitle the solicitor who conducted the negotiations to the scale fee.

"*Arrange*" *in rule* 11 *to Schedule I., Part I., of the General Order under the Solicitors' Remuneration Act,* 1881, *means* "*finally arrange.*"

Adjourned summons.

The solicitors to the defendants, who were the trustees of certain real estate which was the subject of this action, received instructions from their clients to sell the property, and succeeded in obtaining an offer from a bank, conditional upon the contract being sanctioned by the court, to purchase the property for £5,000.

The solicitors obtained evidence to induce the court to sanction the sale, including the opinions of two skilled valuers, who made affidavits to the effect that the proposed price was fair and proper. The sale was sanctioned by the court, and the solicitors claimed to be entitled to the scale fee under Schedule I., Part I., r. 11, of the General Order to the Solicitors' Remuneration Act, 1881, for negotiating the sale. The taxing master disallowed the fee, and this summons was taken out to review the taxation.

Marten, Q.C., and *Davenport,* for the summons, referred to *Stanford* v. *Roberts,* 32 W. R. 404, 26 Ch. D. 155; *In re Wilson,* 29 Ch. D. 790, 34 W. R. Dig. 185; *Parker* v. *Blenkhorn, Newbould* v. *Bailward,* 37 W. R. 401, 14 App. Cas. 1; *Humphreys* v. *Jones,* 34 W. R. 1, 31 Ch. D. 30; Solicitors' Remuneration Act, 1881, General Order, r. 2, and Schedule I., Part I., r. 11.

Levett, for the plaintiffs, was not called upon.

KAY, J. [after stating the facts as set out above, continued:—]. In this case the solicitor has had the scale fee for completing the sale, according to the decision in *Stanford* v. *Roberts,* and now asks for the scale fee for negotiating the sale, and also to have the costs of obtaining the sanction of the court to the sale. This must be on the footing that a conditional contract would entitle him to the scale fee. But can he be said to have arranged the price and terms and conditions of the sale? A vendor's solicitor is to have a scale fee for deducing title and perusing and completing a conveyance, and another scale fee for negotiating a sale; rule 11 does not apply to the former scale fee, but to the latter only. [His lordship then read rule 11.] Taking the words "and no commission is paid to an auctioneer, or estate or other agent," the meaning of the rule is plain, that when the solicitor has done all the work without having paid an auctioneer or other agent to assist him, and that work results in a complete contract, then the scale fee applies. But if he does not do all the work, but part is done by an agent whom he pays, then he is not entitled; because that part of the work was not done by him.

The question is, did this solicitor arrange the sale and the price and the terms and conditions? He did not do so finally, because that was done by the court. And it is obvious that arrange means finally arrange; the scale fee applies when the solicitor makes the contract himself. In the present case a complete arrangement was never made by the solicitor without assistance.

Then, as to the price, he negotiated with the bank for sale if the court approved the price. There was clearly no binding contract made until the court sanctioned it. If the court had said that the price was not a fair and proper price, there would have been no contract at all.

"Arrange," in rule 11, which only applies to negotiations, means that the negotiation must be a complete negotiation resulting in a binding contract, and then the solicitor must have carried it through himself, without assistance. Suppose that the contract had been to sell to the bank for £5,000, if the price should be stated to be a fair one by A. B., in my opinion the solicitor could not have been said to have arranged the price. The rule means that he must, unaided and without paying others, have arranged a complete and binding contract.

The cases cited are upon the other part of the Act and rules relating to completing the conveyance, and do not touch rule 11, which applies only to negotiations.

Summons dismissed.

Solicitors, *Cunliffes & Davenport,* for *Darbishire, Tatham, & Worthington,* Manchester; *Bower, Cotton, & Bower.*

(*a.*) Reported by JAMES H. BAKEWELL, Esq., Barrister-at-Law.

Chan. Div. Chitty, J. — July 31; Aug. 5, 1890.

In re EARL OF LUCAN.
HARDINGE *v.* COBDEN. (*a.*)

Administration—Voluntary charge—Equitable reversionary interest—No assignment of fund—Creditors for value—Volunteer—Priority.

A mere voluntary charge on an equitable reversionary interest, although coupled with covenants for payment and further assurance, cannot be held equivalent to an assignment pro tanto *so as to give the volunteer claiming thereunder priority as against creditors for value.*

Donaldson *v.* Donaldson, 2 *W. R.* 691, *Kay,* 711, *discussed.*

Adjourned summons.

The action was for administration of the estate of the late Earl of Lucan. The only point calling for report was as to the validity, as against creditors for value, of the charge created by the following indenture.

By a voluntary deed dated the 10th of October, 1867, the Earl of Lucan granted a life annuity of £300 to Miss Ellen Cobden, and charged it upon his real and personal estate as appears below. The operative part of the deed was as follows:—

"He, the said Earl of Lucan, doth by these presents grant, bargain, and sell unto the said Ellen Cobden one annuity, clear yearly rent-charge, or sum of £300

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

sterling to be issuing or payable out of, and charged or chargeable upon, all that and those the said several lands, tenements, and hereditaments the property of the said Earl of Lucan, and also upon the said several chattels, goods, moneys, securities for money, and other effects of the said Earl of Lucan."

The deed also contained a covenant by the earl for payment of the said annuity and a covenant for further assurance. It was admitted that a valid rent-charge issuing out of the said real estate had been created, but, such real estate being insufficient to pay the annuity, the annuitant sought to charge the personal estate. The chief clerk, in answer to an inquiry, certified in favour of the charge, and the executor thereupon took out a summons to vary this finding.

Vaughan Hawkins, for the executor, stated the facts.

Edward Ford, for Miss Cobden.—Having regard to the Bills of Sale Acts, I cannot contend that any chattels are charged, but there was an equitable reversionary interest in a sum of railway stock which was vested in trustees at the date of the annuity deed and which is still reversionary. The cases show that a voluntary assignment of such an interest is good, and I contend that a charge, although without consideration, operates as a partial assignment, and is therefore good: *In re Way's Trusts*, 13 W. R. 149, 2 De G. J. & S. 365; *Kekewich* v. *Manning* 1 De G. M. & G. 176; *Donaldson* v. *Donaldson*, 2 W. R. 691, Kay, 711; *Milroy* v. *Lord*, 4 De G. F. & J. 264, 11 W. R. Ch. Dig. 120; *Richards* v. *Delbridge*, 22 W. R. 584, L. R. 18 Eq. 11; *Rycroft* v. *Christy*, 3 Beav. 238; *Woodroffe* v. *Johnston*, 4 Ir. Ch. Rep. 319; *Wilcocks* v. *Hannyngton*, 5 Ir. Ch. Rep. 38.

Vaughan Hawkins, for the executor.—The charge must operate at law if at all; but as the law stands a voluntary assignment is good, a mere charge is bad. You cannot charge a chattel except for value: Lewin on Trusts, 8th ed., p. 70; *Sloane* v. *Cadogan*, reported in Sugden on Vendors and Purchasers, App. No. xxiv., 11th ed.; *Edwards* v. *Jones*, 1 My. & Cr. 226, 237, followed in *Voyle* v. *Hughes*, 2 W. R. 143, 2 Sm. & Giff. 18. Nothing short of an assignment will do. The case is one of contract, and must come under the rule that equity will not aid a volunteer to obtain specific performance. Lord Macnaghten in *Tailby* v. *Official Receiver*, 37 W. R. 513, at p. 519, 13 App. Cas. 523, at p. 549, says that "a contract for value for an equitable charge is as good an equitable charge as can be." The words "for value" are essential to the proposition: *Cochrane* v. *Moore*, 38 W. R. 588, 25 Q. B. D. 57. The document must be such as to constitute a trust for the donee. A transfer of an equitable interest does this. It the best gift that can be made when the interest is reversionary, but a mere charge effects nothing of the sort. The trustees could not have paid on production of this deed. The subject of the charge is the equitable reversionary interest, not the stock, and the trustees could not be made parties to an action to sell or enforce the charge as the trust for the earl himself does not arise till the tenant for life dies.

CHITTY, J.—The deed I have to deal with is a voluntary one. Four points arise on it. First, it creates a rent-charge on certain hereditaments to which the Earl of Lucan is entitled—*i.e.*, a valid rent-charge which issues out of land, but does not, of course, issue out of chattels. Secondly, there is a covenant by the earl for payment of the annuity or rent-charge which creates a good debt answerable from the real and personal assets of the testator, but, the deed being voluntary, the covenantee is postponed to creditors for value. Thirdly, there is a covenant for further assurance, but, again, the deed being voluntary, the grantee of the annuity cannot have specific performance. Fourthly, at the time of the execution of the deed the earl had an equitable reversion in a fund vested in trustees. The deed recites that the earl was possessed of various properties, chattels, moneys, and securities, and the operative part charges them. There is no question of construction. If the deed had been for value, the reversionary interest would have been charged. But it is not conceded that the deed has any direct operation on the reversionary interest itself. Its operation, if any, is indirect, and by way of equitable charge or assignment.

Kekewich v. *Manning*, *Donaldson* v. *Donaldson*, and *In re Way's Trusts* have been referred to, and it has been argued that the earl, as owner of the reversion, had a right to assign it by way of gift so as to place the donee in the same position as himself by way of substitution. This proposition is accepted by the other side. The donee in such a case could have given notice to the trustees, and when the life dropped and the reversion fell in she could have gone to the trustees and asked for an assignment. But the question is whether in fact this deed does create a perfect equitable charge. Equity will not assist an imperfect gift, though it will aid in protecting a perfect gift. In *Donaldson* v. *Donaldson* Wood, V.C., said the transferee could go to the trustees and ask for a transfer, and could enforce his right in an action against them without making the donor a party. Now I cannot hold that proposition here in favour of this annuity, because the thing itself is not transferred. The utmost that has been done is to create a charge. If three years after the annuity was granted the tenant for life was still living, could the lady have instituted an action against the trustees for the purpose of having her annuity raised out of the reversionary interest? It is clear she could not. Could she have sued the donor? Clearly.

The point of the case is that what is given is not the thing itself, but a charge on the thing. Could the court order the thing which was not given to be sold for the purpose of raising an annuity? Clearly not; and the conclusion is that the gift is not perfect as it stands. The right, when carefully analyzed, depends on contract, and equity in such a case gives no assistance to volunteers seeking specific performance. The right which is claimed is not a mere right of having the thing which is given protected, but to have something which has not been given sold to make good what has been given.

Certificate varied.

Solicitors for the executor, *Farrer & Co.*

Solicitor for Miss Cobden, *T. Gill.*

Chan. Div. North, J. — June 17, 18, 1890.

KELLY *v.* HEATHMAN. (*a.*)

Patent—Specification—Amendment—Validity—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 18.

A patent was granted for "a telescope ladder for domestic and other purposes." The specification claimed —" (1) *The two ladders occupying the space of one only;* (2) *the ready means of working by the cord;* (3) *the*

(*a.*) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

simple bracket lever by which the ladder is secured at any required length." The patentee subsequently amended his specification by leave by striking out (1), (2), *and* (3), *and substituting "The combination in a telescope ladder herein described, of means for raising, lowering, and stopping, all as herein described and shown in accompanying drawings." In an action for infringement,*

Held, upon the construction of the entire specification before amendment, that the claim was really for a combination, and that therefore the amendment was only "a correction or explanation" within section 18 *of the Patents, Designs, and Trade-Marks Act,* 1883, *and did not make the specification as amended claim an invention substantially larger than, or substantially different from, the original claim; and consequently that amendment did not render the patent invalid.*

Trial of action.

The plaintiff, as patentee, claimed in this action an injunction for the infringement of his patent, and damages or an account of profits. The defendant denied infringement, and also alleged that the patent was invalid, and by his particulars of objection alleged—(1) That the specification did not sufficiently distinguish which of the matters and things therein described were new and which were old; (2) That the amended specification claimed an invention larger than and differing from the original specification; (3) That if the defendant's apparatus was covered by the plaintiff's specification the alleged invention was not new, having been already published in six earlier specifications.

The plaintiff's patent was dated the 5th of October, 1886, and was for "a telescope ladder for domestic and other purposes."

The invention was described in the provisional specification as "A telescope ladder, designed to take the place of the cumbrous ladders now in use, being two distinct ladders of equal length, one drawing out of the other by pulling a cord at the side of the ladder, both ends of such cord being attached to the inner or sliding ladder, which is drawn out to its full extent with perfect ease in a few seconds of time. It can be adjusted to any height and stopped at every tread or nine inches in ascending or descending by means of a light strong lever bracket fixed to the lower ladder. This lever is raised by the ascending ladder and drops down under each tread, becoming locked by the sliding ladder descending and resting on it. This lever is raised and the sliding ladder released by a simple sliding rod running down the side of the lower ladder like the cord for raising, to within the convenient reach of the person working the ladder. The raising cord runs through pulleys near the top and bottom of the lower ladder. The steps or treads are flat, and placed edgewise near the face of each ladder: thus, being close behind each other, no inconvenience is felt when in use."

The complete specification contained a description of the invention by reference to drawings which accompanied it, and the claim was as follows:—

"Having now particularly described and ascertained the nature of my said invention and in what manner the same is to be performed, I declare that what I claim is—

"(1) The two ladders occupying the space of one only.

"(2) The ready means of working by the cord.

"(3) The simple bracket lever by which the ladder is secured at any required length."

Leave was subsequently obtained to amend this specification, which was done by striking out paragraphs (1), (2), and (3) from the claim, and substituting for them the following:—

"The combination in a telescope ladder as herein described with means for raising, lowering, and stopping all as herein described and shown in accompanying drawings."

Cozens-Hardy, Q.C., and *Macrory, Q.C.*, for the plaintiff.—The plaintiff claims a combination, and none such exists in any of the alleged anticipations.

W. R. Bousfield, for the defendant.—All the parts of the plaintiff's invention are old. The original specification claimed three things, each of which was old; and no claim was made for a combination. A patentee cannot strike out of his specification things he has claimed and introduce instead a claim for a combination of them: 46 & 47 Vict. c. 57, s. 18, sub-section (2), and s. 5, sub-section (5). The combination is not the subject-matter of a patent: *Williams* v. *Nye*, 7 Rep. Pat. Cas. 62.

Cozens-Hardy, Q.C., in reply.—Plaintiff has practically used old elements for a combination previously unknown, and it is good subject-matter for a patent. The original specification shows a manifest intention to claim the combination, and the amendment does not increase the claim: *Hayward* v. *Hamilton*, Griffin Pat. Cas. 1884-6, p. 115; *Bateman* v. *Gray*, 8 Ex. 906.

NORTH, J.—The claims in the original specification are not well expressed, but I have no doubt the plaintiff meant to claim the combination of the various things specified.

It is suggested that the claim does not accord with sub-section 5 of section 5 of the Patents, Designs, and Trade-Marks Act, 1883, which says that "a specification, whether provisional or complete, must commence with the title, and in the case of a complete specification must end with a distinct statement of the invention claimed." So that whereas formerly a claim was not necessary, it is now required. But any difficulty caused by the section itself is removed by the decision of the Court of Appeal in *Siddell* v. *Vickers*, 39 Ch. D. 92, 37 W. R. Dig. 133, which says that noncompliance with this section does not make the patent void, but that it is merely a directory provision to the comptroller or other law officer who deals with the matter when it comes before him, and if he is satisfied, mere noncompliance with this provision will not of itself make the patent void. In my opinion the original specification claimed what is expressly claimed in the amended specification; and as the whole combination is claimed there is no ground for saying that there ought to be a distinction of the specific parts claimed and which of them are old.

A further objection is taken that "the specification as amended claims an invention substantially larger than and different from the invention claimed by the specification as it stood before amendment." Now, sub-section 8 of section 18 of the Act of 1883 provides that "no amendment shall be allowed that would make the specification, as amended, claim an invention substantially larger than or substantially different from the invention claimed by the specification as it stood before amendment." But sub-section 1 provides that amendment may be made "by way of disclaimer, correction, or explanation," and in my opinion what has been done in this case is by way of correction or explanation, and not by way of disclaimer, and the result is that the plaintiff has not claimed an invention substantially larger than or substantially different from that which was claimed by the specification as it originally stood.

Another objection is that the invention is not new, as six prior specifications anticipate the plaintiff's invention. The evidence does not justify my arriving at such a conclusion. I am satisfied that, so far as the witnesses know, none of them have ever been

employed at all, and the defendant has not been called as a witness, and he must necessarily have some knowledge upon the subject. The only other point is that the invention is not the proper subject-matter of a patent. It is said that telescopic ladders are old, and that endless cords and other means for working them are old, and that brackets or something similar for supporting the extended ladder are old, and I am asked to say that as this invention is merely a combination of certain old matters, it is not the proper subject-matter of a patent. I see no grounds for that conclusion. I should have anticipated evidence to be adduced to show that there was really nothing new in this invention, but it is entirely wanting. I am without evidence of public knowledge which might have rendered it a serious question whether there was a proper subject-matter for a patent. Having regard to this, and to the fact that at a time when he was acting as the plaintiff's agent he published a circular with reference to the plaintiff's ladders in which he referred to them as "in point of utility there is nothing better." With such a statement from a man experienced in this class of business I cannot come to the conclusion that this is not a proper subject-matter for a patent.

The question of infringement is not really in dispute. The suggested difference between the lever bracket of the defendant and the plaintiff's is apparently that the defendant's is a trifle less useful from a mechanical point of view. There is no defence in substance, and the plaintiff is entitled to an injunction and an account.

Solicitors, *Wolferstan & Avery; J. H. Johnson, Son, & Ellis.*

Chan. Div. } July 31; Aug. 6, 1890.
Stirling, J. }

In re SMITH.
BILKE *v.* ROPER. (*a.*)

Will—Republication—Will of married woman during coverture—Death of husband—Subsequent testamentary instrument of widow containing no reference to will—Will and testamentary instrument admitted to probate.

In order that a will may be republished by a subsequent testamentary instrument, that instrument must contain sufficient reference to the will to raise the inference that the testator had in his mind the republication of his will, though no expression of direct intention is absolutely necessary.

By marriage settlement M. S. had a power of appointment over certain freehold messuages and a sum of £2,000 New £3 per Cents., being property comprised in such settlement. By her will, made in 1878, in her husband's lifetime, she exercised this power, and also purported to dispose of all other property over which she had any power of disposition. After her husband's death, M. S. executed a testamentary instrument, subsequently admitted to probate with the will, not referring in any way to the will. M. S. died in 1888, possessed of other estate, including the property mentioned in the testamentary instrument, to which she was absolutely entitled, besides the settled property and certain separate estate.

Held, applying the principle of Barnes *v.* Crowe, 1 *Ves. jun.* 497, *that, as the testamentary instrument did not contain anything from which it could be, directly or indirectly, inferred that the testatrix had in her mind the republishing of her will, such instrument did not act as a republication.*

Rowley *v.* Eyton, 2 *Mer.* 128, *explained.*

(*a.*) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

Adjourned summons.

By an indenture of settlement made the 14th day of November, 1864, between Maria Smith, then Maria Rockhill, widow, of the first part, Joseph Smith, of the second part, and the defendants R. Roper and H. C. Smith of the third part, prior to the marriage afterwards solemnized between the said Maria Smith and Joseph Smith, a freehold messuage at Dunmow, in the county of Essex, and two messuages at Upway, in the county of Dorset, and a sum of £2,000 New Three per Cent. Annuities were settled by the said Maria Smith in trust for herself during her life, and after her decease in trust for her husband during his life, and after the decease of the survivor of them in trust for such persons as she should by deed or will appoint.

Maria Smith, by her will, dated the 17th of December, 1878, in exercise of the powers in the settlement contained, appointed the messuage at Dunmow, after the decease of herself and her husband, to Richard Roper and his heirs, and as to the premises at Upway, and all other the real estate, if any, not thereinbefore disposed of, and comprised in the said indenture, she appointed the same, after the death of the survivor of herself and her husband, to the use of the defendants Richard Roper and Henry Clark Smith and their heirs, in trust for sale, and to hold the proceeds upon the trusts thereinafter declared; and in further exercise of the said powers, and of every other power enabling her thereunto, she directed, limited, and appointed that the said sum of £2,000 New £3 per Cent. Annuities should be sold and the money arising therefrom disposed of as thereinafter mentioned; that was to say, she directed and appointed that the proceeds of the sale and the money arising from the sale of her real estate, and all other, if any, her moneys, property, and effects over which she had any power of disposition, should be disposed of in manner thereinafter mentioned, and the residue, subject to the payment of expenses of proving and executing her will, unto and amongst all her nephews and nieces (the children of her brother, the defendant H. D. Darden, and sisters, the defendant Elizabeth Bowdith, widow, and Mary Ann Bowditch, deceased) living at her decease, and their child or children in manner therein directed, and the testatrix appointed the defendants R. Roper, H. C. Smith, and her nephew, the defendant John Durden, her executors.

Joseph Smith died on the 24th of June, 1884. After the death of Joseph Smith, Maria Smith executed an instrument of a testamentary character in the following terms:—

"Dunmow, July 30th, 1885.

"This is a present to Oswald Newman Roper from his aunt Maria Smith, by the express wish of his late uncle, Joseph Smith, a few weeks before his death. 10 shares of £10 each in the Dunmow Gas Company.

"MARIA SMITH.

"Witness—
"HENRY C. SMITH.
"ELIZA CLARK."

Maria Smith died on the 19th of June, 1888, and her said will and codicil were proved at the principal registry on the 26th of September, 1888, by the executors therein named.

Maria Smith died possessed of the following property, in addition to the settled property and dividends and rents accruing thereon, and the ten gas shares bequeathed to the said Oswald Newman Roper—namely, £1,000 Consolidated Annuities, with dividends accruing thereon; nineteen shares of £10 each in the Dunmow Gas Co.; a sum of £250 secured upon mortgage from a Mr. Whiffin, with interest thereon; household furniture of the value of £144, or there-

abouts; cash in the house, at her bankers, and in the savings bank, amounting to £73, or thereabouts.

The sum of £1,000 Consols and the gas shares were the property of the testatrix before her marriage, and remained up to the time of her death standing in her name.

The question arose whether the testatrix was or was not intestate as to this last-mentioned property. This depended upon this point—whether the document of the 30th of July, 1885, operated as a republication by her, after she acquired a complete power of disposition, of a will made while she had only a limited power of disposition (her will being made by her when a *feme covert*) in order to make that will speak from the time of republication and pass that property to which she was, at the time of her death, absolutely entitled.

E. Crawley, for one of the legatees.—If the document or codicil admitted to probate was a republication of the will, everything passes under it; if not, there must be an inquiry as to the separate estate. Republication is necessary, applying the principle of the decision in *Willock* v. *Noble*, 23 W. R. 809, L. R. 7 H. L. 580. By section 34 of the Wills Act (1 Vict. c. 26) the will dates from the time of republication. *Du Hourmelin* v. *Sheldon*, 2 W. R. 639, 19 Beav. 389, is no authority. In that case the will was made in 1824, and confirmed in 1829. The principle of constructive republication is given in 1 Jarm., 4th ed., p. 193. In *Rowley* v. *Eyton*, 2 Mer. 128, the codicil was held to be a republication of the will so as to subject after-acquired copyholds subject to a devise for payment of debts. In *Skinner* v. *Ogle*, 4 Notes of Cas. 74, the will was made before the Wills Act, the codicil after. The cases show that the very act of making a codicil is a recognition of the will then existing, and everything admitted to probate counting as a will has effect as such: 1 Powell on Devises, 3rd ed., p. 610; *Utterton* v. *Robins*, 1 A. & E. 423, 2 Nev. & M. 819. *Burton* v. *Newbery*, 24 W. R. 388, 1 Ch. D. 234, seems to be against my contention, but that case is explained in *Green* v. *Tribe*, 27 W. R. 39, 9 Ch. D. 231, and in *Follett* v. *Pettman*, 31 W. R. 779, 23 Ch. D. 337. In the present case the testatrix did not call the instrument a codicil; if she had done so there is no doubt it would have acted as a republication.

He also referred to *Herbert* v. *Turball*, 1 Keb. 589.

Waggett, for H. Durden, one of the next of kin.—The will can only operate on the separate estate. There has been no republication. An intention to revive must be shown: section 22 of the Wills Act. The admission to probate does not affect the rights of the parties. The intention is the point, and there is no reference to any previous testamentary disposition: *In re Steele*, 17 W. R. 45, 1 P. & D. 575. The fact that the document is not called a codicil is important.

He also referred to *Price* v. *Parker*, 16 Sim. 198.

H. Robertson, for Elizabeth Bowditch, one of the next of kin, argued to the same effect.

V. R. Smith, for the trustees of the will.

Crawley, in reply.

Cur. adv. vult.

August 6.—STIRLING, J.—This case raises a singular point, and one not entirely covered by authority. [His lordship stated the facts, and continued:—] In the document of July 30, 1885, there is no reference whatever to the prior will of December 17, 1878, the document is not called a codicil, and there is no attestation clause attached to it. Probate has been granted of both these instruments, and the question is whether the second testamentary instrument of July 31, 1885, constitutes a republication of the will of December 17, 1878.

Now, according to the decision of the House of Lords in the case of *Willock* v. *Noble*, it is quite clear that, as regards property acquired by a married woman after the death of her husband, a will made by her during the coverture would have no effect, unless it was republished after the determination of the coverture. Apart from any statutory requirements, it has long been settled that a will may be republished, either by a re-execution of it or by a codicil, and according to the notes to *Duppa* v. *Mayo*, 1 Saund. 278, 6th ed., 1845, "anything which showed an intent that the will should be of subsequent date was a sufficient republication." Of course a codicil to a will, if it refers to the will and shows such an intention, would be a republication. Now the learned author of Williams on Executors, Vaughan-Williams, J., says, 1 Williams' Executors, 7th ed., p. 211:—"A codicil will amount to a republication of the will to which it refers, whether the codicil be or be not annexed to the will, or be or be not expressly confirmatory of it, for every codicil is, in construction of law, part of a man's will, whether it be so described in such codicil or not; and as such furnishes conclusive evidence of the testator's, considering his will as then existing."

It must, however, be borne in mind that the learned author was there speaking of a codicil which refers to the will, and while the long list of cases stated in the note forms an ample justification to the learned author's proposition of law, in every one of those cases, with one apparent exception, with which I will deal presently, there appears to have been an express reference in the codicil to the preceding will. In most of those cases there were the usual formal words, but in some of them that did not occur. In *Serocold and Hunter* v. *Heming*, 2 Lee's Eccl. Reports, p. 490, Richard Heming, the testator, had written at the bottom of his will immediately under his name and seal affixed to the last sheet, as follows:—"London, 16th of October, 1755.—I likewise give to Mrs. Lucretia Luxford £25 a year for her life, and to my black servant, Peter Saville, £10 a year for his life, the said annuities to be paid out of my estate by my executors above-named: Witness my hand, Richard Heming. Witnesses, John Serocold, J. Straw." In that case, although the will was not mentioned in terms, there was a plain reference to it, and it was held by Sir George Lee that the words "my executors above-named" constituted "such a reference to the first will as would revive it at least as to the personal estate which alone was in question." The case, however, which approaches the most nearly of any of them to the present case is *Rowley* v. *Eyton*, and, according to the report, the testator, after making his will, purchased several copyhold estates, which he surrendered "to such uses as he should by will or any codicil thereto appoint"; and he subsequently made a codicil to his will, also duly executed, to pass real estates in the words following:—"I hereby give, devise, and bequeath unto my son, Thomas Eyton, and his heirs for ever, all my copyhold estates within the Manor of Wrockwardine." Apparently, therefore, there was in the codicil no reference to any prior will. I have, however, examined the registrar's book, and I have also referred to the original will, and I find that the report does not state the whole of the codicil, and that the codicil, as a matter of fact, began with the formal words, "This is a codicil to the will of," &c. Consequently, none of the cases which are referred to by Vaughan-Williams, J., or have been cited to me, constitute an authority for what I am asked to do in

this case, or support the proposition that a reference to the will is unnecessary.

I think that the best statement of the law upon the subject occurs in *Barnes* v. *Crowe*, 1 Ves. jun. 485. In that case Lord Commissioner Eyre says this (p. 497):—"If we disentangle ourselves from the rule that there shall be no republication without re-execution, the principle that a codicil attested by three witnesses shall be a republication seems intelligible and clear. The testator's acknowledgment of his former will, considered as his will at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself; as by the nature of it, it supposes a former will, refers to it, and becomes part of it, and, being attested by three witnesses, his implied declaration and acknowledgment seems also to be attested by three witnesses. Before the statute it was no part of the essence of the obligation that the will should be re-executed. Anything that expressed the testator's intention that the will should be considered as of a subsequent estate was sufficient. Since the statute re-execution of the will is not necessary, but nothing more is required than a writing, according to the provisions of that statute, expressing that intent. Therefore, Lord Hardwicke might well say he saw no great difference between the words 'I desire this codicil may be part of my will' and the words 'I republish,' which it was there admitted would have done. In the *Attorney-General* v. *Downing* Lord Camden supposed a particular intent to republish ought to appear, and that annexation or particular expressions in the codicil would demonstrate that intention. If that was necessary, not only Lord Hardwicke's opinion cannot stand, neither can *Acherly* v. *Vernon*, for there was no particular intention to republish, but the testator referred to the will, made alterations, and gave sufficient demonstration that when making and executing the codicil he considered the will as his will, and from that republication was implied, but it was not particularly in his thoughts to do any formal act of republication. Upon considering these cases, I confess I am inclined to stand upon the general proposition stated by Lord Hardwicke to show the will in the case before us was republished."

It seems to me that we must find something from which to draw an inference that the testator, when making the codicil, had in his mind the republishing of his will. If I apply that test to the present case I find nothing from which I can draw any such inference, and I accordingly think that this testamentary instrument does not amount to a republication of his will. The application therefore fails upon that ground.

Solicitors, *H. S. Clutton*, for *Andrews, Son, & Hurtable*, Weymouth; *Guscotte, Wadham, & Daw; H. Pritchard; Paterson, Snow, Bloxam, & Kinder*, for *E. Holmes*, Braintree.

Q. B. Div. (Hawkins and Stephen, JJ.) Nov. 14.

HEAP *v.* PEART. (*a.*)

County court—Costs—Refresher—Adjournment for want of time—Continuous sittings—County Court Rules, 1889, *Costs, item* 78.

Where a county court is held from day to day, it rests with the judge to say whether the sittings shall be one continuous sitting or a succession of several sittings, so that, when a case which appears in the list is not reached on one day, but is heard in its turn upon another day, a refresher may be allowed by order of the judge as upon an adjournment for want of time under item 78 *in the scale of costs of the County Court Rules*, 1889.

This was an application on the part of the defendant in an action for a prohibition against the county court judge at Birmingham to prevent the recovery of a sum of £1 3s. 6d. which the judge had allowed to the plaintiff by way of a refresher to counsel under item 78 of the County Court Scale of Costs in the County Court Rules of 1889.

The case was in the list for hearing at the Birmingham Court on June 18, 19, and 20, but only came on for hearing on June 20, when it lasted for an hour, and resulted in a verdict for the plaintiff. Counsel then applied for a refresher, and the question was referred to the registrar, who allowed the fee, and the judge, before whom the matter was brought on appeal, confirmed the decision of the registrar.

Willes, for the defendant.—This is a case which is not provided for by the County Court Rules of 1889, and by section 164 of the County Court Act of 1888 in such a case the rules of the High Court shall apply. In the High Court there is no such practice of allowing a refresher for a case which has not been commenced. The words of item 78 are, "where the trial lasts more than one whole day, or is adjourned for want of time, further consideration, or upon payment of the costs of the day, a refresher may be allowed by order of judge not exceeding £1 3s. 6d. where the subject-matter does not exceed £50." Here there was no application for adjournment. The case remained in its place in the list and came on in its turn exactly as it would have done in the High Court. The trial did not last more than an hour.

Muir Mackenzie, for the plaintiff.—The cases which apply to refreshers in the High Court, such as *Brown* v. *Sewell*, 29 W. R. 295, 16 Ch. D. 517, and *The Neera*, 28 W. R. 816, 5 P. D. 118, do not apply to a county court, which is regulated by its own rules. The words of item 78 referred to distinctly cover this case. County courts do not sit continuously, but only "on such days as the judge shall appoint for the purpose, and notice of the day and hour on which each court is to be held shall, three months before the holding thereof, be affixed in some conspicuous place; but any judge may from time to time hold additional and adjourned courts." Each of these days was a court day as fixed by the judge, and it is a mere accident that they should have followed in succession, as he himself has said in his notes. [HAWKINS, J.—A summons to attend a sitting is not repeated for each day.] It is a matter of discretion, and the judge is entitled to treat each day as a separate sitting. Under item 63 it is the practice to allow the solicitor's fee for attendance as a matter of course.

Willes, in reply.—Each day is not a separate sitting, or there would be a distinct adjournment each day and a separate list, which is not the case. It can only be held an adjournment by operation of law. [HAWKINS, J.—Is there any form of order for adjournment?] No; there is no such form, and the Act clearly contemplates a continuous sitting, for in section 88 it says, "If upon the return-day, or at any continuation or adjournment," and the same words are used in section 91. By section 106 the judge "may adjourn from time to time." What is contemplated is a judicial act, and not a mere lapse of time. [HAWKINS, J.—Is there any rule which prevents a judge from making each day a special sitting?] There is no such rule, but here the judge is expressing a

(*a.*) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

judgment on what should be inferred, not relating what he did as a matter of fact. The adjournment refers to a trial which has actually commenced.

HAWKINS, J.—In the result we come to the conclusion that we cannot interfere with the jurisdiction of the county court judge. We cannot say that the judge had no jurisdiction. I do not pretend to say that I should have allowed the refresher, but as to the character of the adjournments it may be possible to extend the cause lists from one day to another. The real question is whether, inasmuch as the case was not reached, the judge had a right to allow a refresher. That depends on whether the sitting was a continuous one or, as he contends, a succession of adjournments. The judge says on the record what has been his practice in regard to this matter. He says that under item 63 the attendance fee of a solicitor is allowed under similar circumstances without an order. He says also that it is a mere accident that sittings in Birmingham are from day to day. If we adopt this view, and the judge certainly had the jurisdiction to make them separate sittings, we are not at liberty to deny that he did so as a matter of fact. But it is said that item 78 only applies to trials which have begun. I do not agree with that reading, and think it means rather when the cause cannot be tried. It provides for two states of things—(1) When the trial begins and lasts for more than a day; and (2) when the court is wholly adjourned for want of time. The case is not the less adjourned in either of these cases; I cannot, therefore, help coming to the conclusion that this rule is not limited in the way suggested. We ought not, therefore, to interfere with the discretion exercised, but, under the circumstances, we think that the appeal should be refused, without costs.

STEPHEN, J.—This is a case in which I should be peculiarly reluctant to take a course adverse to that of the county court judge. The rules affecting such questions are administered by the county court judges, and are peculiar to their courts. They must know a great deal more than we can on such a point, whether of adjournment or refresher. The judge has here allowed the refresher on the ground that each day is a distinct sitting, and, looking at all the circumstances, I am not disposed to dispute his jurisdiction. If there is any doubt, the Rule Committee can alter it; but so long as the rule stands the county court judge is the best interpreter of it. As to what is adjournment and what continuation, it seems to me very much a matter of words, and not easy to distinguish. It does not seem to be of much importance whether you say that you will sit for several days or hold several sittings in succession. I think the appeal should be dismissed, without costs.

Solicitor for the plaintiff, *Raphael*, for *Blackham*, Birmingham.

Solicitors for the defendant, *Burton & Co.*, for *Johnson*, Birmingham.

Q. B. Div. (Lord Coleridge, C.J., and Wills, J.) June 10, 11, 1890.

ROLLES *v.* NEWELL. (*a*.)

Shipping—Thames navigation—Steamboat towing barges into dock—"Navigating"—Watermen's and Lightermen's Amendment Act, 1859 (22 & 23 *Vict. c. cxxxiii.*), *ss.* 8, 10—*Bye-law* 59.

The towing of barges into a dock by a steamboat is not "navigating a steamboat on the river" so as to render the master of the steamboat liable to a penalty under bye-law 59 *made under the Watermen's and Lightermen's Amendment Act*, 1859, *which prohibits "a person in charge of and navigating any steamboat on the River Thames" within certain limits, from towing at the same time more than six barges exceeding ten tons each.*

Case stated by a deputy stipendiary magistrate. The master of a steamboat having collected thirty-one barges immediately outside the Victoria Docks, towed them all into dock at once, under the directions of the pierhead foreman of the London and St. Katherine Docks Co., in accordance with the orders of the dock master of the company. The barges were towed four abreast, and exceeded ten tons each. The plan of so towing barges had been practised for many years at the docks under the regulations and direction of the dock officials. These regulations were made under the London and St. Katherine Docks Act, 1864 (27 & 28 Vict. c. clxxviii.), and the Acts incorporated therewith. By section 56 of the Victoria (London) Docks Act, 1853, a distance of 100 yards into the river is prescribed as the limit within which the powers of the dock master shall be exercised, and by section 52 of the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), the harbour or dock master may give directions for regulating the manner in which any vessel shall enter into the dock. The steamboat and barges started within the distance of 100 yards from the dock entrance. The master was summoned for infringing bye-law 59 of the Watermen's and Lightermen's Amendment Act, 1859, which provides that "if any person when in charge of and navigating any steamboat on the river between Vauxhall Bridge and the entrance to the Victoria Docks shall at the same time tow more than six barges—exceeding ten tons each—attached thereto the person in charge of or navigating the same shall incur a penalty." The magistrate convicted the defendant, who appealed.

Cohen, Q.C. (*H. Avory* with him), for the appellant.—The tug was not being navigated within the meaning of the bye-law. To so hold would be unreasonable, because the time required to take thirty barges in separate batches of six would be excessive and impossible with a falling tide, unless several tugs were employed. That would entail unreasonable expense. Nor does the bye-law apply to that portion of the river where the navigation took place, because by section 100 of the Watermen's and Lightermen's Amendment Act, 1859, nothing in that Act is to lessen the rights and privileges of any company of proprietors of any docks within the limits of the Act, or any of their officers, with respect to the navigation in the said docks, or in anywise relating thereto. That section keeps alive the jurisdiction of the dock master within 100 yards from the dock entrance, as prescribed by section 52 of the Harbours, Docks, and Piers Clauses Act, 1847, and bye-law 59, if applicable to these limits, is inconsistent with it.

C. E. Jones, for the respondent.—The act of towing barges into dock by means of a tug necessitates the navigation of the tug. The case of *Elmore* v. *Hunter*, 26 W. R. 215, 3 C. P. D. 116, decides that such a use of a steamboat is navigation within the meaning of this Act and its bye-laws. The use of motive power on the river is distinguished as navigation from the use of motive power from the shore. That is shown by bye-law 61, which permits unlicensed persons to be employed in hauling, but not in rowing. The exception of rowing covers all means of propelling on the river, and of course includes a steamboat.

Lord COLERIDGE, C.J.—We have in this case to construe a bye-law which, if fairly construed and

(*a*.) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

confined within reasonable limits, is a very reasonable and useful bye-law. The words are these: "That if any person, when in charge of and navigating any steamboat on the river between Vauxhall Bridge and the entrance to the Victoria Docks, shall at the same time tow more than six barges, lighters, or other craft exceeding ten tons each, attached thereto, or if such barges, lighters, or other craft shall not be well and sufficiently attached and fastened to such steamboat and to each other so that the same or either of them shall go adrift, the owner thereof, or the person in charge of or navigating the same, shall incur a penalty not exceeding forty shillings." What is the fair construction of that? It seems to me that the difficulty in the way of the respondent's contention is to bring the facts of the case within any reasonable construction of the word "navigating."

I do not express my opinion with any great degree of confidence because I know that on such questions as these different minds will take different views. But one must look at the object of the bye-law, and that object, as it seems to me, was to prevent the danger pointed out by Grove, J., in *Elmore* v. *Hunter*, that where a tug was towing a long string of barges up or down the stream, and came to the bends of the river, the tug, on rounding the curve, might lose control, and the barges proceed on their former course. It is quite reasonable to suppose that when navigating along the course of the river a tug would not have proper control over more than six barges, and, therefore, so far as the ordinary navigation of the river is concerned, this is a very proper bye-law, and had the tug in the present case been towing the barges along the stream it would undoubtedly have come within the bye-law. But that was not what happened here. All that the tug did was to haul the barges, which were already collected immediately outside the dock gates, through the gates into the dock. I asked whether, supposing that the hauling power, instead of being a steamboat, had been a steam-engine fixed on the land, the process of hauling the barges into the dock could have been said to be "navigating" them, and it was admitted that it could not, but then the reason given for that was that that method of shifting the position of craft was expressly excepted by bye-law 61. It may be that it was so excepted, but I do not agree that the mere fact that one mode of shifting craft was excepted from the term "navigation" necessarily goes to show that every other mode of shifting them was intended to be included within it.

No doubt, as an abstract proposition, the word "navigate," if used in the widest sense of the term, would include such an operation as was conducted here, but I do not think that that operation was a navigation of the tug within the meaning of the bye-law, having regard to the object with which it was framed.

The question whether the bye-law applies to this particular portion of the river, I will not decide, as we have not heard the respondent's counsel upon the point, though, as at present advised, I am strongly of opinion that it does not.

The magistrate's decision was wrong, and the conviction must be quashed.

WILLS, J.—I am of the same opinion, and for the same reasons.

Conviction quashed.

Solicitors for the appellant, *J. A. & H. E. Farnfield.*

Solicitors for the respondent, *C. S. Sharman.*

Court of Appeal.

From Prob. Div. and Adm. Div. Nov. 19.

HANDLEY v. HANDLEY AND WROUGHTON. (a.)

Divorce—Practice—Guilty wife—Access to children—Discretion of judge—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 35—*Matrimonial Causes Act,* 1859 (22 & 23 *Vict. c.* 61), *s.* 4.

There is no general rule of practice to compel a judge of the Divorce Division to refuse a mother, who has been divorced on account of her adultery, access to the children of the marriage. The judge of that Division is, by section 35 *of* 20 & 21 *Vict. c.* 85, *given the fullest discretion in the matter.*

In January, 1886, *a decree for dissolution of marriage on account of the wife's adultery was made absolute, and the custody of the children—two boys, now aged respectively eleven and thirteen years—was given to the father, but the decree contained no declaration as to access by the mother.*

The mother (who, in February, 1886, *married the co-respondent) did, in fact, however, from time to time visit the children, with the permission of the father, until June,* 1890, *when the father, who had then recently married again, withdrew such permission.*

An application to the court by the mother for an order for access was refused by Hannen, P.; *and the* Court of Appeal *now affirmed this decision.*

Symington *v.* Symington, *L. R.* 2 *Sc. App.* 415, *followed.*

Appeal from the refusal of an application made to the Divorce Division by the respondent in the suit for an order that she should have liberty of access to the children of the marriage which was the subject of the divorce suit.

On July 16, 1885, Mr. J. W. Handley Davenport Handley obtained a degree *nisi* for divorce from his wife, on the ground of her adultery with the co-respondent, E. N. Wroughton. By the decree *nisi* the custody of the children was given to the father, but the decree contained no order that the mother should have access to the children of the marriage, two boys now aged respectively 13 and 11½. On January 26, 1886, the decree was made absolute, but it contained no order as to access to the children. In February, 1886, the divorced wife married the co-respondent. From the date of the decree absolute down to June, 1890, the mother was in fact allowed by the father to have access to the children, whom she was frequently in the habit of visiting at their school. They were also allowed to be with her in the holidays. In March, 1888, she applied to the court for an order giving her the right of access to the children, but the application was refused, an affidavit having been made by the father's solicitor to the effect that the father was willing to allow the mother access. She continued to visit the boys at their school until June, 1890, when, without any previous intimation, just as she was about to pay them a visit, she was informed by the schoolmaster that, in consequence of the father's directions to that effect, she could no longer be permitted to see them. She then made the application now in question, for an order that she should have access to the children. The application was heard before Sir James Hannen, P., on July 23, 1890, and was resisted by the father on the ground that he had been informed that on her visits to the children she had endeavoured to prejudice

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

them against himself and his present wife (he having recently married again), and that she was likely to estrange the children from him. The mother, in her evidence, entirely denied this charge.

The President said that the substantial question was tried before him on the previous application (March, 1888), and he referred to the fact that the general course of practice in the Divorce Court was not to grant a guilty wife access to the children of the marriage. That in the present case, however, the mother had been allowed access by the father's indulgence, but that the father was not bound to allow his children to associate with the co-respondent which might create confusion in their minds, and he accordingly refused the application.

From this refusal the mother now appealed.

By section 35 of the Divorce Court Act of 1857 (20 & 21 Vict. c. 85), "in any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the court may from time to time, before making its final decree, make such *interim* orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery." Section 4 of the Act 22 & 23 Vict. c. 61 extends this power by enabling the court to make such orders from to time after a final decree.

Sir Edward Clarke, S.G., and *Oswald*, for the appellant.—The President seems to have acted on what has been considered to be a rule of practice binding the Divorce Court—viz., that a guilty wife ought never to be granted access to the children. This practice originated in consequence of section 4 of Talfourd's Act (2 & 3 Vict. c. 54), which was passed in 1839, and the practice continued after the passing of the Divorce Act of 1857: *Clout* v. *Clout and Hollebone*, 30 L. J. P. & M. 176, 9 W. R. Div. Dig. 11; *Bent* v. *Bent and Footman*, 30 L. J. P. & M. 175, 9 W. R. Div. Dig. 18; *Seddon* v. *Seddon and Doyle*, 31 L. J. P. & M. 101, 10 W. R. Div. Dig. 18; although in *Taylor* v. *Taylor and Wolters*, 39 L. J. P. & M. 23, 18 W. R. Div. Dig. 6, that practice was departed from. But Talfourd's Act was repealed in 1873 by the Infants Custody Act (36 Vict. c. 12), ss. 1 and 2, and therefore no such rule of practice ought now to be accepted as binding on the Divorce Division. Further, section 35 of the Divorce Act, 1857, in fact gives the judge of the Divorce Court discretion to deal with such matter: *Symington* v. *Symington*, L. R. 2 Sc. App. 415; having regard, however, to the interest of all parties concerned. In the present case the evidence shows that the children regard their mother with affection, and the father having allowed the mother to have access to them until June last, it is unfair and cruel of him now to deny her access to them.

Inderwick, Q.C., and *Searle*, for the father, admitting that there was no inflexible rule binding the judge of the Divorce Division in the matter, were not further called on.

LINDLEY, L.J., after stating the facts, proceeded.—The President of the Divorce Division declined to make any order on the application made by the mother, the respondent in the suit, and the practical effect of that refusal is to allow the father to exercise his discretion as to the amount of access, if any, which the mother should have to the children. The question turns upon the true construction of section 35 of the 20 & 21 Vict. c. 85, which, though it had been enlarged as to the time within which orders might be made, by section 4 of the 22 & 23 Vict. c. 61 is still the guiding section. The language of section 35 is express and unmistakable. It gives the judge of the Divorce Court a discretion (I do not say an unappealable discretion) to make such orders as to the custody of the children as he may deem "just and proper." The force of those words is apparent to any lawyer who bears in mind the doctrines of common law courts and courts of equity as to the custody of children. Both the common law and the chancery doctrines are excluded by the section, and the judge of the Divorce Court is to have power to make such order as he may think "just and proper," though of course any judge in exercising his discretion would consider the whole of the law and the special circumstances of the case. This construction has, as I understand it, been put on section 35 from the first, and is the construction warranted by the language of Lord Cairns in *Symington* v. *Symington*. It appears to have been the practice of the Divorce Court, founded on Talfourd's Act, not to give the custody of children to a wife who had been found guilty of adultery, or even to allow her access to them, and the cases of *Clout* v. *Clout and Hollebone* and *Bent* v. *Bent and Footman* illustrate that, though in *Taylor* v. *Taylor and Wolters*, with the consent of the husband, Lord Penzance allowed the guilty wife access to the child. I do not say that there is any hard and fast rule that the custody of children can never be given to a wife under such circumstances; in some cases it may be just and proper to do so. The question, then, is whether under the circumstances of the present case this court can take a view of what is just and proper, different from that which the learned President has taken. I do not think we can. To induce the court to differ from a discretionary order it must be shown that the judge had overlooked some special circumstance or had professed to act upon a hard and fast rule. That is not the case here. The husband, until he remarried, allowed his late wife to have access to the children. His marrying again made a great difference. He might well say then, "My late wife broke up my first home; if I do not take care she may break up my second home too." I am not prepared to say that on that ground alone the husband was not justified in desiring that his late wife should not have access to the children.

The appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion.

FRY, L.J.—I entirely agree.

Solicitors for the appellant, *R. E. Vanderpump & Eve.*

Solicitors for the respondent, *Cunliffe & Davenport.*

App. Bankruptcy. Oct. 31; Nov. 14.

In re R. M. EVANS (*Deceased*).
Ex parte C. J. EVANS. (*a.*)

Bankruptcy—Administration of insolvent estate of deceased debtor — Deceased debtor resident out of England for six months preceding death—Jurisdiction—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *ss.* 95, 125, *sub-sections* 1, 4, 6, 10—*Bankruptcy Rules*, 1886, *Form* 11.

The words "unless the context requires it" in sub-section 10 *of section* 125 *of the Bankruptcy Act*, 1883,

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

comprise the whole context of the Act, and are not limited to the context of section 125.

In the case of a debtor residing at his decease, and for the greater part of the six months previously, out of England, the provisions of section 95 *will apply, giving jurisdiction to the High Court*—i.e., *the Court of Bankruptcy—over the estate in England of a debtor not resident in England.*

Appeal from an order of the registrar, for the administration in bankruptcy of the estate of a debtor dying insolvent.

R. M. Evans had died insolvent at Mayumba, on the West Coast of Africa, a place not in British territory. He was a British subject, whose wife and family were domiciled in England, but who had resided on and off for several years in West Africa, where he traded and "had carried on business there for the greater part of the six months immediately prior to his decease." His property vested in his wife as executrix, but, a petition having been presented by a creditor, the registrar made an order for the administration of the estate in bankruptcy. Against this order the executrix now appealed.

Rutherford, for the appellant.—By the Bankruptcy Act, 1883, s. 125, sub-section 10, the court having jurisdiction over a deceased debtor's affairs means "the court within the jurisdiction of which the debtor resided or carried on business for the greater part of the six months immediately prior to his death." There was no such court in this case, and no bankruptcy court has any jurisdiction over this debtor's estate. The registrar held that the note to Form 11 in the Bankruptcy Rules of 1886 brought section 95 of the Act into operation, giving the High Court in London bankruptcy jurisdiction in the case of a debtor not resident in England. Form 11, for a petition in the case of a deceased debtor, runs as follows:—"That the said A. B. for the greater part of the six months next preceding his decease resided (or carried on business) at ———, within the jurisdiction of this court (or, as the case may be, following the terms of section 95)." This last note is not sufficient to enlarge the jurisdiction given under section 125: *In re Baker*, 38 W. R. 417, 44 Ch. D. 262.

Cummins, for the respondent.—The forms and rules must be read into the Act. Sub-section 1 of section 125 specifically refers to the form prescribed, and sub-section 6 mentions that Part III., as to the administration of the property of a bankrupt—with all the modifications introduced by section 125 for the case of a deceased debtor, is to apply. Section 95, in reference to debtors "resident out of England," applies to Part III., and must, therefore, be read into the provisions of section 125. By section 95 the High Court is given jurisdiction over such cases. The petition here was, therefore, properly presented in the High Court, since there was no local court having jurisdiction.

Rutherford replied.

Cur. adv. vult.

Nov. 14.—Lord ESHER, M.R.—In this case the registrar made an order under section 125 of the Bankruptcy Act, 1883, for the administration of a deceased debtor's estate. The executrix appeals on the ground that the registrar had no jurisdiction in this case to make such an order. The debt of the deceased debtor was undoubtedly of sufficient amount to support a petition in bankruptcy, but he had lived for more than six months previous to his decease on the West Coast of Africa out of British jurisdiction, and he died there. Section 125 provides for the petition of a creditor for the administration of a deceased debtor's estate in the prescribed form. Sub-section 10 of this section goes on to say that "unless the context otherwise requires, 'court' in this section means the court within the jurisdiction of which the debtor resided or carried on business for the greater part of the six months immediately prior to his decease." There was clearly no court within the jurisdiction of which the debtor had for the last six months of his life resided, therefore the words "unless the context otherwise requires it" come into operation. The context referred to embraces the whole Act, and not merely the context of section 125. Now section 95 provides that "if the debtor is not resident in England" the petition shall be presented to the High Court. That means the Court of Bankruptcy. Looking at the prescribed form under section 125, Form 11, in the Bankruptcy Rules of 1886, we find that there is a provision in it for following the terms of section 95 where necessary "as the case may be." It is clear that section 125, for the administration of a deceased debtor's estate, was to comprise cases coming within the general description given by section 95, that is to say, debtors at the time of their decease and six months previously resident out of England. The context in section 95, read with section 125, gives the High Court—*i.e.*, the Bankruptcy Court—jurisdiction over such cases. This appeal must be, therefore, dismissed.

LOPES, L.J., concurred for himself and for LINDLEY, L.J.

Appeal dismissed.

Solicitors for the appellant, *Hamlin & Co.*, for *Wills & Co.*, Liverpool.

Solicitors for the respondent, *Ridsdale*, for *Raymond Steinforth*, Liverpool.

From Q. B. Div. July 29, 1890.

BISHOP AND OTHERS v. BALKIS CONSOLIDATED CO. (*a*.)

*Company—Sale of shares—Certification of transfer—Want of title of transferor—*Ultrà vires *act—Estoppel—Representation as to credit and ability—Lord Tenterden's Act* (9 *Geo.* 4, *c.* 14), *s.* 6.

A., who was a shareholder in the defendant company, sold his shares, and the purchaser was entered on the register as the owner of the shares. Subsequently A. purported to transfer some of these shares to another person, from whom the plaintiffs bought them. Before the transfer was executed by the plaintiffs or the price paid, the transfer form was taken to the defendants' office, and the defendants' secretary wrote upon it the words "certificate lodged." No certificate had in fact been lodged. The plaintiffs, relying upon this "certification," paid the price of the shares. The defendants subsequently discovered that the transferor had no title to the shares, and refused to recognize the plaintiffs' title. The plaintiffs then brought an action to recover the value of the shares.

Held, that the "certification" amounted to a representation that the transferor had produced to the person certifying, such documents as on the face of them showed a primâ facie *title in the transferor to transfer the shares, but did not amount to a warranty of the title of the transferor to the shares; that the giving of the "certification" by the secretary of the company was not* ultrà vires, *and, though the company were estopped from denying the truth of the facts certified, they were not estopped from denying the title of the transferor to transfer*

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

the shares; and that, as the company could not be held liable for a mere careless misrepresentation, the plaintiffs were not entitled to recover.

Held, further, that the "certification" was not a representation as to the credit and ability of the transferor within section 6 of Lord Tenterden's Act.

Judgment of Vaughan Williams, J. (38 *W. R.* 750, 25 *Q. B. D.* 77), *affirmed, but not for the reasons given in his judgment.*

Appeal from the judgment of Vaughan Williams, J., in favour of the defendants, at the trial of the action without a jury (reported 38 W. R. 750, 25 Q. B. D. 77.

The facts are stated in the report of the case in the court below, and also in the judgment of the court delivered by Lindley, L.J.

July 3, 4, 5.—*Henn Collins, Q.C., W. D. Rawlins,* and *Hugo Young,* for the plaintiffs.

Sir H. Davey, Q.C., H. D. Greene, Q.C., and *A. T. Lawrence,* for the defendants.

The following authorities were referred to:—*In re Bahia and San Francisco Railway Co.,* 16 W. R. 862, L. R. 3 Q. B. 584; *Hart* v. *Frontino and Bolivia Gold Mining Co.,* L. R. 5 Ex. 111, 18 W. R. C. L. Dig. 57; *Simm* v. *Anglo-American Telegraph Co.,* 28 W. R. 290, 5 Q. B. D. 188; *Shaw* v. *Port Philip Gold Mining Co.,* 32 W. R. 771, 13 Q. B. D. 103; *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.,* 35 W. R. 590, 18 Q. B. D. 714; *Société Générale de Paris* v. *Walker,* 34 W. R., at p. 665, 11 App. Cas., at p. 36; *In re British Farmers' Pure Linseed Cake Co.,* 26 W. R., at p. 335, 7 Ch. D., at p. 538; *Swann* v. *Phillips,* 8 A. & E. 457; *Swift* v. *Jewsbury,* 22 W. R. 319, L. R. 9 Q. B. 301; *Eaglesfield* v. *Marquis of Londonderry,* 24 W. R. 568, 25 W. R. 190, 4 Ch. D. 693.

Cur. adv. vult.

July 29.—The judgment of the COURT (Lord ESHER, M.R., LINDLEY and BOWEN, L.JJ.) was read by

LINDLEY, L.J.—This is an action brought by the purchasers of shares in the defendant company against the company for the value of 195 shares which the plaintiffs have bought, and the value of which the plaintiffs say they have lost by reason of the wrongful acts of the company.

The 195 shares are divisible into two parcels—viz., 135 shares bought from a person named Lupton, on the faith of what is called a "certification," and 60 shares bought from a person named Angel. As regards these 60 shares it appeared, however, when the facts were investigated, that the company never had refused to recognize the plaintiffs' title to them, and that the company had done nothing wrong. There is no necessity for alluding further to them.

The facts as to the 135 shares are as follows:—One Powter was the registered holder of 1,000 shares in the defendant company, and he had the usual certificate under the seal of the company certifying him to be so. He sold and transferred the whole of these shares to Maitland and Balfour, and his certificate was lodged with the company to enable them to complete their title. After this Powter purported to sell and transfer 135 of these same shares to Lupton, and Lupton in his turn transferred them to the plaintiff Cuthbert, to whom he had agreed to sell 135 shares in the company. Both transfers were certificated, as it is called, by the secretary of the company, or by someone acting for him. The plaintiff Bishop was Cuthbert's principal in this transaction, and on the faith of the certification of the transfer from Lupton to Cuthbert Bishop paid Lupton the price of the shares; and as the shares really belonged to Maitland and Balfour, and not to the plaintiffs Cuthbert and Bishop, the company refused to recognize their title. The plaintiffs contend that the company is estopped by the certification from denying Lupton's title, and is bound, therefore, either to accept Cuthbert as the present owner of the 135 shares or to pay the value of them to Bishop. This contention renders it necessary to ascertain the precise meaning and legal effect of a certification, a term better known to business men than to lawyers. The certification is in these terms:—"Certificate lodged." Then follow the name of the company and the signature of the secretary, or of the person signing for him. The certification is on the margin of Lupton's transfer to Cuthbert, and the transfer identifies by their numbers the 135 shares transferred to him. The practice of giving certifications has arisen from the difficulty felt by members of the Stock Exchange in settling their accounts as buyers and sellers of shares when the seller's certificate of title does not accompany his transfer. If the seller's certificate includes more shares than he sells, he does not deliver it to the buyer with the transfer, but the seller produces his certificate and the transfer to an officer of the company, and he certificates the transfer, and buyers and their brokers act on the faith of this certification just as they would if the certificate produced to the company had been produced to and lodged with themselves. No fee is paid for a certification. In every case the certification must be read in connection with the transfer on which it is put. The object of the certification is to enable the transferor to satisfy the transferee that he, the transferor, can make a good title to the shares mentioned in the transfer. This he can only do if he is himself the registered owner of the shares mentioned in the transfer, or if he has a transfer from the registered owner to himself, or someone through whom he claims by a transfer or series of transfers. The certification, therefore, to be of any use at all, must amount to a representation that the transferor has produced to the person certifying such documents as on the face of them show a *primâ facie* title in the transferor to transfer the shares mentioned in the transfer, or, in other words, that the transferor has produced to the person certifying either what purports to be a certificate of the title of the transferor to the shares mentioned in the transfer, or the equivalent of such a document—in other words, what purports to be a certificate of the title of someone else to those shares, and one or more documents purporting to transfer those shares from such person to the transferor.

The evidence in this case shows that the certification does mean this. But the certification means no more, nor can it reasonably be supposed to mean more. The certification is made by the secretary or some other officer who has no time to do more than look at the documents produced to him. If, in business language, they are in order—*i.e.*, if they are right on the face of them—he certifies; if they are not, he refuses to certify. But he has no means of ascertaining, and no time to inquire, whether the documents produced to him are genuine or not, nor whether the various transfers are valid or invalid in point of law. He acts on what he sees, and there is no pretence for saying that he does more, or is understood by business men to do more. He does not warrant the title of the transferor nor the validity in point of law of the various documents which together establish his title. That this is the true view of the effect of a certification will be apparent if it is remembered that certifications are sometimes made by an official of the Stock Exchange, and not by any officer of the company the shares in which are the subject of transfer.

Having ascertained the true effect and meaning of a certification, it is necessary to consider how far the defendant company is affected by the certification given by its secretary or clerk in the present case. It was said to be no part of the business of the company to give certifications, and that the company was in no way bound or affected by the certification given. This, however, is, in our opinion, a complete mistake. It is part of the business of the company to give certificates of title to shares in it, and to register transfers of such shares and to place the names of the transferees on its own books. It is, moreover, to the interest of every company to do what it can to assist its shareholders to deal with their shares in the way in which shares in other companies are ordinarily dealt with, and if the officers of a company conform to the ordinary practice in such a matter as we are considering, it is absurd to say that they are acting beyond any power the company can confer on them, and that the company is not bound by what they do.

In our opinion it is proved that to give certifications is incidental to the transaction in the ordinary business way of part of the legitimate business of all companies having their capital divided into shares which are transferable by deed or other instrument; and the certification in this case, having been given by the proper officer of the company in the ordinary way of business, is binding on the company, and the company is estopped from denying the truth of the facts certified, either expressly or by necessary implication. What these facts are has been already stated in general terms. The facts necessarily implied in this case are that Lupton produced a certificate purporting to show that he, or some registered owner, through whom he claimed by transfers, also produced, was entitled to transfer to Cuthbert the shares mentioned in the transfer. In truth, however, Lupton produced no such certificate. He had none of his own, and he did not produce Powter's, through whom he claimed. This had been lodged long before by Maitland and Balfour. The plaintiff, however, was induced by the certification to part with his money, and he has lost it, and if an action would lie for a careless misrepresentation we should be of opinion that the plaintiff could recover the money thus lost from the defendants. But no action lies for such a misrepresentation. This was finally decided in *Derry* v. *Peek*, 38 W. R. 33, 14 App. Cas. 337, which it is not for us to criticize. It is, however, contended that the doctrine of estoppel can be made available to assist the plaintiff in this case. But the doctrine of estoppel cannot put the company in a worse position than if a certificate of Lupton's transferor, Powter, had been produced. If it had, still the transfer from Powter to Lupton would have been invalid, and Lupton, without any default on the part of the company, would not have been able to transfer the shares to Cuthbert. The fact, then, which the company is estopped from denying would not, if true, have entitled the plaintiff to the 135 shares. The loss of the shares, as distinguished from the loss of the money paid for them, is attributable, not to any misrepresentation by the company, but to something quite different—viz., the invalidity of the transfer from Powter to Lupton. If, indeed, the certification amounted to a warranty of Lupton's right to transfer, or if it were equivalent to a certificate by the company that Lupton was the registered owner of the shares which he purported to transfer to Cuthbert, the case would be very different, and would be indistinguishable from *In re Bahia and San Francisco Railway Co.* But a certification and a certificate are totally different things. The lodging of one or more documents may be certified, and yet the documents lodged may be invalid owing to circumstances not apparent on the face of them, and in this case the defect in Lupton's title was caused by the invalidity of one of the documents produced, and not by the non-production of the certificate which the company erroneously certified to be lodged. The real truth is that the plaintiffs lost their money by reason of a misrepresentation for which no action lies, and they lost the shares transferred to them by Lupton because he had no title to them, and the company is not estopped from denying this.

Under these circumstances we are of opinion that the plaintiffs' remedy is not against the company, but against Lupton, who could not deliver the shares for which he was paid by the plaintiffs. In the result, therefore, we agree with Vaughan Williams, J., that this action is not maintainable. We are not, however, able to concur in the whole of his reasoning. He has not, we think, attached sufficient importance to the fact that the transfer from Powter to Lupton was invalid; nor to the fact that the certification did not represent this transfer to be valid. Moreover, we think the learned judge was mistaken in considering this case governed by the observations of Bowen, L.J., and Fry, L.J., in the case of *The British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* There is nothing *ultrà vires* in this case as there was in that. Neither can we agree with him that Lord Tenterden's Act applies to this case. A statement that a document is lodged is not, we think, within that Act. The case relied on by Vaughan Williams, J., was decided on a demurrer to a declaration which set out statements of a very different nature. For the reasons we have given, the defendants are, in our opinion, entitled to judgment, and the appeal ought to be dismissed, with costs.

Appeal dismissed.

Solicitors for the plaintiffs, *Woodcock, Ryland, & Parker*, for *Rowley & Chatwin*, Birmingham.

Solicitors for the defendants, *Stretton, Hilliard, Dale, & Newman.*

From Chan. Div. June 5, 6, 23, 1890.

In re ROPER.
TAYLOR *v.* BLAND. (*a.*)

Administration action—Real and personal estate—Order on further consideration—Costs ordered to be paid primarily out of several funds in court, of which some represented personalty only—No further consideration reserved—Liberty to apply—Subsequent application on behalf of charity legatees for apportionment of burden of costs between funds representing realty and personalty.

A testatrix devised real estate upon trust for sale, and left a mixed fund, composed of the proceeds and of pure personalty, to a legatee for life, with remainder to a charity. An action having been brought to administer the estate, the order made on further consideration directed that certain non-charitable legacies and the costs of the action should be paid primarily out of four several funds in court, some of which represented pure personalty, and that, so far as such four funds were together insufficient, the balance should be made up from another fund, representing realty only. In carrying out the order the entirety of the funds made primarily liable was exhausted, and a portion of the said fund representing realty only, was also required. No question was reserved upon that further consideration, but the order directed the income

(*a.*) Reported by R. H. DEANE, Esq., Barrister-at-Law.

of the residue to be paid to the tenant for life, with liberty to apply. The tenant for life having died, the testatrix's heir-at-law and his assignee petitioned, nearly ten years after the order on further consideration, that the residue of the last-mentioned fund should be paid out to them.

Held, by Kay, J., *that the order on further consideration was binding and conclusive as to the funds by which the costs were to be ultimately borne, and that the residue, as consisting of the proceeds of realty only, must therefore be paid to the petitioners.*

Held, by Cotton *and* Bowen, L.JJ., *that the costs of administering the real estate ought to be borne ultimately by the funds representing real estate only, and (reversing the decision of* Kay, J.) *that the order on further consideration had not finally decided the question by what funds the costs must ultimately be borne, but that, the residue fund being still under the control of the court, it was not too late properly to adjust the incidence of the costs, which must accordingly be done.*

Held, by Fry, L.J., *that no subsequent further consideration and no question as to the ultimate incidence of the costs having been reserved by the order on further consideration, that order ought to be taken to have finally determined such incidence.*

Sheppard *v.* Sheppard, 33 *Beav.* 129, *discussed.*

Appeal from Kay, J.

Hetty Roper, by her will of the 8th of August, 1877, appointed the defendants executors and trustees thereof, and after divers dispositions in trust devised to them (subject to payment of a certain sum) a house and lands upon trust for sale, and directed them out of the proceeds of sale to pay the expenses incident to the execution of the aforesaid trusts and her funeral and testamentary expenses and debts, and then in a specified order to pay three charitable legacies of £200, £100, and £100, and certain other pecuniary legacies, and after that to invest the residue in Government securities, together with all moneys or notes of hand, securities for money in her possession at the time of her decease, and rents falling due before the sale of the land, and pay the income to her two sisters, Caroline Taylor and Louisa Roper, during their joint lives, and to the survivor during her life, and after the death of the survivor to sell the investments and out of the proceeds pay, first, the expenses incident to the execution of the last-mentioned trust, and then two legacies of £300 each; and give the residue to the vicar, churchwardens, and overseers of the poor of the parish of Fordham, upon trust to invest the same in Government securities, and apply the dividends arising therefrom for the benefit of the sick and afflicted poor of that parish.

The testatrix died on the 16th of May, 1878, and she left no impure personalty. An order on further consideration, dated the 29th of July, 1880, and made by Bacon, V.C., after declaring that the charitable legacies of £200, £100, and £100 given out of the proceeds of sale of the house and lands were void, and resulted to the heir-at-law, and that the personal estate of the testatrix was primarily liable to pay the debts and funeral and testamentary expenses, directed taxation of the costs of the action, including charges and expenses properly incurred by the defendants, the executors, as trustees, relating to the administration of the estate, and directed balances of £424 15s. 9d. and £287 3s. 2d. to be paid into court by the executors, and a sum of £340 10s. by one J. S. Fletcher. It then proceeded to direct that so much of a sum of £4,134 4s. 3d. Consols in court to the credit of the action as, with a small sum of cash in court to the same credit, and the aforesaid balances and sum directed to be paid in, would raise the costs when taxed and the aggregate amount which should be certified to be due in respect of certain pecuniary legacies given by the will, and one of nineteen guineas given by a codicil, and two sums amounting to £76 3s. 9d. payable respectively to Caroline Taylor and the representatives of Louisa Roper (who had died before the date of the order) in respect of interest on legacies, should be sold, the said costs, legacies and sums paid, and the income of the residue of the Consols paid to Caroline Taylor for her life. Liberty to apply was given, but no subsequent further consideration was reserved.

It appeared that the sum of £4,134 4s. 3d. Consols mentioned in the order represented proceeds of sale of the house and lands, and that the small sum of cash arose from dividends on the same. The £424 15s. 9d. was the balance found due from the executors on the account of the general personal estate, and the £287 3s. 2d. was the balance due on the account of rents and profits of the realty; while the sum of £340 10s. represented principal and interest due to the testatrix on a promissory note. When the costs had been taxed and paid and all the directions of the order had been complied with, all the smaller sums were exhausted, and the Consols having been resorted to, there remained a final balance of £2,898 8s. 9d. New Consols. In 1882 the heir-at-law assigned his reversionary interest in that sum (Caroline Taylor being entitled to the income for her life) to one M. T. Whitehall absolutely. Caroline Taylor having died at the beginning of the present year, Whitehall and the heir presented a petition for the sale of the Consols and that the residue, after payment of the costs of the petition and of the legacies payable on the death of Caroline Taylor, and legacy duty, should be handed over to Whitehall.

The Attorney-General, on behalf of the Fordham Charity legatees, opposed the petition, and claimed a part of the fund on the ground that it represented not only the proceeds of the real estate, but also a certain amount of pure personalty, and that the costs, at any rate those incurred in administration of the realty, ought to have been paid exclusively out of the proceeds of the realty, but had in fact been improperly paid out of this mixed fund.

Kay, J., held that he was bound by the order made on the further consideration, and accordingly made an order in the terms of the prayer of the petition.

The Attorney-General appealed.

Ingle Joyce, for the appellant.—The costs of the action, so far as it related to real estate, ought to be borne by the real and not by the personal estate: *Patching* v. *Barnett*, 51 L. J. Ch. 74, 30 W. R. Dig. 54. It was not intended by the order on further consideration to conclude the question as to the funds out of which the costs were to be ultimately taken, or if that was the intention it was arrived at under a misapprehension of the facts. At the time the order was made the income of all the funds was payable to the same person—*i.e.*, the tenant for life—so that the question of the ultimate incidence of the costs was not argued, and may have been overlooked altogether. At any rate, the order is not conclusive on that point as to the rights of the parties: *Sheppard* v. *Sheppard*, 33 Beav. 129. If it were, the effect would be to deprive the charity of its legacy.

Warmington, Q.C., and *Mulligan*, for the petitioners.—The costs of an administration action are included in a direction in a will to pay "testamentary expenses": *Harloe* v. *Harloe*, 23 W. R. 789, L. R. 20 Eq. 471. The rights of the parties are concluded by the order on further consideration. The point ought to have been raised then if at all: *Peareth* v. *Marriott*, 31 W. R. 68, 22 Ch. D. 182. The order in question was made ten years ago, and ought not now to be in

effect reversed. In *Sheppard* v. *Sheppard* there was no variation of any previous order as to funds which had been realized at the date of that order. The subsequent order only affected funds realized after the date of the previous order. In the present case all the funds were realized at the time, and the order on further consideration must be taken to be a final order, no subsequent further consideration having been reserved.

Ingle Joyce, in reply.—[COTTON, L.J.—We need only hear you as to whether we can now in effect reverse the order made on further consideration.] After the death of Caroline Taylor, the tenant for life, it remains to be decided whether the residue goes to the charity or to the heir-at-law. If necessary, I ought to have leave to appeal even now against the order. [BOWEN, L.J.—What rule of practice do you gather from *Sheppard* v. *Sheppard?*] The rule is that when you are dividing a fund and paying part to one party and part to another, that is a final division, and you cannot generally get it back, but where it is not final, and you can see as between capital and income how the costs ought to have been borne, the matter ought to be set right by adjusting the incidence of the costs. That is precisely the position here. The cash has been taken and applied in payment of the costs in the first instance as a mere matter of convenience, instead of applying the stock to that purpose, and directing the balance of the cash to be invested, which would have involved additional brokerage fees and other expense and trouble. There has really been no decision here as to the rights of the parties. All that was meant to be decided by the order on further consideration was that the special direction in the will to pay the expenses in the first instance out of the realty was not sufficient to exonerate the general personal estate. There is nothing but a technicality against us, and even that disappears when looked into.

Cur. adv. vult.

June 23.—COTTON, L.J.—This is an appeal by the Attorney-General representing a charity. The question arose in this way. There was a fund in court when the petition was presented which had undoubtedly arisen from real estate, and which, though given to a charity, could not go to the charity, and an order was made on the petition giving the fund to the assignee of the heir-at-law, who took by intestacy in consequence of the charity being unable to take real estate. But the Attorney-General urges that what was given to the charity consisted partly of personal estate and partly of money arising from the sale of real estate, and that the portion of the costs attributable to the administration of the real estate ought to be paid out of the real estate; whereas they have, in fact, been paid so as to exhaust the whole of the personal estate; and he asks for an inquiry to ascertain how much of the costs which ought to have been paid out of the real estate has in fact been paid out of personal estate comprised in the gift. That seems to be right, for it has not been disputed that as a general rule the costs of administering real estate ought to be borne by the real estate; and if they are so borne in this case, there would be something left for the charity—about £700. Then why is it said that such an inquiry would be wrong? It was argued that there had been a declaration in the order on further consideration which threw the costs on the personal estate. I do not think that was the true meaning of that portion of the order; and it was certainly not so understood, because, as far as I can gather, the order for payment of costs was not in accordance with that view when the payments into court directed by the order on further consideration had been made. There were in court five funds—a sum of stock which had arisen entirely from real estate, and four sums of cash, two of which had arisen from real estate and two from personal estate. Then, without any reference to the order in which those funds were to be applied, there was an order which would exhaust for payment of costs and legacies all the four sums of cash which I have mentioned, and which required a certain sum to be added by sale of a portion of the £4,134 4s. 3d. stock in court, which had arisen from real estate. I think that the declaration cannot be held to apply to personal estate which was specifically disposed of by these words in the will, "together with all moneys, notes of hand, securities for money, which may be in my possession at the time of my decease, as well as rents falling due prior to the sale."

There is another question which deserves more consideration, and it is this. The order which directed payment of the costs in the way I have mentioned was an order on further consideration, and it is said that therefore it must be taken to have decided ultimately the rights of the parties, and so, as it exhausted the personal estate, all the rest must go to the heir-at-law, who took the real estate. That was undoubtedly a strong argument, but if we see on the true construction of this order that there was no intention whatever to decide the rights of the parties, I do not think that the mere fact that this payment of costs was directed by an order on further consideration ought to prevent the court from setting the matter right where there is a fund in hand enabling it to do so. I agree that an order on further consideration ought to settle the rights of the parties, and I also think that the Attorney-General ought, when the action came on for further consideration, to have asked the court to insert in its order what, if asked, it certainly would have inserted, a statement that the order for payment of costs was without prejudice to the question out of what fund the costs were to be ultimately paid. That, unfortunately, was not done, and we have to consider what effect ought to be given to this order as it stands.

Mr. Ingle Joyce referred to *Sheppard* v. *Sheppard*, where Lord Romilly laid down in very wide terms that a direction for payment of costs could not be taken in any way to decide the rights of the parties, and the case really stood over that we might discover, if we could, whether that was a general declaration, or only one referring to that particular case. We have looked at the petition which was presented there, and I should say that Lord Romilly was making too wide a statement in laying down that an order for payment of costs out of a particular fund is not to be taken as deciding the rights as between persons entitled to the fund when it comes ultimately to be divided. We must look at the order and see whether it was the intention, at the time of directing that certain costs should be paid out of a particular fund, to decide that they were to be ultimately borne by that fund. Here, although there is a declaration that certain legacies given to charities out of the testatrix's real estate were void, and that the amount of those legacies passed to the heir-at-law, we find no declaration at all as regards this fund which now remains. When the order on further consideration was made, the same person was entitled to the income, both of that part of the fund which consisted of real estate and of that part which consisted of personal estate, and the order contained no direction what was to be done after the death of the tenant for life, nor any declaration as to what would ultimately become of this fund, such direction or declaration not being necessary at that stage. I can, then, only look upon this order

as taking those funds which were most readily available for payment of the costs and legacies, without considering whether they arose from real estate or from personal estate, leaving entirely untouched, and not making any declaration upon, the question what fund should, as between the parties who were ultimately to be entitled to the different funds, be held liable to the costs. I think it would be wrong, in the absence of any declaration of the rights of the parties, to hold that by that order the Attorney-General is precluded from claiming anything on behalf of this charity when there would have been something which he could have claimed if the costs relating to the real estate had been paid, as I think they ought to have been paid, out of the real estate.

In my opinion, therefore, the Attorney-General is entitled to the inquiry which he asks, there being still in court a fund which will be clearly sufficient to set the matter right. I think the charity ought not to lose its legacy because the Attorney-General made, as I think he did, a slip in not raising, or asking the court to reserve, the question, when the matter was before the court on further consideration, out of what fund these costs ought ultimately to be paid. I think there should be an inquiry what portion of the costs has been improperly, under the circumstances, paid out of the personal estate, and that the amount should be recouped out of the proceeds of real estate.

Then comes the question as to the costs. The learned judge below directed all the costs to be paid out of the fund, and that we do not disturb. As to the costs of the appeal, although our decision is in favour of the Attorney-General, I think we ought not to give him any costs, since there would probably have been no conflict at all if the question how the costs were ultimately to be borne had been reserved, as the Master of the Rolls said, in *Sheppard* v. *Sheppard*, that it ought to be.

BOWEN, L.J.—I am of the same opinion.

FRY, L.J.—I am, unfortunately, unable to agree with my learned brothers in their view of this case. We have here an order made on further consideration when the whole of the proceedings in the action were before the court, and it was known how much of those proceedings related to realty and how much to personalty. The court then made an order dealing with the whole costs of the suit, and directed them to be paid out of certain funds. It appears to me that the way in which the order deals with the costs and with the funds indicates something like an arrangement between the parties to the litigation not to work out their rights with extreme exactitude, because, there being five funds to be dealt with, the court deals with them in this way. In the first place there are four funds consisting of cash, two of which arise from personalty and two from realty; and in the next place there is a sum of stock arising from realty alone. The court then directs the application of the four funds, without regard to whether they arose from personalty or realty, in payment of three things —viz., (1) the whole of the costs without reference to the question whether they relate to realty or personalty; (2) the balance of the legacies; and (3) a sum of £76, one part of which went to Caroline Taylor and the other part to the representative of Louisa Roper. All those three payments were directed to be made out of the four funds without regard to their origin, and then any deficiency of those four funds to make the three payments, was to be raised out of the £4,134 stock which had arisen from the realty. No liberty to further discuss the incidence of any of these sums was reserved, and therefore we have an order on further consideration which reserves no second further consideration—an order which deals with the costs and in which no point is reserved. Such an order as that is, in my humble opinion, final with regard to the costs, and I do not think it is competent to any of the litigant parties to come subsequently under the liberty to apply and to ask for an order which shall vary the incidence of the costs. As I have already observed, the whole matter is before the court on such an occasion, and, according to my view of the practice of the Court of Chancery and the Chancery Division, it has always finally dealt with costs on further consideration, unless express liberty for further discussion has been reserved, and that course seems to me to be a very convenient one. It seems to me that if such a point as this can be raised, notwithstanding the absence of a reservation of the right to raise it, the order is converted into a trap.

In the present case the respondent has actually purchased the interest of the heir under this order, without notice that there was any intention of raising this point, and then he finds that part of the fund purchased is to be taken away from him. So far as my memory enables me to speak, I have never known a case in which such a thing has been done by the Court of Chancery. I have never known a case in which, where an order on further consideration has dealt with the costs and directed them to be paid out of a particular fund without reserving liberty to alter their incidence, they have afterwards been ordered to be paid out of another fund. Therefore, although, under the circumstances, I cannot help mistrusting my own judgment, yet, as I have a strong opinion of the inconvenience of the course now pursued, I am bound to express my concurrence with the learned judge below. I may add that in *Sheppard* v. *Sheppard* there does not appear to have been any order on further consideration.

COTTON, L.J.—It does not appear that there had been.

Solicitors, *W. Horsley; Hare & Co.*, for *The Solicitor to the Treasury.*

High Court of Justice.

Chan. Div. Kay, J. } Oct. 27, 28; Nov. 8.

HALIFAX JOINT-STOCK BANKING CO. *v.* GLEDHILL. (*a.*)

Fraudulent deed—Purchaser for value without notice—Interest under the deed—13 Eliz. c. 5, s. 6 (Statutes Revised, 2nd ed., vol. 1, p. 510, s. 5).

Section 6 (section 5, revised edition) of 13 Eliz. c. 5 includes a purchaser for value without notice of any interest under a fraudulent deed, whether that interest be legal or equitable, and prevents the deed from being void as against him.

Trial of action.

This was an action by the plaintiff company to have it declared that a settlement made by the defendant John Gledhill was fraudulent and void under the statute of 13 Eliz. c. 5.

On the 25th of June, 1885, John Gledhill gave to the plaintiff bank a guarantee to secure the banking account of his son, Thomas Gledhill, and a judgment, dated the 15th of November, 1888, was subsequently obtained againt him by the bank on

(*a.*) Reported by JAMES H. BAKEWELL, Esq., Barrister-at-Law.

this guarantee. Thomas Gledhill, who was living with his father, but carried on business separately, became embarrassed, and on the 26th of October, 1887, called a meeting of his creditors for the 31st of October. On the 27th of October John Gledhill executed a settlement of certain real property belonging to him and a policy of life assurance on trusts for his wife for life, and then for himself for life, and then for all his present and future children. On the 8th of November Thomas Gledhill entered into a composition with his creditors, and the defendant Sellers, at Thomas Gledhill's request, became surety for the payment of the last instalment nnder the composition, amounting to £2,000. For this purpose Sellers gave a cheque for that sum, dated November 15, 1887, to Richard Moore, chairman of the creditors' meeting, and John Gledhill, on the same day, gave to Sellers a security by depositing with him, with—according to the evidence of John Gledhill—the consent of his wife and son Samuel, the deed of settlement of October 27, 1887, and the policy and the prior title deeds of the settled property; and a memorandum of that date was signed by Thomas and John Gledhill.

Sellers, in his defence, stated that he did not know that the settlement was fraudulent and void, and in his evidence said that he did not know of John Gledhill's guarantee to the bank.

Moore negotiated Seller's cheque, which he was compelled to pay to the holder, although the composition scheme failed, and Thomas Gledhill was adjudicated bankrupt. Sellers brought an action against Moore for improperly parting with the cheque, and recovered judgment; but, a new trial being ordered, the action was compromised, Moore paying £1,297 6s. 8d., and Sellers now claimed the balance due to him on his security.

Marten, Q.C., and *B. Eyre*, for the plaintiffs.

Haldane, Q.C., and *Hood*, for the defendant Sellers.—A subsequent purchaser for value can set up the settlement: 13 Eliz. c. 5, s. 6 (section 5, revised edition); *George* v. *Milbanke*, 9 Ves. 190; *East India Co.* v. *Clavell*, Prec. Ch. 377; s.c. *sub. nom. East India Co.* v. *Shepherd*, 4 De G. & J. 455n; *Payne* v. *Mortimer*, 7 W. R. 646, 4 De G. & J. 447; *Prodgers* v. *Langham*, 1 Siderfin, 133; *In re Barker's Estate*, 23 W. R. 944; *Freeman* v. *Pope*, 18 W. R. 399, 906, L. R. 9 Eq. 206, 5 Ch. App. 538; *Doe* v. *Martyr*, 1 B. & P. (N. R.) 332.

Butcher, for John Gledhill.

Cartmell, for parties interested under the settlement.

Marten, Q.C., replied.

Nov. 8.—KAY, J. [after stating the facts as above set out, held, upon the evidence, that the settlement was void under 13 Eliz. c. 5 as against the general creditors of John Gledhill, and that the deposit of the deeds and the memorandum only gave the defendant Sellers a security upon the reversionary life interest of John Gledhill, and continued:—] The question of law which has been raised is important. Section 6 of 13 Eliz. c. 5 has generally been treated as applying to a purchase by the settlement itself, but there is some authority for treating it as applicable to the purchase for value of an interest under a voluntary deed, which has been subsequently assigned.

As far as I can discover, there is no direct decision upon this point. The subject is carefully considered in May's Treatise on the Statutes, 2nd ed., p. 323. It is there stated that, although there is authority for saying that a subsequent valuable consideration will support a deed under 27 Eliz. c. 4, there is no express decision that this would be the case under 13 Eliz. c. 5. The rights of creditors under that statute accrue immediately upon the execution of the settlement impeached. The learned author proceeds to argue that the deed, being good against the grantor and only void against creditors, is, practically, not void, but voidable at their suit, and that, consequently, a purchaser for value of an interest under the deed can successfully resist any attempt to avoid it.

It seems to me impossible to say that the right of creditors under the statute of 13 Eliz. c. 5 is an equity, if that is the learned author's meaning. A court of equity does not avoid the deed in a suit by such creditors, but merely declares, if it is proved fraudulent, that it is void against them by the statute. The real question is whether a subsequent purchaser for value of an interest under the settlement without notice has his purchase protected by section 6. If he has, it does not matter whether it was a legal or merely an equitable interest. If he has not, then, as the creditors' rights are under a positive enactment that the deed is void as against them, their claim is not equitable, but legal.

It seems strange that there should be no direct decision. On the other hand, I have not been able to find a case in which creditors have prevailed against such a purchaser. In *Prodgers* v. *Langham*, a case treated as authoritative by Lord Eldon in *George* v. *Milbanke*, and called by Lord Kenyon, in *Parr* v. *Eliason*, 1 East, 92, "a very leading authority," it is stated that if there be a fraudulent feoffment and the feofee enfeof another for valuable consideration without notice of the fraud, his title shall prevail against a subsequent purchaser for value from the first feoffor, notwithstanding the 27 Eliz. c. 4. It is not expressly stated in the report that this is by reason of section 3 of that statute, which is similar to section 6 of the 13 Eliz. c. 5, nor does Lord Eldon or Lord Kenyon give that as the reason for the decision. Lord Eldon says this, 9 Ves. at p. 195:—"The reason as stated is this, that, though a voluntary feoffment is bad as between the creditor and the feoffee, yet it is good as between the feoffor and feoffee; and therefore the latter, if prior, shall hold against the subsequent feoffee of the feoffor. The consequence is that the feoffment of the voluntary feoffee is good against creditors."

This can hardly be a correct report of what Lord Eldon said. The voluntary feoffee could not hold against a subsequent feoffee for value from the original feoffor by reason of the statute 27 Eliz. c. 4. A feoffment, although made for value, by a voluntary feoffee, could not make good the voluntary feoffment to him, if void under 13 Eliz. c. 5, unless the position of his feoffee is saved by section 6 of that statute. In that case the feoffment of the voluntary feoffee is good against creditors of the original feoffor by positive enactment.

The actual decision in *Prodgers* v. *Langham* was that a lease for the benefit of a daughter, if she married with her father's consent, being voluntary, would be void against a subsequent purchaser for value by virtue of the 27 Eliz. c. 4, but that although so void it might be made effectual against such purchaser by a subsequent marriage of the daughter upon the faith of it. This seems to have proceeded upon the ground that the subsequent consideration of the marriage related back as though the settlement had been made upon the marriage.

The case of *George* v. *Milbanke* was a contest between the creditors of an appointor, who in his lifetime had exercised a general power of appointment over a fund in favour of a volunteer, and a purchaser after his death from the volunteer of £500, part of the appointed fund. By the equitable rule the exercise

moneys in their hands as trustees, in the aforesaid business, or any other business in which they, in their uncontrolled discretion, might think fit, without being liable for loss. D. and M. J. were appointed executors and trustees. The widow entered into partnership with D. in the business for ten years from the 1st of January, 1873. The £1,000 was left in the business during and after the said term of ten years. In June, 1883, the widow having then left the business, D. filed a petition for liquidation of his affairs, and a composition of 10s. in the pound was agreed to, payable by three instalments—on the 2nd of January, 1884, the 2nd of April, 1884, and the 2nd of October, 1884. Only one instalment was received by the trustee M. J., and it was not invested, but placed on deposit at a bank. No pressure was made for payment of the unpaid instalments. G. R. J., having come of age, brought an action against the trustee M. J. and others seeking relief on the ground of breaches of trust.

Held, as regards M. J., (1) that the not calling in the £1,000 on the widow's retirement from the partnership was not a breach of trust, but that, on the true construction of the codicil, the power was not restricted to lending to any particular partners in the business; (2) that the not calling in or pressing for payment of the two instalments unpaid was not a breach of trust, the trustee, M. J., not having been guilty of negligence, but having acted honestly in the belief that pressure would not have resulted in benefit to the estate, and with a reasonable ground for acting as he did; (3) that having regard to the fact that the loss of income, if any, through non-investment of the first instalment was very small, coupled with the probability, then existing, of another instalment being shortly received, when both might be invested together, it would be going too far to make an order on that head against the trustee M. J., who acted on his solicitor's advice in placing the money on deposit at a bank instead of investing it.

Trial of action.

In this case Earl, the testator, by his will directed £1,000 to be raised and invested on certain trusts therein declared in favour of his stepson, the plaintiff, one G. R. Johnson. The testator subsequently entered into partnership with the defendant Davies in the business of manufacturing confectioners. By a codicil to his will, after reciting the gift of this legacy, the testator proceeded as follows:—"And whereas since the date and execution of my said will I have entered into partnership with my brother-in-law, Robert Jones Davies, in the business of manufacturing confectioners, at the City of Chester, under articles of partnership dated the 23rd of November, 1871, and have invested the bulk of my estate in the way of capital in the said business, and am desirous that such capital shall remain in the said business, and that my wife, Elizabeth Earl, should, in the event of my death, enter into partnership with the said Robert Jones Davies on the same terms and with the full benefit of the same capital as I now have therein, and that my said trustees should have power to continue the said sum of £1,000 bequeathed to or in trust for the said G. R. Johnson and hereinbefore referred to in the said business; Now I do hereby declare that it shall be lawful for my said trustees or trustee, in addition to the powers of investment given to them by my said will, to invest or continue invested any moneys which may come to their hands as such trustees or trustee either in the aforesaid business or in any other business in which they in their uncontrolled discretion may think fit, without being liable for any loss to be thereby occasioned. And I further declare that so long as the said sum of £1,000 shall remain invested in the said business the trustees or trustee shall be entitled to receive and shall pay to the said G. R. Johnson or otherwise invest for him or his benefit in manner aforesaid interest thereon," as therein mentioned.

The testator died in December, 1872, and his will and codicil were shortly afterwards proved by the executors and trustees therein named, the defendants Davies and Jones. His widow entered into partnership with the defendant Davies in the confectionery business for a term of ten years from the 1st of January, 1873, the £1,000 being left in the business during the whole term, and even after the partnership had expired by effluxion of time.

In June, 1883, the defendant Davies filed a petition for liquidation of his affairs, which resulted in the acceptance by his creditors of a composition of ten shillings in the pound, payable by instalments on the 2nd of January, 1884, the 2nd of April, 1884, and the 2nd of October, 1884, and secured by promissory notes in favour of the trustee in the liquidation and by a further guarantee. Of these instalments only one had been received by the trustees of Earl's will, which was not invested by them, but placed on deposit at a bank.

The plaintiff, G. R. Johnson, having attained the age of twenty-one years, brought the present action against the trustees of Earl's will and Davies' trustee in liquidation, claiming relief as against Jones in respect of the following alleged breaches of trust—(1) not calling in the £1,000 on the widow's retirement from the business when the term had expired; (2) neither taking steps nor compelling the trustee in Davies' liquidation to take steps to recover the second and third instalments; (3) omitting to invest the first instalment. The plaintiff also sought to have Davies' estate declared liable.

Neville, Q.C., and *Rutherford*, for the plaintiff.—Jones refrained from pressing Davies out of friendship, and not because in his (Jones's) judgment the estate was likely to benefit by the delay. In support of this contention we rely on a letter of the 22nd of January, 1885, from Davies to Jones, to the following effect:—"I am sure that you would not harass me by pressing me to do what will be a great inconvenience at the present time, and if you would grant me an interview I could explain things to your entire satisfaction. If the whole thing was realized at the present moment I would be able to pay all the unpaid accounts to G. R. J. . . . out of book debts alone, leaving stock and plant to cover less than £500 trade creditors (new). Had a good year, and am starting another under much brighter circumstances than the last, and if God gives me health and strength I shall be able, with His blessing, to pay these deferred accounts in a short time. Hoping you will grant my request, which is not much for you, but a great deal for me, I remain, &c., ———."

Haldane, Q.C., and *Maidlow*, for the defendant Jones.

The defendant Davies and the trustee in his liquidation were not represented.

ROMER, J.—As against the defendant Davies the case is undefended. There must, therefore, be a direction that his estate is liable for the amount lost and for costs. As against the defendant Jones the case is different. It is attempted to render him liable for losses caused by alleged breaches of trust under three heads. First, it has been contended that he committed a breach of trust in allowing a sum of £1,000 to remain in the business after the testator's widow had retired from it, on the expiration of the term of her partnership. This question turns on the construction of the testator's codicil. His trustees were thereby empowered to allow this sum to remain in the business, and their power was not restricted to

lending it to any particular partners in the business. I come to this conclusion, not on the power standing alone, but reading it together with the recital contained in the codicil. Reading them together, it is clear to my mind that the testator did not intend to restrict the lending to the partnership between his widow and the defendant Davies, and that the trustees were therefore justified in allowing the £1,000 to remain in the business, notwithstanding the change of partners.

Secondly, the plaintiff seeks to make Mr. Jones liable for not having received the two instalments of the composition in Mr. Davies' liquidation payable on April 2, 1884, and October 2, 1884. On this question I have felt considerable doubt; the case coming very near the line. On the whole, however, I think that Mr. Jones ought not to be held liable. On the evidence I think that he had reasonable ground for believing that if he put on pressure, with a view to obtaining payment, such a course would not result in benefit to the trust. This is not a case in which the trustee has taken no trouble, or one of simple negligence, or of not looking into the matter, or of being content with the supposition that the instalments might be paid at any time. On the contrary, Mr. Jones was desirous of obtaining, if he could, payment of these instalments. Reliance has been placed, and justly placed, by counsel on behalf of the plaintiff, on the letter of the 22nd of January, 1885, as showing that the business was at that time in such a state that pressure by Mr. Jones would have resulted in payment. But I am convinced, not only that that letter did not represent the true state of the business at that time, but also that Mr. Jones was not misled by it. I think that the writer of that letter was too sanguine, and that the result of putting on pressure would have been stoppage of the business and non-payment of the instalments remaining due. The trustee honestly believed that it was better not to press for payment; and, whether that opinion was correct or not, he had reasonable grounds for acting as he did. The second claim, therefore, in my opinion, fails.

Thirdly, the plaintiff seeks to have Mr. Jones declared liable for not investing the first instalment of the composition. The trustee having received this small sum, acted on the advice of his solicitor, and placed it on deposit at a bank. Having regard to the smallness of the loss of income, if any, and the probability of another instalment being received, when the two instalments might be invested together, I think it would be going too far to make any order against Mr. Jones on this head. As against Mr. Jones, therefore, all the claims fail, and the action must be dismissed, with costs.

Solicitors, *Rowcliffes, Rawle, & Co.; Robbins, Billing, & Co.*

Q. B. Div. (Grantham, Vaughan Williams, and Lawrance, JJ.) Nov. 10.

MACKAY *v.* MCGUIRE. (*a.*)

Election law—Parliament—Registration of voters—Occupation franchise—Bankruptcy of occupying tenant—Subsequent acceptance of rent—Undisturbed occupation—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 20, 168—*Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 3, *sub-section* 2.

In support of an objection to the name of a voter being retained on an occupation list, it was proved that he had been adjudicated bankrupt during the qualifying period. The trustee in bankruptcy, however, had not interfered, the voter had remained in occupation, and the voter's landlord had accepted rent from him, subsequently to the adjudication. The revising barrister retained the name of the voter on the list.

Held, that the revising barrister was right.

Appeal from a decision of the revising barrister for the city of York.

William Britton, the nature of whose qualification to be on an occupation list of voters was stated to be a dwelling-house in Walmgate, was duly objected to on the ground that he had not occupied the dwelling-house in question during the qualifying period—*i.e.*, during the whole of the twelve months preceding the last day of July, 1890. He was a yearly tenant, and was adjudicated bankrupt on the 17th of October, 1889. He paid, and the landlord accepted, rent from him on the usual quarter days during the residue of the qualifying period after the adjudication. His occupation during the period was continuous and was not disturbed or interfered with in any way, either by the landlord or by the trustee. The revising barrister held that the objection failed, on the ground that the occupation was clothed with the legal character of a tenancy—(1) by contract; (2) by implication of common law of a tenancy at will; (3) by acceptance of rent.

The objector appealed.

Scott Fox, for the appellant.—By section 20 of the Bankruptcy Act, 1883, "where a receiving order is made against a debtor . . . the property of the bankrupt shall become divisible among his creditors, and shall vest in the trustee." The debtor, therefore, is no longer tenant, having been divested of his right by the trustee, who could have assigned it to a third person. The occupation of the house by the voter was, for some time at least after the adjudication, permissive only, and not a tenancy within the meaning of section 3, sub-section 2, of the Representation of the People Act, 1867.

T. Willes Chitty, for the respondent.—Section 3, sub-section 2, of the Representation of the People Act, 1867, allows any person to have a vote if he occupies as owner or tenant. Bankruptcy is not *per se* a disqualification, and ought not, therefore, to become so indirectly by means of a side question. Up to the date of the receiving order the claimant occupied as tenant, and so long afterwards as he remains in possession he is in the same position as an executor on the death of a testator—*i.e.*, a tenant at will. *Doe d. Hull* v. *Wood*, 14 M. & W. 682; *Doe d. Palmer* v. *Andrews*, 4 Bing. 348.

Scott Fox, in reply, cited *Richardson* v. *Langridge*, 4 Taunt. 128; *McLean* v. *Pritchard*, 36 W. R. 508, 20 Q. B. D. 285.

GRANTHAM, J.—I am of opinion, though not without some misgivings, that the revising barrister was right, and that this appeal ought to be dismissed Having regard to the principle, not of extending the franchise, but of including rather than excluding claimants on somewhat technical grounds, I have come to the conclusion that the claimant in this case was an occupying tenant, and therefore entitled to be on the list of voters. All the property of the bankrupt vested, no doubt, in the trustee, but the fact that the landlord took rent from the tenant after bankruptcy refers back the tenancy to the time that the trustee took the premises. The tenancy, therefore, was continuous, or if any hiatus exists it may be disposed of by the maxim *De minimis non curat l*

(*a.*) Reported by G. K. PALEY, Esq., Barrister-at-Law.

VAUGHAN WILLIAMS, J.—I assent to the judgment of my brother Grantham with considerable doubt. The statute requires not mere occupancy, but occupancy as tenant or owner. The occupancy must also be continuous. We must satisfy ourselves, therefore, that there was a tenancy during the whole time of the qualifying period, and looking at the circumstances of the present case—the holding over of the bankrupt, the subsequent sufferance, consent, and receipt of rent by the landlord, I think we must conclude that the bankrupt was a tenant to the landlord from the date of the adjudication. There was, therefore, no hiatus, and the revising barrister was right in retaining the voter's name upon the lists.

LAWRANCE, J., concurred.

Appeal dismissed.

Solicitors for the appellant, *Iliffe, Henley, & Sweet*, for *Russell & Mackay*, York.

Solicitors for the respondent, *Sharpe, Parker, Pritchard, & Sharpe*, for *McGuire*, York.

Q. B. Div. (Mathew and Grantham, JJ.) Nov. 6.

In re LANGLOIS & BIDEN. (*a.*)

Solicitor — Costs — Action in county court — Amount claimed over £10—Amount recovered less than £10—Higher and lower scales—County Court Rules, 1889, *Appendix—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 118.

Where the amount claimed in an action in a county court is over £10, but the amount recovered is less than £10, the taxation of costs, both as between solicitor and client and as between party and party, must be on the lower scale. Therefore, where a plaintiff in a county court action stated to his solicitor and swore in an affidavit that £15 was due to him from the defendant, and it afterwards appeared that, to the plaintiff's knowledge, £5 only was due, and judgment was recovered for that sum,

Held, that the plaintiff's solicitors were entitled to have their bill taxed on the lower scale only.

This was an appeal from a decision of Huddleston, B., in chambers, reviewing the taxation by Master Wilberforce of a solicitor's bill of costs.

A person named Wood instructed the solicitors to appear for him in an action in a county court in which he was plaintiff. The action was upon a bill of exchange for £15, and Wood informed the solicitors that he had paid for the bill the full amount for which it was drawn. In the course of the proceedings an affidavit was filed in which Wood swore that the whole £15 was due to him. At the trial Wood admitted in cross-examination that he had paid £5 only for the bill, and judgment was given for him for that amount, with costs.

Wood, being dissatisfied with the amount tendered to him by the solicitors as the result of the action, obtained an order for taxation of their bill. The master taxed the costs of the action upon the lower scale, which is headed (see Appendix to County Court Rules, 1889): "Costs to be paid to solicitors in actions and matters, as well between party and party as between solicitor and client, where the amount recovered exceeds £2 and does not exceed £10," and his allocatur was, accordingly, for £2 13s. 6d.

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

The solicitors having taken out a summons to review this taxation, Huddleston, B., held that the taxation ought to have been according to the higher scale, "where the subject-matter or the sum recovered exceeds £10." According to this decision the taxed bill amounted to £9 14s. 6d.

Wood appealed.

Crump, Q.C. (*W. H. C. Payne* with him), for the appellant.—Costs as between solicitor and client are to be taxed according to the scales: County Courts Act, 1888, s. 118. The "amount recovered" here did not exceed £10, and therefore the lower scale is applicable. The word "subject-matter" in the heading to the higher scale refers to actions in which it is not a sum of money, but land or other property which is in dispute.

R. Bray, for the solicitors, referred to the note at the foot of the lower scale:—"N.B.—No other costs are to be allowed than the above where the amount claimed does not exceed £10, unless the judge certifies under section 119 of the County Courts Act, 1889." This shows that the amount claimed is to be considered in taxation, and here £15 was claimed. £15 was the "subject-matter" within the meaning of the heading to the higher scale.

MATHEW, J.—In this case it seems to me that the order of the master is perfectly right, and that the learned judge ought to have confirmed it instead of setting it aside. The question arises, in the first instance, upon section 118 of the County Courts Act, 1888. Nothing can be clearer and more explicit, it seems to me, than that section upon this subject. It is clear, I think, that there was an intention on the part of the Legislature that there should not be that distinction with reference to the minor claims to be recovered in county courts between costs between party and party and costs between solicitor and client, which so unfortunately prevails in the High Court. That section deals with the costs of solicitors both as between party and party and as between solicitor and client. It provides for taxation, and enacts that "no costs or charges shall be allowed on such taxation which are not sanctioned by the scale then in force unless the registrar shall be satisfied that the client has agreed in writing to pay them, in which case they may be allowed, and no solicitor shall have a right to recover from his client any such costs or charges unless they shall have been allowed on taxation. It was, therefore, intended that (except in the case mentioned) there should be no distinction between the two sets of costs. Then section 119 provides for costs upon the higher scale on the certificate of the judge, the certificate containing statements which are mentioned in the section. When we come to look at the scale we find that it is headed in this way:—"Costs to be paid to solicitors in actions and matters as well between party and party as between solicitor and client where the subject-matter or the sum recovered exceeds £10," that is, where the subject-matter recovered or the sum recovered exceeds £10; that is the obvious interpretation of it. But it was said that attention must be called to the note to the lower scale, and in that, the word "claimed" is substituted for the word "recovered"; although the heading part is the same—the words used are "the amount recovered"—it is said that you are to pass that, and control that statement and the statement with reference to the costs upon the higher scale, and the statement in the section of the Act of Parliament, because there appears this *nota bene* at the end:—"No other costs are to be allowed than the above where the amount claimed does not exceed £10, unless the judge certifies under section 119 of the County Courts

Act, 1888." It is perfectly clear the meaning of that note is to call attention to section 119, which controls section 118 according to its terms, but not to enlarge the word "recovered" to the word "claimed." There is a further observation to be made; the matter appears to have been present to the attention of those who framed these scales, and the distinction between the amount recovered and the amount claimed clearly appears. "Where the costs of a defendant are being taxed, the word recovered, wherever it occurs in the scale, means claimed." The meaning of that is quite obvious. The defendant is entitled to resist the whole claim, and has his costs, therefore, taxed upon that scale. But when the plaintiff brings a claim which he ought not to have brought, and for an amount in excess of that which he ought to have claimed in that case (although, as appears in this particular case, great hardship may be done to his solicitor), the Legislature has not protected the solicitor against that. It has imposed upon him the obligation of protecting himself by an agreement in writing that he is to have more than would otherwise be allowed. This taxation ought to have been on the lower scale, and the appeal must be allowed.

GRANTHAM, J.—I am of the same opinion. In this case there may be individual hardship to the solicitor in consequence of the false statement made by his client, but, unfortunately for him, we have to deal with the Act of Parliament and the rules, and it is clear from both of them that the word "recovered" cannot mean "claimed."

Appeal allowed.

Solicitor for the appellant, *Morris N. Fuller.*

Solicitors for the respondents, *Langlois & Biden.*

Q. B. Div. (Lopes, L.J.) Aug. 9, 1890.

GORDON *v.* SILBER. (*a.*)

Innkeeper—Lien—Husband and wife guests at inn—Credit given to husband—Lien on wife's goods belonging to her as her separate property.

Where a husband and wife have come to an inn to stay as guests, bringing goods with them, the innkeeper's lien for his charges attaches to the whole of such goods, including any that are the wife's separate property, although the innkeeper may be unable successfully to sue the wife in respect of her separate estate, by reason of his having given credit to the husband alone.

Action tried by Lopes, L.J., sitting without a jury.

The circumstances of the case sufficiently appear from the judgment.

J. E. Bankes and *Lewis Thomas*, for the plaintiffs.

Paget, for the defendants.

LOPES, L.J., delivered the following written judgment:—This is an interesting and important case, and raises a question which could not have arisen before the Married Women's Property Act, 1882. The claim is made by the plaintiffs, the proprietors of the Hotel Metropole, against Mr. Martin Silber and his wife, Lady Lucy, to recover £340 4s. 1d., the balance of an hotel bill. Lady Lucy has separate property, and the claim is made against her on that ground. The separate property is admitted. Mr. Martin Silber has become insolvent, whence this action.

The facts may be shortly stated thus:—Before May, 1889, Mr. Martin Silber had been staying at the Hotel Metropole by himself, and had incurred expenses which he had paid. In May he was joined by his wife; she subsequently left for a fortnight, and then again joined her husband at the Hotel Metropole. He met her at the station, and they came to the hotel with a large quantity of luggage, and were received there, occupying the same rooms which they had previously occupied. They continued to live there together until August 27, when Mr. Martin Silber left, Lady Lucy remaining there until September 4, when she left. Mr. Martin Silber had made payments on account. The plaintiffs claimed the balance of the bill from Lady Lucy, and sought to make her separate property liable. I was of opinion that their claim could not be sustained against Lady Lucy, on the ground that Mr. Martin Silber was the contracting party, to whom credit (as Mr. Hollands, the proprietor, candidly admitted) had been given. But the separate property of Lady Lucy in the shape of trunks, boxes, and their contents had been detained by the plaintiffs as and for their lien in respect of the unpaid balance, and the return of this separate property was claimed by Lady Lucy in her counter-claim. This raises the important question in this case.

The question is, Were the plaintiffs entitled to retain these last-mentioned goods of Lady Lucy? They were unquestionably her separate property, but were brought into the hotel and there received by the plaintiffs at the time when Mr. Martin Silber with his wife became the guests of the plaintiffs. The plaintiffs, as innkeepers, were bound to receive the defendants and their goods, and were bound, so long as the defendants remained guests at the hotel, to keep safely and securely their goods; and the plaintiffs would have been liable in damages if these goods had been lost. How did the plaintiffs receive them? They knew of no distinction between the goods of the husband and wife, and could not inquire into their respective titles to the goods. They received them as the goods of Mr. Martin Silber and his wife, who became their guests. Suppose Mr. Martin Silber had stolen the goods, still if the plaintiffs received them with their guests, the lien would have attached.

By the common law of England every person who keeps a common inn is under an obligation to receive and afford proper entertainment to everyone who offers himself as a guest, if there be sufficient room for him in the inn, and no good reason for refusing him. The innkeeper is under an obligation to keep the goods of a guest received into the inn safely and securely, and can be sued and made liable in damages if he fails in this respect. As a compensation for the burden thus imposed upon him, the law has given him a lien upon the goods of the guest until he discharges the expenses of his lodging and food. If the guest has brought goods to the inn to which he has no title, this will not deprive the innkeeper of his lien, because he is obliged to receive the guest without inquiries as to his title.

It seems, therefore, that the lien is commensurate with the obligation to receive the guest and to keep safely and securely his goods. The right of lien of an innkeeper depends upon the fact that the goods came into his possession in his character of innkeeper, as belonging to a guest: *Smith* v. *Dearlove*, 6 C. B. 132. The guests received in this case were Mr. Martin Silber and his wife, and all the goods received by the innkeeper were received as the goods of Mr. Martin Silber and his wife. They brought the goods to the hotel. If Mr. Martin Silber had stolen the goods, the

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

lien, as I have said, would have attached. Can it be said that it is not to attach because some of the goods happen to be the separate property of his wife, who was received as his wife with him as a guest? Husband and wife arrive at an hotel with luggage; the innkeeper has no power of discriminating what may be the property of the husband and what may be the property of the wife; he receives, and is bound to receive, husband and wife with their luggage; the innkeeper's charges are not paid, and I cannot see how it can be successfully contended that the lien does not attach. It would, in many cases, be defeating the innkeeper's lien, and the object for which it was given. The plaintiffs, therefore, fail as to their claim against the female defendant, but succeed as to her counter-claim, and there will be judgment for the defendant on the claim, and for the plaintiffs on the counter-claim.

Solicitors for the plaintiffs, *Ingram, Harrison, & Ingram.*

Solicitors for the defendants, *Arnold & Henry White.*

Q. B. Div. (Huddleston, B.) June 17; July 1, 1890.

SERRAINO & SONS *v.* CAMPBELL AND OTHERS. (*a.*)

Shipping—Charter-party—Bill of lading—Exceptions in charter-party which are not repeated in bill of lading.

By a bill of lading goods were to be safely delivered, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted, unto order or to assigns, they paying freight for the said coals and all other conditions as per charter with average accustomed." By the charter-party, in addition to the clause above referred to was the following—namely, "Negligence clause as per Baltic bill of lading 1885," *which provided that "stranding and collisions, and all losses and damages caused thereby, were to be excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, or mariners." The goods were lost by the negligence of the master. In an action by the indorsees of the bill of lading against the shipowners for negligence,*

Held, that the words in the bill of lading, "All other conditions as per charter," referred only to such conditions as are ejusdem generis *with the payment of freight, and did not incorporate the negligence clause in the charter-party, and that the owners were therefore liable.*

Russell *v.* Niemann, 17 *C. B. N. S.* 163, *followed.*

This was an action tried before Huddleston, B., and a special jury. It was brought by the indorsees of a bill of lading against the owners of the vessel *John Banfield* to recover £447 1s., the value of goods lost by the negligence of the defendants. The facts and arguments sufficiently appear in the judgment.

Barnes, Q.C., Lawson Walton, Q.C., and *C. F. Lowenthal,* for the plaintiffs.

French, Q.C., and *Joseph Walton,* for the defendants.

HUDDLESTON, B., read the following judgment:—This was an action brought by the plaintiffs as indorsees of a bill of lading and owners of goods entrusted to the defendants, as owners of the vessel *John Banfield,* for delivery at Trapani, in the Island of Sicily, shipped by Messrs. Fisher, Renwick, & Co., and lost by reason of the negligence and want of skill of the officers and crew in charge of the ship near Mazzara, on the coast of Sicily. The vessel stranded at Mazzara, and the plaintiff's goods were lost. Witnesses being called, the jury found that the loss was due to the negligence of the master. On this finding it was agreed that the jury should be discharged, and that the rest of the case should be decided by me alone. The charter-party, which was in the ordinary form, was described to be by Fisher, Renwick, & Co. "as agents for the charterers." It contained in print the usual exceptions, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever during the said voyage," and in writing at the end, "Negligence clause as per Baltic bill of lading 1885." It was contended on the part of the defendants that the plaintiffs were parties to the charter-party, Fisher, Renwick, & Co. being their agents, and, therefore, that the plaintiffs as principals were bound by all the terms of the charter-party, but if they were not actual parties to the charter-party, as principals they were so to the bill of lading, which, it was alleged, incorporated all the provisions of the charter-party, including the Baltic bill of lading clause 1885. Besides, the fact of Fisher, Renwick, & Co. describing themselves as agents for the charterers, there was no evidence to show that they were so in fact. The contract between them and the plaintiffs was contained in letters and telegrams discussing the price, and concluded with a letter of the 12th of December in which Fisher, Renwick, & Co. write: "Referring to telegrams exchanged between us, we confirm sale to your good selves of a cargo of large Newcastle steam coals at 19s. 6d. per ton *c.i.f.* Trapani," and the invoice was made out by Fisher, Renwick, & Co. as vendors to the plaintiffs as vendees. I was clearly of opinion that the contract was one of sale, and not of agency, and that Fisher, Renwick, & Co. were principals in the charter-party, and that the plaintiffs were not parties directly bound by it.

It was, however, contended that the bill of lading incorporated all the provisions of the charter-party, and amongst them the Baltic clause. The bill of lading provided that the goods shipped by *The John Banfield* by Fisher, Renwick, & Co. were to be delivered at the port of Trapani, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted, unto order or to assigns, they paying freight for the said coals, and all other conditions as per charter with average accustomed," and it was argued that the words "all other conditions as per charter" imported into the bill of lading the Baltic clause. The Baltic clause provided that "stranding and collisions, and all losses and damages caused thereby," were to be excepted, "even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners." I am of opinion that the words "all other conditions" must be connected with the words "paying freight for the coals," and include only such conditions as are *ejusdem generis* with the payment of freight, importing into the bill of lading so much of the charter-party as is referable to the subject-matter of the discharge and receipt of cargo at the port of discharge, and do not include a clause which would add to the exceptions already recited, and very materially alter the contract on the face of the bill of lading. *Russell* v. *Niemann,* 17 C. B. N. S. 163, 12 W. R. C. L. Dig. 121, is directly in point. *Russell* v. *Niemann* was recognized and approved of in the case of *Taylor* v. *Perrin* in the House of Lords, the shorthand writer's judgment in which has been furnished to me, though the case does not seem to have found

(*a.*) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

its way into the regular reports. Lord O'Hagan describes *Russell* v. *Niemann* to be a perfectly well-decided case. Lord Blackburn says: "I am clearly of opinion that, on the true construction of the bill of lading, the reference to the charter-party does not extend the exceptions by adding those that are in the charter-party. The case which has been referred to (*Russell* v. *Niemann*)—in which Wills, J., gave judgment, as it appears to me, perfectly correctly—decided that the reference to the charter-party is meant to bring in those conditions which would apply to the person who has taken the bill of lading and is taking the delivery of the cargo, such as the payment of demurrage, the payment of freight, the manner of paying, and so on, but is by no means to be taken to incorporate all the conditions of the charter-party.

It was said that Lord Fitzgerald appeared to dissent from that view in the House of Lords, but I do not so read his judgment. He merely says that it was not necessary to discuss it for the decision of the particular case before them. Mr. French argued that *Gray* v. *Carr*, 19 W. R. 1173, L. R. 6 Q. B. 522, and *Porteus* v. *Watney*, 27 W. R. 30, 3 Q. B. D. 534, must be considered to overrule *Russell* v. *Niemann*, but in both those cases the conditions imported into the bill of lading were *ejusdem generis* with those contained in the bill of lading. The other authorities cited—*Gullischen* v. *Stewart*, 31 W. R. 745, 11 Q. B. D. 186, and on appeal 32 W. R. 763, 13 Q. B. D. 317; *Gardner* v. *Trechman*, 33 W. R. 190, 15 Q. B. D. 154; and *Hamilton* v. *Mackie*, 5 Times Law Rep. 677—amount to this, that where there are such words of reference in the bill of lading all the provisions of the charter-party are to be considered as introduced in the bill of lading, and that if then any of those are contradictory to the terms of the bill of lading or insensible they may be rejected. In this case, as the parties have agreed that there should be only certain exceptions mentioned in the bill of lading, the introduction of the Baltic clause would altogether override those exceptions, and, therefore, be inconsistent with the provisions which in the bill of lading were agreed to by the parties. Under these circumstances I am of opinion that, the negligence having been proved, the defendants are not exempted from the consequences of that negligence either by the terms of the bill of lading or the charter-party, and that, therefore, the plaintiff is entitled to a verdict for the amount claimed—£447 1s.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Cooke & Ball*, for *Adamson & Co.*, North Shields.

Solicitors for the defendants, *Stocken & Jupp*.

Court of Appeal.

From Chan. Div. Nov. 17, 18; Dec. 3.

In re PATRICK.
BILLS *v.* TATHAM. (*a.*)

Settlement—Voluntary settlement—Assignment to trustees—Debts secured by bills of sale—Debts got in during lifetime of settlor—Liability of settlor's estate.

P. executed a voluntary settlement in favour of his wife and other relatives, by which he assigned to two trustees certain property, including four debts secured by registered bills of sale, for which he gave them power to sue, upon trust to convert the trust property into money, and execute all necessary assurances for this purpose. P. died intestate, having in his lifetime got in the four debts in question.

Held (affirming the decision of the court below), that the debts were completely assigned by the voluntary settlement, and the estate of the settlor was liable to make good to the trustees the amount of the debts got in by the settlor.

Appeal from Kekewich, J.

J. Patrick, a solicitor, executed a voluntary settlement on the 11th of August, 1873, in favour of his wife, his sister, and two sisters of his wife. By this deed he assigned to two persons therein named as trustees a leasehold house and certain other property, including four debts secured in his favour by registered bills of sale on the goods and chattels of the debtors, to be held by the trustees upon the trusts therein declared. The deed contained a recital that the settlor was "entitled to the several principal sums of money specified in the schedule hereto, and due and owing to him respectively on the securities in such schedule also specified, together with interest thereon respectively." The deed also contained an assignment to the trustees of "all that and those the several principal sums of money specified in the schedule hereto as owing to the settlor, and all interest due and to grow due thereon respectively, and all the estate and interest of the settlor therein," together with power for the trustees to sue and give receipts for the principal sums thereinbefore assigned, or any of them, and all interest thereon respectively, in the name or names of the settlor, his executors, administrators, or assigns. The first trust declared was to "sell, call in, or convert into money the said trust premises," "and for the purposes aforesaid, or any of them, to execute and do all such assurances and things as shall be expedient." The deed did not contain any express assignment to the trustees of the securities for the four debts, nor any covenant for further assurance. The schedule to the deed stated the amount of each of the four debts, the name of the debtor from whom it was due, and the date of the bill of sale by which it was secured.

The settlor died, intestate, on the 29th of September, 1888, and he had before his death received from the debtors the four debts in question.

This action was brought for the administration of the estate of the intestate and the execution of the trusts of the settlement.

The plaintiffs were the two sisters of the deceased's wife; the widow (who was of unsound mind, and sued by a next friend); and a creditor, who sued on behalf of himself and all other the creditors of the deceased. The defendants were the trustees of the settlement and the sister of the deceased, who was the administratrix of his estate.

Kekewich, J., held that the four debts were validly assigned by the voluntary deed, and became subject to the trusts thereof.

The administratrix appealed.

Crackanthorpe, Q.C., and *A. Whitaker*, for the appellant.—The assignment of the debts is incomplete because the settlor did not assign the securities for them.

They cited *Milroy* v. *Lord*, 4 De G. F. & J. 264, 11 W. R. Ch. Dig. 120; *Woodford* v. *Charnley*, 28 Beav. 96, 9 W. R. Ch. Dig. 96; *Bizzey* v. *Flight*, 24 W. R. 957.

Warmington, Q.C., and *E. Ford*, for the sisters of the widow.—The securities for the debts are assigned, upon the true construction of the settlement.

They cited *Fletcher* v. *Fletcher*, 4 Hare, 67.

(*a.*) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

537, that a bailee can set up the title of another only "if he defends upon the right and title and by the authority of such other." Thus restricted, we think the doctrine is supported both by principle and authority, and will not be found in practice to produce any inconvenient consequences. Here the defendants are defending for themselves, and are claiming to hold the copper for their own benefit. They have therefore no defence.

Appeal allowed.

Solicitors for the plaintiffs, *Druces & Attlee.*

Solicitors for the defendants, *Johnson, Budd, & Johnson.*

4903, 2 KB. 444

App. Bankruptcy. Oct. 31.

In re TREHEARNE.

Ex parte EALING LOCAL BOARD. (*a.*)

Bankruptcy—Garnishee order—Postponement of payment under garnishee order—Liability of debtor to bankrupt's estate—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 45, *sub-section* 1.

A garnishee, by an arrangement with the judgment creditor obtained an extension of time for the payment of the attached debt. Subsequently to the garnishee order being made absolute, but before the extended time for payment had expired, the judgment debtor was adjudicated bankrupt. The garnishee, subsequent to this adjudication, paid the attached debt under the above arrangement to the judgment creditor.

Held, that the garnishee order became ineffectual under the provisions of section 45, *sub-section* 1, *of the Bankruptcy Act,* 1883, *by reason of the intervention of the bankruptcy of the judgment debtor before the attached debt had been actually paid by the garnishee to the judgment creditor, and consequently that the garnishee remained liable to the estate of the bankrupt for the amount of the debt.*

Appeal from an order of Cave, J., declaring a debt, attached under a garnishee order before the receiving order had been made, to be part of the brankrupt's estate.

The appellants, the Ealing Local Board, had contracted in April, 1889, with the present bankrupt, Trehearne, for some work to be done for which they owed him payment. Messrs. Fardell & Co. subsequently obtained judgment against Trehearne for £78.

On August 1, 1889, Messrs. Fardell obtained a rule *nisi* for a garnishee order on the local Board for the money due from them to Trehearne. Notice of the order was served upon the Board on August 2, and the order was made absolute on August 8, in favour of Messrs. Fardell. The money thereupon became due from the local Board, and execution could have issued, but owing to the vacation of the financial committee of the Board, by an arrangement between Messrs. Fardell and the clerk to the Board incorporated in letters, Messrs. Fardell undertook not to issue execution until after the next meeting of the financial committee on October 3, the board in the meantime undertaking "to hold the sum on behalf of and in favour of Messrs. Fardell and at their disposal." In the interval a receiving order was made against Trehearne, whom the Board had no previous reason to suspect of being in difficulties, and he was adjudicated bankrupt on the 6th of September.

On October 3 the Board met and sent a cheque to Messrs. Fardell for the £78, according to their undertaking. The official receiver, as trustee for Trehearne, called upon the Board to pay the money over again to the bankrupt's estate. This they declined to do. The trustee thereupon applied to and obtained from Cave, J., an order declaring the debt to be part of the estate. Against this order the Board now appealed.

H. R. Clayton, for the appellants.—Cave, J., held that section 45 of the Bankruptcy Act, 1883, applied, but that only refers to a creditor of a bankrupt. Here, the Board was a debtor to the bankrupt. Assuming that the section applied, there was a real receipt of the debt by Messrs. Fardell on August 8, and from that time they had a charge on the moneys of the Board to that amount. The Board became trustees for Fardell. *Butler* v. *Waring,* 17 Q. B. D. 182, 34 W. R. Dig. 17, does not apply.

Muir Mackenzie, for the trustee.—The real test is, what was the situation at the time that Trehearne was adjudicated bankrupt? The debt due to the bankrupt was not discharged. A receiving order coming between a garnishee order, and payment under that order, renders it void, and the creditor loses his right to attach it under section 168 of the Bankruptcy Act, 1883. The effect of section 45 is that the creditor of the bankrupt is not entitled to retain the benefit of his garnishee order. [He was stopped by the court.]

Clayton, in reply.—Messrs. Fardell were in the position of "secured creditors."

Lord ESHER, M.R.—I do not think that the judgment of Cave, J., implies that the Local Board came within the terms of section 45 of the Act, but that the consequences of that section applied against Messrs. Fardell and made their garnishee order ineffectual. The Board, therefore, remained debtors to Trehearne. Had the debt been paid to Messrs. Fardell under the garnishee order the Board would have been relieved from any liability to Trehearne. But his bankruptcy intervenes, with the result that Messrs. Fardell could no longer insist on their garnishee order being satisfied. The trustee had a right to take Messrs. Fardell's place, as it were, and claim payment from the Board. The Board, indeed, have paid Messrs. Fardell, not under the garnishee order, but under the terms of the alleged contract. Trehearne was no party to such contract. His trustee is not, therefore, bound in any way by it. Whether such an undertaking was binding upon the Board or not is quite inmaterial to the trustee in bankruptcy.

LINDLEY, L.J.—It is hard that the Board should have to pay twice over, but it is their own fault. They owe £78 to Trehearne; a garnishee order is made in favour of Messrs. Fardell, who become to that extent secured creditors. Had payment been made to them at the time there was an end to the liability of the Board. But they do not pay. They only give a promise to pay. The letters do not amount to an equitable assignment of the debt to Messrs. Fardell. Such an assignment must be made by the creditor, not the debtor. They simply amount to an arrangement for forbearance from execution, and an extension of the time for payment. The fact that the Board may have by this arrangement bound themselves to pay Messrs. Fardell does not affect Trehearne or his representative. Before the obligation is discharged the bankruptcy of Trehearne intervenes, and by section 45 the holders of the garnishee order thereby lose their security. The Board must therefore discharge their liability to

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

Trehearne or his trustee. A promise to pay Messrs. Fardell is no answer, nor can such promise make Messrs. Fardell secured creditors.

LOPES, L.J.—It is enough for me to say that there was no payment of the debt before the receiving order was made. Messrs. Fardell, therefore, under section 45 of the Bankruptcy Act, 1883, lose the benefit of their garnishee order; and that they had agreed by arrangement to forbear from enforcing payment at the time when they had a right to do so, does not secure to them the maintenance of that right when the bankruptcy of the original creditor has intervened.

Appeal dismissed.

Solicitor for the appellants, *S. Pilley.*

Solicitor for the trustee, *Solicitor to Board of Trade.*

From Q. B. Div. July 16, 1890.

In re AN ARBITRATION BETWEEN SMITH & SERVICE AND NELSON & SONS. (a.)

Arbitration — Submission — Power of court to compel appointment of arbitrator—9 & 10 Will. 3, c. 15, s. 1 —3 & 4 Will. 4, c. 42, s. 39—52 & 53 Vict. c. 49.

An agreement to refer disputes to arbitration contained a provision that the matters in dispute should be referred to three arbitrators, one to be appointed by each of the parties, and the third by the two so appointed. A dispute having arisen, one of the parties refused to appoint an arbitrator.

Held, that the court had no power to compel him to do so.

Appeal from the decision of a divisional court (Lord Coleridge, C.J., and Wills, J.).

Messrs. Nelson & Sons, by a charter-party dated the 28th of November, 1889, chartered a steamship belonging to Messrs. Smith & Service for a voyage to America, the ship to be at the charterers' disposal on the 3rd of December. She did not arrive until the 6th of December, and the charterers having then refused to take her, her owners claimed damages for breach of the charter-party, which contained the following clause:—"Should any dispute arise between the owners and charterers the matters in dispute shall be referred to three persons, one to be appointed by each of the parties hereto, and the third by the two so chosen, whose decision, or that of any two of them, shall be final, and for the purpose of enforcing any award this agreement may be made a rule of court."

The shipowners on the 7th of December gave the charterers notice that they had appointed an arbitrator under this clause, and called upon them to appoint one. The charterers took no notice of this.

The Arbitration Act, 1889, having come into force on the 1st of January, 1890, the shipowners on the 28th of April, 1890, served the charterers with a fresh notice of their appointment of an arbitrator, and upon this being again disregarded they obtained an order at chambers directing the charterers within seven days to appoint an arbitrator in accordance with the terms of the submission to arbitration contained in the charter-party. The Divisional Court upheld this order, and the charterers appealed.

French, Q.C., and *C. A. Russell*, for the appellants.—The court has no power under the Arbitration Act, 1889, to make this order. Section 1, under which the order is made, gives no new remedy, and prior to the Act there was no power to force a party to appoint an arbitrator.

Barnes, Q.C., and *Leck*, for the respondents.—The Act makes the submission an order of court, and the court has an inherent jurisdiction to enforce its order.

Lord ESHER, M.R.—In this case, in an ordinary mercantile charter-party, a not unnatural clause for arbitration is inserted, that in case of any dispute arising it shall be referred to three arbitrators, one to be appointed by each of the parties, and the third by the two arbitrators. They are all three to take part in the inquiry and award, so that they are three arbitrators, and not two arbitrators and an umpire. That submission to arbitration was on the 1st of January, 1890, made a rule of court by the operation of the Arbitration Act, 1889. Thereupon the court is asked to make an order upon the charterer that he should appoint an arbitrator within seven days. It is said that there is no jurisdiction to make such an order. If there is no jurisdiction, it is plain that the court could not fix any time at all. The question, therefore, is whether the court have any jurisdiction to order one of the parties to appoint an arbitrator. It is said that the question depends on the construction of the Arbitration Act, 1889. It is plain that since this was a case of three arbitrators sections 4, 5, and 6 have no application, but the Divisional Court have thought that section 1 gave them the power to make this order. It has been argued that the court had power before the Act of 1889 to make such an order, and that that Act only declares a power which already existed. If there was such a power before, I should be inclined to agree with this, but if there was no such power it will become a question whether any such power is given by the Act of 1889. No court, either of law or of equity, has ever exercised this power before, but it is said that the power existed wherever a submission was made a rule of court, although it was overlooked. I confess that that argument does not commend itself to me. No doubt persons tried at equity to obtain specific performance of agreements to refer, but they failed. That they went to courts of equity shows that they knew they had no power to enforce the arbitration at common law, and in equity they failed. Submissions to arbitration were allowed to be made rules of court because when the arbitration tribunal was fixed the aid of the court was needed in carrying on the arbitration. The effect was to give the court various powers over the arbitration, and to enable them to enforce the award. Under the early Acts the submission to arbitration was revocable, even although it had been made a rule of court. That is wholly inconsistent with the idea that the submission became an order of the court, and enabled the court to force either party to nominate an arbitrator and proceed with the arbitration. By subsequent Acts the submission was made irrevocable—that is to say, that after the arbitrator has been appointed, the person appointing him cannot revoke his authority. That is called revoking the submission, because if there is no arbitrator the arbitration cannot proceed. That was the state of things up to the Act of 1889, which, by section 1, makes all submissions irrevocable except by leave. Submission there means the appointment of the arbitrator, not the agreement to refer. That was always irrevocable. The section goes on to enact that the submission shall have the same effect as if it had been made a rule of court. The section gives no more power to the court than it possessed before. It is said that the court had power to attach a person disobeying its orders after the submission had been made a rule of court. That may be so, but the attachment would issue for revoking an appoint-

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

ment, not for neglecting or refusing to appoint. There was no power either before or after the Act to call upon a party to appoint an arbitrator. The only remedy is for a breach of the agreement to appoint. The Divisional Court, therefore, have, in my opinion, unduly stretched the meaning of the Act, and the appeal must be allowed.

LINDLEY, L.J.—The question is whether the Divisional Court had any jurisdiction to make this order. It seems quite plain that until 1889 there is no precedent for any such order, and it is difficult to assume that the jurisdiction nevertheless existed. The contention is that by making the submission a rule of court, which was first allowed by the Act of Will. 3, it becomes an order of the court which can be enforced. If that argument is sound the court would from that time have had power to do much which they have consistently declined to do. The real truth is that the statute of Will. 3 was never so construed. Submissions to arbitration when made rules of court have had certain consequences, but they have never had such consequences attributed to them as is sought to be done in the present case. There has never been an order to appoint an arbitrator nor an attachment for refusing to appoint. I do not think the Act of 1889 alters the law as to this. Submissions are by virtue of the Act made rules of court, but they are to have the same effect as if they had been so made by the act of the parties. I agree, therefore, that there was no jurisdiction to make this order.

BOWEN, L.J.—I am of the same opinion. The words "submission" and "revocation" are often used with some inexactitude. There may be a general agreement to refer matters to arbitration. That is a submission, and is always irrevocable. There may be an agreement to clothe a certain person with the authority of an arbitrator. That was at one time revocable, and when it was revoked the agreement became useless, and in that sense it was a revocation of the submission. The distinction is well pointed out in *Randall* v. *Thomson*, 24 W. R. 837, 1 Q. B. D. 748, and it must be borne in mind in examining the section now under consideration. The agreement to refer was always irrevocable, the submission to a particular person was sometimes revocable and sometimes not. This section, however, makes it irrevocable, and by section 27 a submission includes an agreement to refer where the arbitrator is not named. The distinction is perceived by the Act of Will. 4, which directs that when the submission is made a rule of court the powers and authority of the arbitrator shall become irrevocable. The person appointing the arbitrator cannot after that determine the mandate which he had given. The thing, therefore, that was revoked was not the agreement to refer, but the authority given to the arbitrator. But no making of the submission a rule of court compelled the party to go on with the arbitration if the arbitrators were not named. The Act of Will. 4 does not apply to such a case, and if we were to allow the contention of the respondents to succeed we should be giving a much larger construction to the Act than was ever intended. The law as to attachments is well laid down in *Rouse* v. *Meier*, 19 W. R. 438, L. R. 6 C. P. 212, by Willes, J. A person revoking the authority of the arbitrator after the submission had been made a rule of court might be attached, but there is no case of an attachment for the nonperformance of an agreement to refer. No doubt it was not often that a submission was made a rule of court before the arbitrator was appointed, but the object of making it a rule of court was to give the court power over the arbitration and award, and not to compel either party to proceed to appoint an arbitrator. I think, therefore, that section 1 does not extend the law as to this, and that as the respondents cannot bring the case within the other sections there was no jurisdiction to make this order, and the appeal must be allowed.

Appeal allowed.

Solicitors for the appellants, *Rowcliffes, Rawle, & Co.*, for *C. A. M. Lightbound*, Liverpool.

Solicitors for the respondents, *Field, Roscoe, & Co.*, for *Bateson & Co.*, Liverpool.

High Court of Justice.

Chan. Div. North, J. — Nov 7.

In re HARDING'S SETTLED ESTATE. (*a.*)

Settled land—Absolute trust for sale vested in trustees—Application by tenant for life for leave to exercise power of sale—Settled Land Act, 1882 (45 & 46 Vict. c. 38), *ss.* 3, 63—*Settled Land Act*, 1884 (47 & 48 Vict. c. 18), *ss.* 6 (1), 7.

A testator directed that, if his residuary personal estate should be insufficient for payment of his debts, funeral and testamentary expenses, and legacies, they should be paid out of the proceeds of the sale of his residuary real estate, and he devised his residuary real estate to trustees upon trust for sale and investment, and to hold the trust funds in trust for two ladies during their joint lives, and for the survivor during her life, with remainder for their children, and if neither should have a child who attained a vested interest the testator gave the property to the trustees absolutely. Neither of the two ladies had married. The residuary personalty proved insufficient for the payment of legacies as well as debts. In 1887 the trustees commenced an action for the administration of the testator's estate in the Lancaster Palatine Court, and, under an order made in that action, money was raised by mortgage of the residuary real estate for payment of the legacies, and it was certified to be for the benefit of all parties interested that the sale should be postponed. All charges prior to the interest of the two ladies were paid off.

Held, on the application of the two ladies, that they should have leave, under section 7 of the Settled Land Act, 1884, to sell the real estate remaining unsold.

Adjourned summons.

This was an application under section 7 of the Settled Land Act, 1884, by the persons constituting the tenant for life of settled land, subject to a trust for sale vested in trustees, for leave to exercise the power of sale conferred, upon the persons constituting the tenant for life by virtue of sections 3 and 63 of the Settled Land Act, 1882.

John Harding, by his will, dated the 14th of February, 1881, directed that, if his residuary personal estate should be insufficient for payment of his debts, funeral and testamentary expenses, and legacies, they should be paid out of the proceeds of sale thereinafter directed of his residuary real estate. And he devised his residuary real estate to his executors and trustees, John Smith and John Wigram, upon trust for sale and for investment as therein mentioned, and to hold the investments in trust for Jane Smith and Elizabeth Smith during their joint lives, and for the survivor of them during her life, and after the death of the survivor in trust for their

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

children as therein mentioned, and in case there should be no child who should live to attain a vested interest in the trust property, the testator gave the same to John Smith and John Wigram for their own benefit. The will gave the trustees no power to postpone the sale of the residuary real estate.

The testator died in 1884. At the time of his death the two ladies who became the tenant for life of the trust property were spinsters of the respective ages of fifty-three and forty-nine, and neither had since married.

The residuary personal estate of the testator was sufficient for payment of his funeral and testamentary expenses and debts, but not for payment of the legacies given by his will.

An action for the administration of the testator's estate had been commenced by the trustees in the year 1887 in the Lancaster Chancery Court, Jane Smith and Elizabeth Smith being made defendants; and, in pursuance of an order dated the 6th of January, 1888, made in that action, a sum of £7,000 had been raised by mortgage of the residuary real estate, and the legacies were paid out of that sum. An inquiry whether it would be fit and proper and for the benefit of all persons interested that the residuary real estate should be sold had also been directed in the action, and the registrar had certified that it would be for the benefit of all persons interested that the sale should be postponed. But, notwithstanding this answer to the inquiry, the trustees subsequently entered into a contract for the sale of a part of the estate.

The present summons was taken out by Jane Smith and Elizabeth Smith against the trustees for an order that, notwithstanding what had taken place, they might be authorized by the court under section 7 of the Settled Land Act, 1884, to exercise the statutory power of sale by the combined operation of sections 3 and 63 of the Settled Land Act, 1882, given to the persons constituting the tenant for life of settled land.

The Settled Land Act, 1882, after providing by section 3 that "a tenant for life may sell the settled land or any part thereof," provides by section 63 that in case of land or any estate or interest in land which under or by virtue of any deed or will "is subject to a trust or direction for sale of that land, estate, or interest, . . . and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being who are by the settlement declared to be trustees thereof for purposes of this Act are for purposes of this Act trustees of the settlement. In every such case the provisions of the Act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised," subject to certain exceptions not material to the present case.

The Settled Land Act, 1884, enacts by section 6 (1) that "in the case of a settlement within the meaning of section 63 of the Act of 1882 any consent not required by the terms of the settlement is not by force of anything contained in that Act to be deemed necessary to enable the trustees of the settlement or any other person to execute any of the trusts or powers created by the settlement." And by section 7 that "with respect to the powers conferred by section 63 of the Act of 1882 the following provisions are to have effect:—(1) Those powers are not to be exercised without the leave of the court; (ii.) the court may by order in any case in which it thinks fit give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given; (iii.) the court may from time to time rescind or vary any order made under this section or may make any new or further order; (iv.) so long as an order under this section is in force neither the trustees of the settlement nor any person other than a person having the leave shall execute any trust or power created by the settlement for any purpose for which leave is by the order given, to exercise a power conferred by the Act of 1882; (vii.) an application to the court under this section may be made by the tenant for life or by the persons who together constitute the tenant for life within the meaning of section 63 of the Act of 1882; (ix.) the person or persons to whom leave is given by an order under this section shall be deemed the proper person or persons to exercise the powers conferred by section 63 of the Act of 1882, and shall have and may exercise those powers accordingly."

Cozens-Hardy, Q.C., and *R. J. Parker*, for the applicants.—The effect of sections 3 and 63 of the Settled Land Act, 1882, is to confer upon the applicants the power of sale of a tenant for life; but in consequence of section 7 of the Settled Land Act, 1884, the leave of the court is now necessary to enable them to exercise that power. The order of the Palatine Court, made more than three years ago, which was to some extent a consent order, does not take away their power of sale which by the Act of 1882 is made inalienable, or prevent them from coming to this court for leave to exercise that power. Since the order of the Palatine Court, circumstances have arisen which make a sale advisable, and as all interests prior to that of the applicants are now cleared away, and repairs, &c., are paid out of the income, which belongs to the applicants, they are the proper persons to exercise the power of sale. Also the trustees are entitled to a commission on the income, which reduces the benefit derived by the applicants, and gives the trustees an interest adverse to the applicants to a limited extent.

They referred to *Cardigan* v. *Curzon-Howe*, 37 W. R. 247, 40 Ch. D. 338; *Taylor* v. *Poncia*, 32 W. R. 335, 25 Ch. D. 646.

Alfred Hopkinson, for the trustees.—The trustees have a power of sale given them by the testator, and the Act of 1884 does not take it away, but by section 6 makes the consent of the tenant for life unnecessary. The trustees are the proper persons to exercise the power of sale, when it is to be exercised.

He referred to *Taylor* v. *Poncia*.

NORTH, J.—I think the case is reasonably clear. The trustees here have a trust to sell but have no power to postpone the sale. Then there was a suit for the administration of the testator's estate in the

Lancaster Chancery Court, and in answer to an inquiry directed in that suit it was found by the registrar in his report that it would be for the benefit of all persons interested that the sale should be postponed. Although it is suggested in this case that the trustees have an interest adverse to the tenant for life, what the Palatine Court has decided satisfies me that everything was *bonâ fide* and proper down to the date of the report. The report was made on the 16th of February, 1888, in the presence of the parties, and that is conclusive that at the time it was made it was advisable that the sale should be postponed, and that the legacies should be raised by mortgage. That was three years ago. The tenants for life now come and say that they ought to be allowed to exercise the power of sale given by the Settled Land Act, 1882. That Act provides, speaking in general terms, that the tenant for life is the person to decide whether land should be put into the market. That would not have effect in cases where land was subject to a trust or direction for sale and for the application of the proceeds if it were not for section 63 of that Act, for that section deals with land so subject, and implies that without its provisions such land would not come within the Act. Subsequently difficulties arose with respect to land subject to a trust for sale which came within that section. Lands are vested in trustees upon trust for sale for many purposes, such as to pay debts and other things, and to hold the surplus in trust to invest and pay the income to beneficiaries.

Difficulties arose as to the application of the Act in these cases. Pearson, J., in *Taylor* v. *Poncia*, took the view that an absolute trust for sale vested in trustees was not overridden by the provisions of the Act of 1882. That decision solved the difficulty to some extent. Then the Legislature passed the Settled Land Act, 1884, which provides, by section 6, that in case of a settlement within section 63 of the Settled Land Act, 1882, any consent not required by the settlement is unnecessary to enable the trustees to execute any trusts or powers created by the settlement. That provision is not confined to the point decided in *Taylor* v. *Poncia*. As regards land coming within that provision the powers of the trustees are confirmed, and the tenant for life is not the person to dictate whether the trust for sale is to be carried out. Then the Settled Land Act, 1884, goes on to provide, by section 7, that "with respect to the powers conferred by section 63 of the Act of 1882, certain provisions are to have effect"—viz., that those powers are not to be exercised without the leave of the court, but that the court may give leave to the tenant for life to exercise those powers. The result of the two sections is that the consent of the tenant for life is not required to enable the trustees to exercise the trusts created by the settlement, but, with respect to the powers conferred by section 63 of the Act of 1882, the court may give the tenant for life leave to exercise all or any of these powers. If the court thinks that the tenant for life ought to have a power of sale the court should allow the tenant for life to sell. There are some cases in which the tenant for life ought to have the power to sell. I think this is a case in which I ought, under section 7, to give the tenants for life leave to sell, the reason being that I find that everything paramount to the interest of the tenants for life is cleared away. It is the simplest possible case. If I am ever to say that the tenant for life should have leave under section 7, I cannot suggest a more suitable case. It has been suggested that section 7 of the Act of 1884 is intended to protect the tenant for life against breaches of trust. I think not. There are other ways of preventing breaches of trust. I think that the meaning of it is that the tenant for life should have leave under that section where it is right that he should have power to sell.

There remains the question as to the order of the Palatine Court. I think there is no difficulty as to that. If the order had been made by me, or any judge of the High Court, I should not think that it prevented me from giving the leave asked for. I should say that, notwithstanding that order, the tenants for life should now be empowered to sell. I must take the same course now, especially as the judge of the Palatine Court had no jurisdiction to make the order asked for by the applicants.

Solicitors, *J. Percy Chadwyck*, agent for *Buck, Dicksons, & Cockshott*, Southport; *Phelps, Sidgwick, & Biddle*, agents for *Sale, Seddon, & Co.*, Manchester.

Chan. Div. North, J. } June 13, 1890.

In re WINSLOW.
FRERE *v.* WINSLOW. (*a.*)

Will—Administration—Overpayment to beneficiary—Liability of trustees—Costs.

A testator gave his residuary estate upon trust for his wife for life, and after her death he gave one-fourth to each of his two sons, and the other two-fourths upon trust for his two daughters and their children respectively, and appointed his wife and two sons trustees and executors. His widow and sons proved the will, but the administration of the estate was left to the widow, who distributed large sums among the beneficiaries in respect of their shares, but not equally; and one son, who was an executor and trustee, especially received considerably more than the others. Ultimately, after the death of the widow, the estate was found to be insufficient to give the other beneficiaries as much as the son had received. There was no evidence to show that the deficiency had not arisen from depreciation subsequent to the payments to the son, which primâ facie *appeared probable.*

Held, in an action to administer the testator's estate, that the surviving executors were not liable for the overpayment made by the widow to the son, and that the son was not bound to refund the amount he had been overpaid, but was not entitled to receive his separate costs, as the overpayment exceeded the amount of such costs.

Further consideration.

The action was brought in 1881 for the administration of the estate of Forbes B. Winslow, who died in 1874, having made a will and codicils by which he gave his residuary real and personal estate to his trustees upon trust for his wife, Susannah Winslow, for life, and after her death upon trust to pay one-fourth to each of his two sons, Forbes Edward Winslow and Lyttleton S. Forbes Winslow, and to stand possessed of one other fourth in trust for his daughter, Susannah F. a'Beckett and her children, and to stand possessed of the remaining fourth in trust for his daughter Constance Stanier, then Constance Frere, and her children; and he appointed his wife and two sons, F. E. Winslow and L. S. F. Winslow, and also Thomas Ewing Winslow, trustees and executors of his will, and directed that any sum which he expended in purchasing an advowson for his son F. E. Winslow should be considered as part of the share of that son of the residuary estate.

The testator left his wife and four children him surviving, and the widow and two sons proved his will, but Thomas Ewing Winslow renounced probate

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

thereof. Subsequently to the date of his will the testator laid out £5,000 in the purchase of an advowson for his son F. E. Winslow.

The administration of the testator's estate was left to his widow. The two sons joined her in getting in the debts due to the estate, and in selling certain stock; but the moneys thus obtained were paid into the banking account of the widow, who, without the concurrence of the two sons, made large payments in respect of the testator's property, and also distributed, on account of their shares of the residuary estate, large sums among her children, some of whom received considerably more than the others.

The plaintiffs in the action were the infant children of Mrs. Stanier by her former husband, John T. Frere. The defendants were the testator's widow, his two sons, and the rest of the beneficiaries under his will other than the plaintiffs. By the chief clerk's certificate, dated the 10th of August, 1887, a balance of over £2,000 was found due from the estate of the testator's widow, who died after the commencement of the action; and it was submitted for the decision of the court whether a surcharge brought in by the defendant, Mrs. a'Beckett, against the two sons, as surviving executors of the testator, for moneys received by the executors and paid into the banking account of the testator's widow ought to be allowed.

The action came on on further consideration on the 4th of July, 1888, when the surcharge submitted for the decision of the court was disallowed, the surviving executors were allowed their general costs, the executors' accounts were ordered to be continued, and an account was directed of sums received by the legatees on account of their shares of the residuary estate, with interest from the death of the testator's widow.

By the chief clerk's certificate as to the accounts and inquiries directed on the further consideration of the action, it was found that Forbes Edward Winslow had received £13,294 7s. 5d., of which £10,331 7s. 8d. was principal and £2,962 19s. 9d. interest; Lyttleton S. Forbes Winslow had received £9,548 10s. 10d., of which £7,619 1s. 3d. was principal and £1,929 9s. 7d. interest; Mrs. a'Beckett and her children £9,591 10s. 11d., of which £7,720 19s. 7d. was principal and £1,870 11s. 4d. interest; and Mrs. Stanier and her children £9,404 14s. 9d., of which £7,509 10s. 1d. was principal and £1,895 4s. 8d. interest, in respect of their shares in the residuary estate. The remaining assets were proved to be insufficient to make up the shares of the beneficiaries other than Forbes Edward Winslow equal to the amount he had received.

Lyttleton S. Forbes Winslow was adjudicated a bankrupt.

The action now came on for further consideration for the second time.

Napier Higgins, Q.C., and *Dundas Gardiner*, for Mrs. Stanier and her children.—It was the duty of the two sons as trustees to see that the residuary estate was distributed among the beneficiaries in equal shares, and, consequently, they are responsible for the overpayments. Forbes Edward Winslow, who is a trustee, ought to refund the amount by which he has been overpaid. At any rate, any costs he is allowed should not be paid to him, as he has already received too much.

Levett, for Mrs. a'Beckett and her children.

a'Beckett Turner, for Mr. a'Beckett.

Gazdar, for the trustee in bankruptcy of Lyttleton S. Forbes Winslow.

Cozens-Hardy, Q.C., and *A. a'B. Terrell*, for the two sons, the surviving executors.—The rule is that if an estate is insufficient to pay all beneficiaries to the same extent as some have already been paid, but the deficiency arises from depreciation of the estate since the latter have received their shares, there is no breach of trust, and the beneficiaries who have been paid are not bound to repay any portion of what they have received: *Fenwick* v. *Clarke*, 10 W. R. 636, 4 De G. F. & J. 240; *Peterson* v. *Peterson*, 15 W. R. 164, L. R. 3 Eq. 111; *Hilliard* v. *Fulford*, 25 W. R. 161, 4 Ch. D. 389. The testator's widow alone paid the moneys to Mr. Forbes Edward Winslow, and the two sons did not receive and disburse those moneys. The payments to him were allowed on further consideration, and the executors were allowed their costs, which is sufficient answer to any charge of breach of trust.

Napier Higgins, Q.C., replied.

NORTH, J.—In this case the residuary estate is divisible among four sets of persons. There were three executors—the testator's widow and his two sons; and although the three executors proved and acted to some extent, yet, to a considerable extent, the widow acted alone. She received and paid large amounts in transactions in which the sons took no part. Amongst other things, she distributed large sums among the beneficiaries. She did not do so equally, and it turns out now that one of the sons has received between two and three thousand pounds more than the others, taking capital and income together. After these payments were made the action commenced; and I know, from what I have seen of the proceedings in chambers and in court, that the costs were very considerable, and, having regard to the nature of the estate, they must necessarily have been large. The action was heard upon further consideration at that time, and certain surcharges brought against the executors were dealt with by the court. When the order on further consideration was made the executors, as distinguished from the executrix, were cleared, and the best proof of that is that they got their costs of the action. The executrix was in a different position. A balance was found due from her which her estate was unable to pay, and it was argued before me that certain sums which she had received were sums for which her co-executors and co-trustees were responsible, and I came to the conclusion that they were not. Generally, when accounts are taken in chambers, sums paid by an executor or trustee to a beneficiary are not allowed in the first instance. They are disallowed with a note that the payments have been made to the beneficiaries on account, and the matter is set right subsequently, when it appears that there is sufficient in court to bring the other beneficiaries up to an equality. I do not know why the usual course was not followed. I come to the conclusion that the payments were allowed because everybody was satisfied that there was no reason why the payments should not be allowed. The largest payments were made to one of the trustees, and an attempt was made to distinguish this case on that ground. But the money was not paid to him in his character of trustee, and when he had received it it was not a sum he held as a trustee, for he would then have been charged with it in taking the accounts. The person who was charged with the amount paid to him was the widow. It was paid to him as a legatee, and, although he was a trustee of the will, he was not a trustee of that sum.

It is said that on further consideration it was apprehended that the estate might be insufficient to pay the other beneficiaries in full, because certain inquiries were directed. I am not satisfied that this is so, because such inquiries would have been necessary in

any event in order to equalize the payments. It now turns out that, after payment of costs, the remaining assets will be insufficient to bring up the other three shares to an equality with what has been received by Forbes Edward Winslow. First, it is said that the estate of Lyttleton S. Forbes Winslow ought to be charged with that excess, because, being a trustee, he had paid it. It is inconsistent with the facts to say that he paid it; he never had it. With respect to Forbes Edward Winslow, it was paid to him before the action was brought, as a beneficiary. In my opinion there is no ground for saying that he is liable. The case of *Fenwick* v. *Clarke* is conclusive on this point. Then it is said that there is nothing to show the estate was sufficient at the time; and that if it was not, the beneficiary who was overpaid must account for what he has received in excess of his share. I think there is a strong *primâ facie* case for saying that the estate was then sufficient, though there is no direct evidence on the subject. There may be many reasons why the estate has since then considerably diminished. The assets comprised two lunatic asylums, which became much less valuable than they had been, and considerable sums had to be expended in respect of the leases, which may well have been at that time valuable property. Further, the expenses of this action must have been considerable; and, further, a sum of upwards of £2,000 has been found due from the estate of the widow. These circumstances afford strong ground for saying that in all probability the inability of the estate to satisfy the shares arose from depreciation subsequent to the institution of the action. There is nothing from which I can come to the conclusion that it did not.

I am asked to deprive the three executors of their costs on the ground that there has been some breach of trust. There has been nothing of the sort. As a matter of course they will be allowed their costs, in the same way as they were allowed them on the occasion of the first further consideration. If there are any separate costs coming to Edward Forbes Winslow in his character of beneficiary, they must be stopped, not because he is not entitled to them, but because he has been paid more than the amount thereof beyond what the others have received, and cannot have them over again.

The funds divisible are to be applied, in the first place, in bringing up the share of Mrs. Stanier and her children to an equality with that of Lyttleton S. Forbes Winslow; in the next place, in bringing up those two shares to an equality with Mrs. a'Beckett and her children; and then any surplus will be applied towards bringing those three shares to an equality with what has been paid in respect of the other shares.

Solicitors, *Fairfoot, Webb, & Rooke; Chester & Co.; Bolton & Mote; Cole & Higson; Van Tromp.*

Q. B. Div. (Stephen and Vaughan Williams, JJ.) Nov. 16.

CHARLES *v.* MORTGAGEES OF PLYMOUTH WATERWORKS. (*a.*)

Master and servant—"Dispute"—Justices—Jurisdiction—Six months' limitation under Jervis's Act (11 & 12 *Vict. c.* 43) *not applicable—Employers and Workmen Act,* 1875 (38 & 39 *Vict. c.* 90), *s.* 4.

By the Employers and Workmen Act, 1875, *s.* 4, "*A dispute under this Act between an employer and a workman may be heard and determined by a court of summary jurisdiction, and such court, for the purpose of this Act, shall be deemed to be a court of civil jurisdiction.*"

Held, that the word "dispute" is not limited to strictly legal causes of action, following Clemson *v.* Hubbard, 24 *W. R.* 312, 1 *Ex. D.* 179.

Held, further, that the time for bringing a complaint under the above Act before the court, was not limited to six months from the time when such complaint arose within the terms of section 11 *of the Summary Jurisdiction Act,* 1848, *nor did that Act apply to a court of summary jurisdiction sitting under the Employers and Workmen Act,* 1875, *as a court of civil jurisdiction.*

Case stated by the stipendiary magistrate of the Petty Sessional Division of Caerphilly, in the county of Glamorgan, under section 33 of the Summary Jurisdiction Act, 1879.

The case was stated as follows:—

At a petty sessions held at the Petty Sessional Court House at Merthyr Tydfil in and for the said Division on the 2nd day of April, 1890, a summons taken out by the mortgagees of the Plymouth Works, thereinafter called the respondents, on the 19th day of March, under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), against William Charles, thereinafter called the appellant, came on for hearing. The particulars attached to the said summons were as follows:—

1. "The defendant (the appellant) is now, and has been for some time past, a workman in the service of the plaintiffs (the respondents) as his employers, as a labourer at a fixed and standing rate of wage per day, paid by weekly advances and monthly settlements, and determinable by one month's notice on either side."

2. "The defendant now contends that he is not a workman engaged at a fixed and standing rate of wage, but insists that he is a workman whose wages are to be regulated by the selling prices of coal, and that, notwithstanding that he has always received a fixed and standing rate of wage, he claims to be entitled to percentages on his wages as from October 2, 1888."

3. "The defendant's contract, as stated in paragraph 1, is existing at the date hereof. The plaintiffs asked to have such contract rescinded upon such terms as to apportionment of fixed and standing wages as are accruing due as the court thinks just."

4. "The plaintiffs ask that the dispute be adjusted, determined, and set at rest by an order of this court."

5. "The subject-matter of the dispute is under the sum of £10."

"Dated this 19th day of March, 1890."

The following objections were taken before the magistrate at the hearing:—

1. That the matter was *res judicata* on the ground that two similar cases had been treated by agreement as test cases. The magistrate held that this was not the fact as to the other cases being treated as test cases.

2. That the contract had been determined by a notice before the hearing of the summons, and was therefore at an end, and could not be rescinded. The magistrate held that he could not rescind a contract already determined, but that he could adjust any existing disputes under that contract.

3. That the magistrate had no jurisdiction unless the dispute was founded upon an actionable claim. He held that under section 3, sub-section 1, of the Employers and Workmen Act, 1875, he had power to hear and adjust any disputes, and also that as a

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

fact he found that a claim had been made, and that a dispute existed.

4. That the claim must be brought within six months under the general provision of the Summary Jurisdiction Act, 1848, and that, this contract having been made on the 2nd of October, 1888, the cause of action arose then. The magistrate held that the dispute alleged commenced in May, 1889, and was a continuing one till the determination of the contract on the 31st of March, 1890, and that, therefore, the court had jurisdiction over it.

5. That the jurisdiction was limited to the amount of £10, but that here the cause of action or the dispute if adjusted must cover the amount due from the 2nd of October, 1888, which would exceed £10. The magistrate held that the amount in dispute must be limited to that which accrued during the six months preceding the issue of the summons, and that as a fact this amount did not exceed £10.

6. That, the contract being determined by the respondents' notice, the relation of employer and workman had ceased to exist at the time of the summons, and no contract was in existence. The magistrate held that there was a dispute in existence, for which the appellant could bring an action notwithstanding the determination of the contract, and that, therefore, there was a dispute upon which the court could adjudicate.

The magistrate stated that he found as a fact: that the appellant was engaged at a standing day rate of wages; that he was not employed in or about the collieries; that he did not come under the operation of the said agreement; and ordered that, a dispute having arisen between the plaintiffs and the defendant under the contract of service, the defendant is entitled to be paid a fixed daily wage of 2s. 8d., and declared that he was not a workman coming under the designation of workman subject to the sliding scale agreement.

The questions of law for the opinion of the court were:

1. Was the magistrate right in holding that the court had power to hear any disputes whether arising during or through an action commenced or brought before the court simply as a dispute to be settled?

2. Was he right in holding that the dispute was of such a nature as would come within the meaning of section 3, sub-section 1, of the Employers and Workmen Act, 1875?

3. Was he right in holding that, the dispute being a continuing one, the determination of the contract was the time from which the six months' time limitation began to run?

4. Was he right in holding that the amount of this case in dispute was the amount in difference for the six months preceding the issue of the summons?

5. Was he right in holding that, notwithstanding the determination of the contract before the hearing, the court had jurisdiction to hear and determine any disputes which may have arisen and were in existence under that contract?

6. If the court were of opinion that he was wrong in any of these points, the order made was to be quashed, and judgment entered for the appellant, with costs.

If the court were of opinion that he was right, then the said order was to stand.

Leslie, for the appellant. — The contract being terminated by notice, there was no existing cause of action known to the law. The court of summary jurisdiction is, for the purpose of the Employers and Workmen Act, 1875, ss. 3 and 4, analogous to a county court, and has only jurisdiction over disputes showing a legal claim sustainable in the latter court. The dispute must be one sounding in damages or in relief known to the law. All the cases show only disputes amounting to a legal cause of action: *Clemson* v. *Hubbard*, 24 W. R. 312, 1 Ex. D. 179; *Hindley* v. *Haslam*, 27 W. R. 61, 3 Q. B. D. 481; and *Grainger* v. *Aynsley*, 29 W. R. 242, 6 Q. B. D. 182. The cause of action arose more than six months previous to the hearing of the summons, and the provision of Jervis's Act (11 & 12 Vict. c. 43) extends to all the jurisdiction of the magistrates' courts, whether given under that or other statutes.

Lewis (*Poland, Q.C.*, with him).—It is not necessary that there should be a dispute in the ordinary legal sense of a claim to give the court jurisdiction under this Act of 1875: *Clemson* v. *Hubbard*. The only limitation to the jurisdiction is as to the amount—viz., £10. The statutory limitation as to time under Jervis's Act is not made applicable here, as it is under the Masters and Servants Act (26 & 27 Vict. c. 103), s. 4. The court here is given by the Employers and Workmen Act, 1875, s. 4, jurisdiction analogous to that of the county court, which is not affected by any such limitation of time for bringing the action except in so far as the ordinary Statute of Limitations applies. [He was stopped.]

STEPHEN, J.—We are both of opinion that the order of the magistrate should stand. As to the only questions on which the court need express an opinion, I will merely say that we think that there was in point of law an existing dispute before the court.

The facts were within the case of *Clemson* v. *Hubbard*, and that case strongly supports the view that a larger meaning must be given to the word "dispute" than that argued for by the appellant. We think, further, that in point of fact there was a dispute in the statutory sense of that word—namely, whether the appellant ought to be paid certain wages at one rate or another. As to the point that there is a six months' limitation of time for bringing an action or dispute before the court imported from Jervis's Act—that is to say, that the party complaining must show to the court that the cause of complaint arose within six months from the time of the issue of the summons—we are of opinion that the argument that this limitation extends to all summary jurisdiction does not hold good. There is nothing in this Employers and Workmen Act, 1875, to restrict actions under it to any such limitation. The ordinary statutory limitation of six years is the only limitation which applies to proceedings under this Act, and Jervis's Act is not meant, nor can it be construed, so as to apply. This being our opinion, the case answers itself. We answer Yes to questions 1 and 2, though the latter question was immaterial. We answer No to question 3, because it was not necessary to consider the six months' limitation at all, and we answer Yes to questions 4 and 5.

VAUGHAN WILLIAMS, J., assented.

Appeal dismissed.

Solicitors for the appellant, *Wrentmore & Son*, for *G. & C. James*, Merthyr Tydfil.

Solicitors for the respondents, *Schultz & Son*.

Q. B. Div. (Hawkins and Stephen, JJ.) Nov. 5, 6.

BURNLEY EQUITABLE CO-OPERATIVE AND INDUSTRIAL SOCIETY (LIMITED) v. CASSON. (a.)

Apprentice — Corporation — Contract of apprenticeship to—Industrial and Provident Societies Act, 1876 (39 & 40 *Vict. c.* 45), *s.* 11, *sub-section* 12 (a)—5 *Eliz. c.* 4—54 *Geo.* 3, *c.* 96, *s.* 2.

A trading corporation registered under the Industrial and Provident Societies Act, 1876, *can enter into a legal and binding contract of apprenticeship.*

The respondent Casson was articled to the Burnley Co-operative and Industrial Society for seven years to be instructed in the business of a "clogger." The society was registered under the Industrial and Provident Societies Act, 1876.

By section 11, sub-section 12 (*a*), of that Act it is provided that "any contract, which, if made between private persons, would be by law required to be in writing, and if made according to the English law to be under seal, may be made on behalf of the society in writing under the common seal of the society, and may, in the same manner, be varied or discharged." The appellants preferred a complaint against the respondent before the justices for a breach of the contract of apprenticeship. The justices refused to convict, on the ground that they had no jurisdiction, but stated a case from which it appeared (1) that the respondent executed the deed of apprenticeship by signing and sealing the same; (2) that from the date of the said deed—viz., the 28th of November, 1887—the respondent, who is an infant, remained in the employment of the appellants until the 25th of February, 1890, when he left the employ of the appellants, and has since refused to return; (3) that his masters were the directors of the appellant society, and might be, and as a fact were, changed from time to time, and that the directors had not necessarily any special knowledge of the business to which the respondent was apprenticed.

It was contended before the justices, on behalf of the respondent, that 54 Geo. 3, c. 96, which repeals 5 Eliz. c. 4, permits any person capable of doing so at common law to take an apprentice, but that the appellants, being a limited company having no common law rights and no statutory power enabling them to take an apprentice, could not enter into a binding contract to do so, and that an apprentice cannot be legally bound to a society or company, on the ground that the apprentice is entitled to the care and instruction of some defined and named person, the master's obligations being of a personal nature, and the following cases were cited in support of this contention: *Couchman* v. *Sillar and Another*, 18 W. R. 757; *Brook* (*Appellant*), *Dawson* (*Respondent*), 20 L. T. N. S. 611, 17 W. R. C. L. Dig. 3; *Whincup* v. *Hughes*, 19 W. R. 439, L. R. 6 C. P. 78.

It was contended on behalf of the appellants that the society could make a binding contract with a minor as its apprentice, in the same manner in which any private person might make such a contract, by virtue of sub-section 12 (*a*) of section 11 of the Industrial and Provident Societies Act, 1876, and that, therefore, the said deed of apprenticeship was a valid deed, and binding on the respondent. The questions for the opinion of the court were:—(1) Whether the appellants could legally enter into the contract with the respondent set forth in the indenture of apprenticeship. (2) Whether the respondent could and did legally bind himself an apprentice to the said appellants by the said indenture of apprenticeship.

R. S. Wright and *Loehnis*, for the appellants.—The justices were wrong in holding that they had not jurisdiction. There is no direct decision on the question as to whether a minor can be apprenticed to an incorporated company, but there is no legal principle against such apprenticeship. The case of *Eaton* v. *Western* 31 W. R. 313, 9 Q. B. D. 636, on the contrary, shows that the contract of apprenticeship does not require a continuity of personal relations between the apprentice and his master. The practice of entering into such contracts prevails extensively amongst societies of this description, and no question as to their validity has hitherto arisen.

Smyley, for the respondent.—The contract is not valid. It is for the appellants to show that in entering on a contract of this kind, extending over a period of seven years, they are acting within the authority conferred upon them by the Act of 1876, under which they were registered. The contract of apprenticeship is a personal trust which cannot be assigned over to another: Austin on Apprenticeship, p. 50.

Loehnis, in reply.—The society does not, as regards a contract of personal trust in the employer, differ from a firm or partnership. The apprentice can be taught his trade as well by the continuing managers of a company as by the continuing members of a firm.

Cur. adv. vult.

Nov. 6.—HAWKINS, J.—The questions we have to decide are—(1) Whether co-operative or industrial societies registered under the Act of 1876 are qualified to take apprentices; and (2) whether a deed of apprenticeship entered into with them is legally valid.

By the deed of apprenticeship the society, for themselves and their successors, covenanted with the youth that they would, by the best methods they could use, instruct him or cause him to be instructed in the business of a "clogger," his father in the meantime maintaining and taking care of him. It was stated that many similar contracts of apprenticeship had been entered into with such societies, but that their legality and validity had not yet been determined. This, in itself, is a fact worthy of consideration. What, then, is the legal objection to such societies entering into such contracts of apprenticeship by which the apprentices are to learn the business carried on by the society. It cannot be because these societies have not the power to carry out such a contract, having regard to the purposes of their constitution; on the contrary, it is incidental to the business they actually carry on, for surely an apprentice cannot learn his business unless he is apprenticed to some person or body of persons bound to teach him. It cannot be said that they are incapable of giving instruction in their business. It appears to me, therefore, that there is no objection on principle to the deed of apprenticeship, and that a trading corporation may take apprentices to learn the business they are carrying on.

It was objected that the contract of apprenticeship is a personal contract; but that view cannot be carried out to its full extent, as may be illustrated by apprenticeships to businesses carried on by firms or partnerships. It has never been doubted that contracts of apprenticeship with large breweries or large manufacturing firms are good and valid, although some of the members take no part in and may know nothing of the business. In such cases instruction would be given to apprentices, not, perhaps, by any members of the firm, but by managers of the business

(a.) Reported by G. K. PALEY, Esq., Barrister-at-Law.

under them—persons, of course, perfectly competent to teach the business, and the best possible persons to teach the business they themselves carry on. It appears to me, therefore, that it is difficult to say that in such cases it is necessary that there should be personal participation by the principals in the giving of instructions to the apprentices, and in this very case the society covenant that they will instruct the apprentice or cause him to be instructed in the business, and that they will instruct him by the best methods they can use. There is nothing in these covenants which they are not capable of carrying out, as they are only to cause him to be instructed in the business, and the father is to have charge of him and maintain him. It is a contract entered into for the benefit of the apprentice, and therefore, as there is no legal objection to it, I think it ought to stand as good and valid. If we decided otherwise there would be this anomaly—that societies or companies which carry on business on a large scale, and have many persons in their service competent to give the best possible instruction in their business, would be precluded from taking apprentices, while persons carrying on business on a small scale would be at liberty to do so.

I am of opinion, therefore, that the deed of apprenticeship is perfectly valid, and that the case must be remitted to the justices to be dealt with accordingly.

STEPHEN, J.—I am of the same opinion and for the same reasons. It would be a very serious thing for the court to interfere to prevent the carrying out of a contract in itself very beneficial, and which was already in operation in a great number of cases. I see no grounds, moreover, for such interference, and the case must go back to the justices.

Case remitted accordingly.

Solicitor for the appellants, *G. B. Wheeler*, for *John Sutcliffe & Son*, Burnley.

Solicitors for the respondent, *Warriner & Kinch*, for *J. Hodgson*, Burnley.

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) April 18, 21, 25, 1890.

Ex parte EXECUTORS OF VAUGHAN.
In re DODDS. (*a.*)

Bankruptcy—Proof—Contingent liability—Creditor's estimate—Assent of trustee—Annuity—Death of annuitant before dividend—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 37, *schedule* 2, *r.* 2—*Bankruptcy Rules*, 1886, *rr.* 219, 228.

A proof tendered by a creditor alleged that the debtor was indebted to her in the sum of £7,000, being the value of an annuity of £1,440 payable to her by the debtor during the residue of her natural life, and the proof further stated the creditor's age, and that the annuity was valued accordingly. The proof was not admitted or rejected by the trustee within twenty-eight days, nor did he require further evidence in support of it; but four months after the proof had been tendered, and before any dividend had been declared or anything further done, the creditor died. The executors of the creditor were thereupon requested by the trustee to withdraw the original proof and to make an amended proof limited to the payments of the annuity due to the date of the creditor's death, and, on their refusal to do so, the proof was rejected by the trustee, on the ground that the annuity had been determined by the death of the creditor. On application by the executors to reverse the decision of the trustee and to direct him to admit the proof for the full amount,

Held, that, although the trustee must be taken to have admitted the existence and amount of the annuity, the omission to deal with the proof was not equivalent to an acceptance of the creditor's estimate, which, by section 37 *of the Bankruptcy Act*, 1883, *was to be made by the trustee, and not by the creditor, and that it was open to the trustee to place an estimate on the value of the annuity after the death of the creditor, the true value of the annuity being the amount of the payments due and unpaid at the time of the creditor's death.*

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

Appeal by executors from the rejection by the trustee of a proof of debt tendered against the estates of M. B. and J. Dodds.

On the 7th of March, 1889, a receiving order was made against M. B. Dobbs; and on the 22nd of March, 1889, a receiving order was made against J. Dodds.

On the 9th of April, 1889, a proof of debt was sent to the official receiver by a Mrs. Ann Vaughan against the estate of J. Dodds for £7,240, it being alleged that at the date of the receiving order the debtor was indebted to her in the sum of £240, being two monthly instalments due to her on the 1st of February and the 1st of March, 1889, under an indenture of covenant dated the 2nd of January, 1885; and also in the sum of £7,000, being the value of an annuity of £1,440 payable to her by the same monthly instalments during the residue of her natural life; and it was further stated that Mrs. Vaughan completed the seventy-fourth year of her age on the 28th of May, 1888, and that the annuity had been valued accordingly. On the 30th of April, 1889, the official receiver handed this proof to the trustees of the estate of J. Dodds.

On the 22nd of May, 1889, Mrs. Vaughan sent to the official receiver a proof of debt against the estate of M. B. Dodds identical with that sent in the case of J. Dodds.

On the 24th of May, 1889, the first meeting of the creditors of M. B. Dodds was held, at which a proposal for a scheme of arrangement of the debtor's affairs was adopted, and trustees appointed to carry out the scheme, which was subsequently confirmed. The proof tendered by Mrs. Vaughan against the estate of M. B. Dodds was duly handed by the official receiver to the trustees, who were the same persons as the trustees of J. Dodds.

On the 20th of September, 1889, Mrs. Vaughan died, having by her will appointed executors; and on the 12th of December, 1889, a letter was written by the trustees to the solicitors acting for the executors of Mrs. Vaughan with respect to both estates that as the basis on which the proofs were made had been altered by the fact of Mrs. Vaughan's death, the original proofs must be withdrawn, and amended proofs made, limited to the amount of the annuity due and unpaid to the date of her death. The executors declined to withdraw the proofs, however, on the ground that they had been admitted and acted on, and on the 7th of January, 1890, the trustees sent to the executors a written notice rejecting the proofs to the extent of £5,920, on the ground that the annuity had been determined by the death of Mrs. Vaughan.

The executors now applied to the court to reverse the decision of the trustees and to direct them to admit each proof for the full amount—viz., £7,240.

E. C. Willis, Q.C., and *Rubie*, for the executors.—The trustee has not complied with rule 228 of the Bankruptcy Rules, 1886. Subject to the power of the court to extend the time the trustee must either admit or reject, or require further evidence of a

proof within twenty-eight days. Where this rule is not complied with, and on an appeal from the rejection of a proof the objection is taken, the court will allow the objection, but will treat the application as a motion to expunge the proof on behalf of the trustee, and will deal with the case accordingly: *In re Voght, Ex parte Spamer*, 3 Morrell's Bankruptcy Cases, 164. It is for the other side to make out their case.

Winslow, Q.C., and *Yate-Lee*, for the trustees.—The court has power, under rule 228, to extend the time for dealing with the proof in order to give the trustee an opportunity of making a correct estimate of the liability. In consequence of Mrs. Vaughan's death he is now able to do this. The executors are only entitled to prove for the payments which actually accrued due. In the case of a contingent liability section 37 of the Bankruptcy Act, 1883, provides the course to be pursued, and until the estimate there provided for is made by the trustee there is not a complete proof. Contingent liabilities must be valued in the best way possible, and it cannot be said here that the value has been ascertained in the best way by the creditor inserting in the proof what she believed to be the value of the annuity. By section 37 the trustee, and not the creditor, is to make the estimate.

They referred to *Banner* v. *Johnston*, L. R. 5 E. & I. App. 157, 20 W. R. H. L. Dig. 11; *In re the Manchester Economic Building Society*, 32 W. R. 325, 24 Ch. D. 488; *In re Bridges*, 17 Ch. D. 342, 29 W. R. Dig. 7; *Ex parte Bates, In re Pannell*, 27 W. R. 927, 11 Ch. D. 914.

E. C. Willis, Q.C., in reply.—The proof tendered contained an estimate of the value of the debt which the trustee could admit or reject, or require further evidence of within twenty-eight days. As he did not do this he adopted the estimate of the creditor and admitted the proof.

CAVE, J.—This case arises out of the bankruptcy of M. B. and J. Dodds. On March 7, 1889, a receiving order was made against M. B. Dodds, and on March 22 a receiving order was made against J. Dodds. On April 9 Mrs. Vaughan's proof was sent in against the estate of J. Dodds, by which she claimed £240 for arrears of an annuity of £120 a month, two months of which were admitted to be in arrear; and proof was also sent in for £7,000, being the residue of Mrs. Vaughan's claim under the deed for her annuity of £120 a month during her life. On April 30 the proof was handed to the trustees. On May 22 a similar proof was put in against the estate of M. B. Dodds, which was admitted for the purpose of voting, but nothing further was done. On September 20 the lady died, and on December 12 the trustees wrote to her executors stating that the proofs could not be admitted for the amount claimed, and proposing to reduce them to a lower sum based on the actual life of Mrs. Vaughan.

The executors declined to withdraw the proofs, and on January 6, 1890, they were rejected by the trustees. The appellants say the trustees could not reject the proofs, but ought to have moved to expunge them. I do not think that the phraseology adopted, or the course pursued by the trustees, is altogether in accordance with the letter of the law, but I do not think this is very important here, because I propose to decide the case on the merits, without regard to what has taken place. By section 37 of the Bankruptcy Act, 1883, provision is made as to the proof of debts, and sub-section (4) of that section provides that "an estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid which, by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value." These are the words of the Act, and there is a further provision made by schedule 2, rule 2, which says, "A debt may be proved by delivering or sending through the post in a prepaid letter to the official receiver, or, if a trustee has been appointed, to the trustee, an affidavit verifying the debt." These are the provisions of the Act of Parliament itself, which are to be further carried out by rules. In accordance with this rules have been made, one of which—rule 219—provides:—"A creditor's proof shall be in the Form No. 72 in the Appendix, with such variations as circumstances may require." Now that form is one which is adapted to proofs for goods sold and delivered and money lent, and, apparently, is intended for debts which are certain, and either have become payable at the bankruptcy or will become payable at a fixed date after it. I do not find any form, nor are the rules directed to debts or liabilities of a different character. Then rule 228 was referred to, which provides that "subject to the power of the court to extend the time, the trustee, other than the official receiver, within twenty-eight days after receiving a proof which has not previously been dealt with by the official receiver, shall, in writing, either admit or reject it wholly or in part, or require further evidence in support thereof. Provided that where the trustee has given notice of his intention to declare a dividend, he shall, within seven days after the date mentioned in such notice as the latest date up to which proofs must be lodged, examine, and in writing admit or reject every proof which has not been already admitted or rejected, and give notice of his decision rejecting a proof wholly or in part to the creditor affected thereby." It was said that where, as in this case, a creditor sends in his proof for a contingent liability, and also estimates the sum at which such liability ought to be valued for the purposes of proof, that the trustee who receives the claim was bound, if he dissent from the proof, to reject it in twenty-eight days under rule 228. I cannot find that this is at all the effect of the Act and the rules. The Act contemplates that a value shall be placed by the trustee, and not by the creditor, who is obviously unable in the majority of cases to place any value on it at all; and although in this case Mrs. Vaughan says that she valued her claim at a certain amount, yet it is clear that she is simply saying what others have told her, and can have no personal knowledge whatever.

It appears to me, then, that neither the Act nor the rules require the trustee to either admit or reject wholly or in part, or require further evidence in support of that part of the claim which professes to estimate the amount of the contingent liability. The reason of this is obvious. When a man sends in a claim it would be extremely unfair that the trustee should remain silent for an indefinite time and then call upon him to produce proof in support of his claim. Take the ordinary cases of goods sold and delivered, the person who can prove the claim may die or leave the service of the creditor, and therefore it would be unfair if the trustee were to postpone the matter until proof of the claim has become expensive, difficult, or impossible, and then call on the creditor to make out his claim. It is with regard to considerations of that kind that rule 228 applies. No doubt it may be contended—and, I think, fairly contended—though I do not propose to decide it now, that, as to so much of Mrs. Vaughan's claim as consists of matters of fact, the trustee was bound to admit or reject, or require further evidence in support of those matters of fact within one month after receiving the proof, and was not at liberty to hold these over or

call for proof of them after an indefinite period. But I cannot see that this applies to an estimate of a contingent liability, the value of which she has no peculiar means of ascertaining, and the putting off the ascertainment of which does not impose a hardship or do harm. Once admit the existence and binding force of the deed and the age of the lady, and you have the materials, or, at all events, a considerable portion of them, out of which a valuation can be made; and it is obvious that the longer the calculation is put off the more likely it is to be correct. Where, as here, she dies in the interval, we are no longer driven to the doctrine of averages, but can ascertain the actual value of the life interest at the date of the bankruptcy. Where the claimant does not die in the interval, still the longer the valuation is put off the more likely it is that a just conclusion will be arrived at. Take, for instance, an extreme case, and suppose the calculation is deferred for ten years, it is obvious that at the expiration of that time a man would have a much better chance of forming an estimate of the value of the life at the commencement of the ten years than if the estimate was made immediately. This shows there is no danger of injury to interests by putting off the time, and in some cases it may be the means of ascertaining the actual value of the interests. It was said, however, that in this particular case, whatever was the general rule, there has been an assent by the trustees to the valuation placed on the contingent liability by Mrs. Vaughan. I have no doubt there may be an assent by the trustee to the valuation placed on a liability by a creditor. The trustee may adopt the creditor's valuation as fair and reasonable, and if he does that it is as good as if he had been the first to place an estimate on the liability. Has this been done here? There is no proof that the trustees actually adopted the valuation. They, however, did nothing until the letter of December 12.

It is said that I ought to infer an assent from their silence. Now if anything had been done by the creditor in consequence of the trustee taking no step, or if it were his duty to take the step within a fixed time, the fact of his not having done anything might have been material. But as the Legislature does not require him to make an estimate within a definite time, and the position of the creditor has not been altered by the omission, and where it is not shown that any notice has been given of a declaration of a dividend, I cannot say that silence on the part of the trustee amounts to an assent. There may be cases where, under other circumstances, the trustee, although he has not actually assented to an estimate, may be estopped from saying that he has not assented; as, for example, when a creditor has been led to act on the belief that he has assented; but nothing of this kind has happened here. It seems to me, therefore, that the matter is left at large. No estimate has been formed by the trustee; and no assent has been given by him to the estimate formed by the creditor. That estimate formed by the creditor is not part of the proof which, by rule 228, the trustee is bound to admit or reject within twenty-eight days. Consequently, there is no objection in substance to what the trustee has done, though objection might perhaps be taken to the language of his letter. Is there any hardship on the executors in consequence of this decision? I think there is none. They will receive the same proportion as the other creditors—namely, a dividend on those instalments which would have been payable to her if no bankruptcy had ensued. On the other hand, if I adopted the view that her estimate was correct, and that there was an assent binding upon the trustee, her executors would receive more than their share. No doubt, if the trustee forms an estimate, or accepts the creditor's estimate, then that is something done by him, and the liability becomes fixed, but nothing here stands in the way of the trustee's forming an estimate which the facts show is the true estimate. For these reasons I dismiss the appeal, and adopt the trustee's calculation as the amount for which the executors are entitled to prove.

Appeal dismissed.

Solicitors for the executors, *Pritchard, Englefield & Co.*

Solicitors for the trustees, *Munns & Longden.*

Prob. Div. & Adm. Div. } May 21, 1890.
Admiralty. }

"THE STEEL BARGES." (*a*.)

Salvage—Conversion of towage into salvage—Owners pro hac vice—*Personal liability for salvage.*

Barge-owners built at Chepstow a number of barges for her Majesty's service under a contract, whereby the full price of the barges was not to be paid until after delivery at Portland, and despatched them on their voyage to that port in charge of two men on board each barge and in tow of a steam tug During the voyage four of the barges broke adrift from the steam tug, and her master and crew rendered salvage services to all the barges beyond what could reasonably be supposed to have been included in the towage contract. After some difficulty two of the barges were towed by the steam tug to Portland, and there delivered up to the proper Admiralty officials; the remaining barges being placed in safety by the exertions of other salvors. Subsequently the owners, master, and crew of the steam tug brought an action of salvage against the three barges so salved by other salvors, and by the writ in such action claimed to recover against the barge builders for salvage services rendered to the barges delivered up at Portland. The writ in the action was never served, but the solicitors for the barge builders undertook to appear thereto, and, in pursuance of such undertaking, the barge builders appeared absolutely as defendants in the suit.

Held, that the defendants were liable to pay salvage remuneration, both in respect of the salvage rendered to the two barges delivered up at Portland, and also in respect of the services rendered by the plaintiffs to the remaining three barges.

Observations as to the right of instituting actions of salvage in personam.*

This was an action of salvage *in rem* instituted on behalf of the owner, master, and crew of the steam tug *White Rose* against three steel barges known respectively as No. 70, No. 71, and No. 72, which, together with two other steel barges, known respectively as No. 68 and No. 69, had been built by Messrs. Finch & Co., at Chepstow, for her Majesty's service, under a contract, whereby the price of the barges was to be paid by instalments, and the final instalment was only to be paid after delivery of the barges at Portland within twelve months of the date of the contract.

The writ in the action was in the form ordered by the Rules of the Supreme Court to be used in

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* See, in cases of salvage within the United Kingdom, the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 458, and, generally, 3 & 4 Vict. c. 65, s. 6, and the Merchant Shipping Act, 1854, s. 476.

(*a*.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

admiralty actions *in rem*, and was directed to the owners of the steel barges Nos. 70, 71, and 72, and to Messrs. Finch & Co., and claimed salvage reward for salvage services rendered by the plaintiffs to all the above-mentioned five steel barges. No service of such writ was ever made, but Messrs. Finch & Co.'s solicitors undertook to appear thereto, and in pursuance of such undertaking entered an appearance on their behalf as defendants in the suit.

May 20, 21.—The action was now heard by the President, assisted by two of the Elder Brethren of the Trinity House.

It appeared in evidence that on or about the 13th of January, 1890, with the view of delivering up the barges at Portland, the plaintiffs entered into an agreement with one David Guy, as agent for the defendants, whereby, in consideration for the sum of £85, the plaintiffs undertook to tow the above five barges from Chepstow to Portland by their steam tug *White Rose*, with use of tug's hawser, subject to the following condition:—Should any or all of the said barges break adrift in towing and be lost, the plaintiffs were to be entitled to the said £85 nevertheless. That in pursuance of the said agreement *The White Rose* on the 16th of January, 1890, took the said five barges in tow at Chepstow, each barge having on board two men employed by the defendants, and proceeded with them down the Bristol Channel. That during the voyage *The White Rose* and her tons encountered bad whether, and four of the barges broke adrift, whilst the master and crew of *The White Rose*, after rendering salvage service beyond the scope of her towage contract to all the barges and certain of the men on board; ultimately, after a passage of fourteen days, succeeded in bringing two of the barges, No. 68 and No. 69, in safety to Portland, and delivering them up to the Admiralty officials there, and that the remaining three barges, after breaking adrift from *The White Rose*, were taken in tow by another steam tug, *The Dunrobin*, and towed by her into safety at Cardiff. The remainder of the evidence, so far as material, appears from the judgment.

Barnes, Q.C., and *Pyke*, for the plaintiffs.—The plaintiffs rendered salvage services to all the five barges beyond the towage service for which the defendants had agreed to pay £85, and can, therefore, properly claim to be remunerated as salvors: *The Kuyalock*, 1 Spinks, 265; and as the barges were, at the time of the salvage services, in the possession of the defendants, and at their risk, the defendants are, for the purpose of these proceedings, to be considered as owners of the salved property, and liable as such owners to pay such salvage as the court may award. They have, moreover, appeared absolutely, but even without this it is immaterial that, owing to two of the barges having got into the possession of the Crown, they cannot be arrested. The lien for salvage still exists, though it cannot be enforced by a proceeding *in rem*.

Bucknill, Q.C., and *Raikes*, for the defendants, *contrà*, on the point that no salvage services had been rendered, cited *The Neptune*, 1 W. Rob. 297, and relied on *The Chieftain*, 4 Notes of Cases, 459, and *The Rapid*, 3 Hagg. 419, as authorities in favour of the proposition that no monition for salvage could have issued against the defendants in respect of the services rendered by the plaintiffs to the barges No. 68 and No. 69.

They also referred to *Ex parte Lambton, In re Lindsay*, 23 W. R. 602, L. R. 10 Ch. App. 405.

HANNEN, P.—The first question in this case is whether or not, as a matter of fact, the services which were rendered by the tug were of such a character, and were rendered under such circumstances, as to take them out of the towage contract. From the examination I have given to the decisions in point, it appears to me that it is not necessary, in order to become entitled to salvage reward, that the supervening danger should be of such a character as to actually put an end to the towage contract. It is sufficient if the services rendered are beyond what can be reasonably supposed to have been contemplated by the parties entering into such a contract. It depends on the circumstances of each case whether or not the services are advanced in this way to a higher degree so as to establish a right to salvage. I have very carefully considered this matter with the Trinity Brethren, and we have come to the conclusion that salvage services have been rendered in this case. The character of the contract is, of course, to be looked at, and the circumstances to which it related, before we arrive at the point from which we have to start in estimating the value of a higher class of services. This was a towage of a very peculiar character, and those who undertook it must have known that it would be a difficult operation at that time of the year, towing, as they would, through a very exposed and dangerous tract of the sea. They must be assumed to have taken that into consideration when they made the bargain to tow these barges from Chepstow to Portland for £85. They must also have taken into consideration that they were liable to delays, although they could not have contemplated so long a delay as was necessarily incurred in consequence of the extreme violence of the weather. No doubt the time taken was somewhat longer than could have been expected; but I do not attach great importance to the delay. But undoubtedly there did supervene some additional operations to be performed which, I think, cannot be considered as within the towage contract. Then arises the question whether the tug was justified in going to Lundy Island? It has been said that that was wrong. I am advised that it was not an improper thing to do. There may possibly be a difference of opinion as to whether it would have been better to go to some other place; but at the utmost that can only be put as an error of judgment, if, indeed, it was that. I am, however, very strongly advised that it was highly injudicious to put to sea from the shelter of Lundy. After the stormy weather which had prevailed for so long a time, any nautical man ought to have known that, in such circumstances, to tow a string of barges was to expose them to extreme danger, as the result proved, for they began to break adrift as soon as they got outside the shelter of Lundy Island. Therefore, in estimating the value of the plaintiffs' services, I do not take into account the return to Lundy Island. But one of the barges, No. 71, was fouled by a steamer, which rendered it necessary that the tug should go to its assistance and extricate it from the position of danger it was in; and at the same time barge No. 72 was taken to a position of greater safety. That, in my opinion, was a salvage service, arising as it did, from necessity, outside the towage contract. We are also of opinion that there was life salvage, in taking the men out of the sea after the boat had been upset by the tightening of the hawser. It seems to me to be perfectly clear that that was an accident for which no blame is imputable to the tug. The rising and falling of the sea would naturally cause a loosening and tautening of the rope, and unfortunately the boat got across the rope at a time when it was slack. The tug saved the lives of two men, and for that I think there should be an award, if there is property saved to which life salvage can attach. Then certain men were taken off one of the barges which went adrift.

I think there can be no doubt that, at the time those men were taken off, everyone believed they were in danger, and though it was possible, and afterwards was the fact, that these men would have been saved by the barge being picked up by the steamer which ultimately salved her, yet I think there was some salvage service rendered to those men. Having regard to the circumstances which existed at the time it was not certain that the barge would be picked up, and, therefore, I think that life salvage is due in that respect. I therefore come to the conclusion that a sum is to be awarded as salvage for the extraordinary exertions which became necessary over and above those which were reasonably contemplated as within the towage contract.

But it is argued that the plaintiffs are not entitled to recover, because, as against barges No. 68 and No. 69 they are not asserting their right as having a maritime lien, but have merely asserted a claim *in personam*. The reason for doing this is, because these barges are now in the possession of the Government, for whom they were made by the defendants. Those remarks do not apply to the other three barges, as to which a lien was asserted before they were given up to the Government. As to the two that have been given up to the Government, I think it is perfectly clear on the authorities that in certain cases an action of salvage *in personam* lies against the owners of a vessel which has been saved, even though the property has been transferred to others and the lien lost. In this case, however, the property in these two barges delivered up at Portland does not appear to have been in the defendants, because it would, I think, under the contract, to which reference has been made, be in the Government. But on this point I am of opinion that the right to sue *in personam* is not confined to the case of the defendant being the actual legal owner of the property saved. I think it exists in cases where the defendant has an interest in the property saved, as the defendants had in this case, which interest has been saved by the fact that the property is brought into a position of security. The jurisdiction which the court exercises in salvage cases is of a peculiarly equitable character. The right to salvage remuneration is a legal liability arising out of the fact that property has been salved that the owner of the property who has had the benefit of it shall make a remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject. I think that proposition equally applies to the man who has had a benefit arising out of the saving of the property. In this case the defendants were under contract with the Government to supply them with barges at a certain price. Payment was to be made by certain instalments, of which only one remained unpaid at the time of the services. I think, if Mr. Barnes' argument is well founded—viz., that those instalments were all paid on condition that the barges should be delivered all within twelve months of the date of the contract—then, in case of non-delivery within the twelve months, the defendants would have been liable in damages for not performing their contract, or liable to make restitution of the instalments which had been paid them on the faith of conditions not fulfilled by them. It appears to me, therefore, that they had substantially an interest to the full amount of the value of the barges at the time of the services, and that the same moral obligation to which the law has given force in the case of an owner applies to those who have such an interest in the property as the defendants had in this case. Moreover, I do not forget that the defendants insured themselves to the full value of these barges. In conclusion, therefore, I award £200 as salvage remuneration to the plaintiffs, independently of the amount due to them under their towage contract.

Solicitors for the plaintiffs, *Fielder & Sumner.*

Solicitors for the defendants, *Botterell & Roche.*

Court of Appeal.

From Q. B. Div. Nov. 14.

STEVENS *v.* MARSTON. (*a.*)

Bill of sale—Registration—Covenant in lease—"Licence to take possession of personal chattels as security for a debt"—Power of distress for recovery of debt in respect of goods supplied by a landlord to a tenant—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Practice—Motion for judgment—Judicature Act,* 1890 (53 & 54 *Vics. c.* 44), *s.* 2.

Motions for judgments upon the verdict of a jury must, by section 2 *of the Judicature Act,* 1890, *be made to the judge who tried the case, and such motions will not, in the future, even by consent of parties, be heard by the Court of Appeal.*

In an agreement for a lease by a brewer, as landlord, to the tenant of "a tied house," a covenant was inserted to the effect that the landlord "should have the same rights, powers, and remedies as landlords ordinarily possess in case of rent in arrear, for any amount due by the tenant for any liquors or other goods sold, or for any money advanced, by him to the tenant, not exceeding in the whole the sum of £200 *over and above any rent then due, and should be at liberty to seize and distrain any furniture, stock, or effects in respect of any such debt, and sell the same as by law landlords are empowered to do for rent."*

Held, that the covenant, in spite of there being no existing debt at the date upon which it was made, amounted to a bill of sale within the meaning of section 4 *of the Bills of Sale Act,* 1878, *as "a licence to take possession of personal chattels as security for a debt," and was void for want of registration.*

Pulbrook *v.* Ashby & Co., 35 *W. R.* 779, *approved.*

Motion by the defendant for a new trial on the ground of misdirection by Denman, J., and on the ground of excessive damages.

Motion by the plaintiff for judgment.

The court intimated that the latter motion could only, since the Judicature Act, 1890 (53 & 54 Vict. c. 44), be heard by consent of the defendant, and that for the future such motions must be heard by the judge who tried the case.

The action was one for wrongful entry and distress under the terms of a document purporting to be an agreement, dated the 12th of May, 1883, between the plaintiff as tenant and the defendant as landlord for the tenancy by the former of a hotel.

The hotel was a "tied" house, and bound to take its liquor from the defendant. The defendant agreed to let the hotel to the plaintiff at £60 per annum at a tenancy from year to year determinable at three months' notice. The plaintiff further agreed that the defendant should have "the same rights, powers, and remedies as landlords ordinarily possess in case of rent in arrear upon the furniture, stock, or effects in and upon the premises for the recovery of any amount due for any liquors or other goods sold by him to the tenant not exceeding

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

in the whole the sum of £200 over and above any rent then due, and should be at liberty to seize and distrain any furniture, stock, or effects in respect of any such debt and sell the same as by law landlords are empowered to do for rent." This agreement was not registered as a bill of sale.

The plaintiff being in debt to the defendant for liquor supplied, the defendant on the 16th of April, 1889, distrained upon the premises. Possession was retained for two days, but then ceased under the terms of an *interim* injunction. The plaintiff brought this action for wrongful entry and distress, and for damages. The action was tried before Denman, J., and a jury. The judge directed the jury that the power to enter and seize the goods was void, the agreement not being registered as a bill of sale. The jury gave a verdict for the plaintiff with damages, £250. The judge left the parties to move for judgment, which motion had been set down in the Divisional Court, but transferred to the Court of Appeal under the terms of the Judicature Act, 1890.

Jelf, Q.C., and *Tindal Atkinson*, for the defendant, as appellant.—This agreement was not a bill of sale. It was not a security over personal chattels for an existing debt. There was no existing debt nor any money advanced at that time. It is a mere means of recovering a future debt, not for securing a present debt. If that portion which related to any money advanced came within the meaning of a bill of sale, that did not affect the document so far as it applied to distress for rent. It might be partially good and partially bad. The right of entry under the agreement is distinct from any right to seize the chattels: Bills of Sale Amendment Act, 1882, s. 8; *Pulbrook* v. *Ashby & Co.*, 35 W. R. 779; *Hughes* v. *Little*, 35 W. R. 36, 18 Q. B. D. 32; *In re Willis, Ex parte Kennedy*, 36 W. R. 793, 21 Q. B. D. 384. The damages are excessive for only two days' possession; no damage to business was shown in evidence. A jury's verdict can be criticized just as much as a judge's verdict when an action is tried before a judge alone. A judge is bound to give reasons for his findings, and a jury ought to be equally bound. If their finding is an unreasonable one it ought to be quashed.

Crump, Q.C., and *J. E. Bankes*, for the plaintiff, as respondent, were only called upon to answer the point as to excessive damages, and they assented to accept a verdict with reduced damages.

Lord ESHER, M.R.—We find that the learned judge in the court below did consider the damages as given by the jury to be somewhat oppressive. We should not reduce those damages except by the consent of the plaintiff, as respondent. That consent being given, we are prepared to give judgment for the plaintiff, on his acceptance of a verdict for £125.

Now this was an action by an occupier for damages for trespass and seizure of goods. The defendant justified both steps under the terms of a document. The plaintiff says that, apart from any right of entry upon the premises in the defendant as landlord, the present entry was solely for the purpose of seizing the goods mentioned under the agreement, and that, so far as the agreement relates to the seizure of the goods (for which purpose a right of entry was necessarily implied under the terms of the document, and without which its object would otherwise have been nugatory), this document is a bill of sale, and, not being registered, is void. It is admitted not to have been registered.

The simple question therefore remains, Was it a bill of sale so far as it related to the seizure of personal chattels? The document does not refer solely to goods and chattels; it is partly a lease by the defendant as landlord to the plaintiff as tenant; but there is a covenant with regard to goods and chattels quite separate and distinct from that part of the document which relates to tenancy. This covenant is to the effect that if money be due for and in respect of the goods and chattels, either afterwards or at the time of the agreement, the defendant should have the right to enter and seize the same. Now does that covenant, apart from the rest of the document, amount to a bill of sale or not?

By the Bills of Sale Act, 1878, s. 4, a "licence to take possession of personal chattels as security for any debt" is within the definition of a bill of sale. The only criterion is that the debt must be in respect of the chattels. There could be no power in a vendor to take possession of the goods because the goods are not paid for. This document does give to the defendant a larger right than he would have without the document. If so, then it is a security for his taking possession of the goods, and amounts to a licence to take possession of personal goods and chattels as his security.

It has been argued that this is the real effect of the whole document. If so, the whole document is a bill of sale, and, not being registered, is wholly void. But this is not a true objection. In *In re Burdett, Ex parte Byrne*, 36 W. R. 345, 20 Q. B. D. 310, and in *In re Yates*, 36 W. R. 563, 38 Ch. D. 112, we have expressly held that where a document contains independent stipulations in regard to two different things, one of which is not within the Bills of Sale Act at all, and the other is an independent covenant in the same document in regard to personal chattels within that Act, that covenant, or part of the document, is a bill of sale, and must be registered. But as regards things not within the purview of the Act at all, the document, so far, is not a bill of sale.

For these reasons we hold that this covenant is a bill of sale within the meaning of section 4 as "a licence to take possession of personal chattels as a security for a debt" so far as it relates to the goods, and is so far void for want of registration, although it is good as to the other independent covenants relating to the agreement for a tenancy. But as to the right of entry for the sole purpose of taking the goods, that is the necessary antecedent of the licence to take possession of the goods, and that entry, coming under the bill of sale portion of the document, was therefore wrongful.

We uphold, therefore, the judgment of Denman, J., both in the case of *Pulbrook* v. *Ashby & Co.*, which he felt bound in the present case to maintain, and also his judgment in this case, so far as the motion for misdirection on the point of law is concerned; and we hold that the defendant was subject to this right of action on the part of the plaintiff, and we enter judgment on that point for the plaintiff.

As regards the damages, the jury allowed £250. It is said that these must be held as excessive and unreasonable. This court is, and will be in the future, most unwilling to grant any new trial at all, but if it were necessary to do so, and no arrangement by agreement of the parties were made to reduce the damages, it may be that there must be a new trial on that ground. We have not decided that question absolutely here. We leave the question open whether under the new legislation the court may not by its own power direct a reduction of damages where needful. We have not decided that question here, but have only acted upon the agreement of the parties that the amount of damages should be left for us to assess. We think that the damages should, under that consent, be reduced to £125, and that this appeal should be dismissed. The plaintiff is therefore justified mainly in his action, he has recovered a considerable

sum and he is entitled to the costs of his action, though something has been taken off from the amount originally recovered. The appeal here was mainly upon the question whether this document was or was not a bill of sale wholly or in part. Upon that the appellant has substantially failed, and he must submit to the usual consequences.

LOPES, L.J.—After the exhaustive judgment of the Master of the Rolls it is sufficient for me to say that I hold that the portion of the document in question which related to the seizure of the goods as a security must be inoperative, as coming clearly within the definition of the Bills of Sale Act, 1878, s. 4, and the appeal on that point justifiably fails. The covenant relating to the goods not only comes within the words of the Act, but within the authorities cited, and within the very mischief which the Act was intended to counteract. The document is bad as to that part and good as to the rest. As to the damages, the judge who tried the case thought them excessive, but I am bound to say they would not have otherwise seemed to me to be so. However, as the plaintiff agrees to their reduction we can by that means avoid sending the case down for a new trial on that point, even if we had thought it necessary to do so.

KAY, L.J.—The first question, and the only one of importance, is whether this document, or any portion of it, is within the meaning of a bill of sale? The matter arises out of a lease for the tenancy of a public-house. There are the ordinary covenants as to the consideration, &c., but there is also a separate provision in respect of any debt arising from the trading contemplated between the defendant as a brewer and the plaintiff as his tenant. The brewer is to have an express right of entry upon the premises for the purpose of seizing the goods just as in the case of an entry for distress for rent. The covenant is to the effect that the tenant further covenanted with the landlord that he should have "the same rights and remedies, as landlords ordinarily possess in cases of rent in arrear, upon the furniture, stock, and effects of the tenant for the recovery of any amount due for any liquor or other goods sold by him to the tenant," &c., and "should be at liberty to seize and distrain any furniture, &c., in respect of any such debt." Was this power collateral to the tenancy? Suppose it stood alone to secure any debt or loan advanced, would it be a bill of sale? A bill of sale is said, among other things, to be a licence to take possession of personal chattels as security for a debt. Clearly, then, such a covenant standing by itself in a document would be one.

It is said that there was no debt at the time of the document being drawn up, but only a possible future debt. But the Act does not say anything about the debt being only a present existing debt. What is a security deposited at a bankers for the purpose of recovering an over-draft of the balance but a security for a possible future debt? Or a deposit of a security on an agreement to buy an estate? There is no debt till the conveyance of the estate has been executed. Suppose in either of these cases a security over personal chattels is given, is it to be said that, because the debt is only in contemplation, such security is not within the Bills of Sale Act? If so, there would be an easy method of evading the Act.

It is said, again, that this seizure is a distress for rent. But another section in the Act of 1878—namely, section 6—would probably then come into play and would comprise the document within its terms. This agreement was doubtless, however, artfully drawn to avoid coming within section 6 as "an instrument whereby a power of distress is given by way of security for any present or future debt." But it is clearly within section 4, and this seizure was not for rent nor for anything in the nature of rent. This covenant is a separate one, and has nothing to do with the actual lease of the premises. Finally, it was argued that it was only the licence to take possession which came within the purview of a bill of sale, and that this did not include the right of entry, upon which the plaintiff really based his action. The argument is too ingenious to be sound. The entry was only made for the purpose of taking possession of the security. If the licence to take possession comes within the meaning of a bill of sale, as we hold it undoubtedly does, then the entry for that purpose is void, and was as wrongful as the seizure.

As to the argument on the other side, that if there is a blot in the document the whole agreement is void, I do not think it tenable. Possession of the premises, rent, or conditions of tenure are all terms of the written contract; the contract as to the tenancy could not be ascertained without the document. Is it to be said that, because a covenant in a clause having nothing to do with the tenancy or the rent is not maintainable, the whole document is void? That would be a most extravagant contention. It has been refuted in the well-known cases cited. In a mortgage to secure a debt when one part of the security is real estate, and the other, personal chattels, the latter part has been held void and the former good. We are only following those decisions in holding here that this document is bad as to the independent covenant providing for the seizure of the goods, which has nothing to do with the lease of the premises, while the part of the agreement relating to that is good.

Appeal dismissed.

Solicitors for the appellant, *Prior, Church, & Adams.*

Solicitor for the respondent, *Thomas Young.*

From Q. B. Div. Oct. 31.

BUDGETT & CO. v. BINNINGTON & CO. (*a.*)

Shipping—Bill of lading—Charter-party—Demurrage—Fixed number of lay days—Strike causing delay—Liability of charterer.

A cargo of grain in bulk was shipped under a bill of lading which incorporated the conditions of a charter-party. By the charter-party a fixed number of days were allowed for unloading the cargo, demurrage to be payable over and above the lay days. Neither the bill of lading nor the charter-party contained any reference to strikes. According to the custom of the port where the ship was ordered to discharge, in the case of grain cargoes in bulk, the unloading was effected by the shipowner and consignee jointly. The shipowner and the consignee each contracted with a separate firm of master stevedores to do their respective parts of the work. During the lay days the dock labourers employed by the master stevedores struck work and remained out on strike until after the expiration of the lay days, during which time the unloading ceased, and no work could be done. In a claim by the shipowner for demurrage,

Held (affirming the judgment of the Queen's Bench Division, ante, *p.* 13, 25 *Q. B. D.* 320), *that, as the delay in unloading was not caused by the default of the shipowner, or of those for whom he was responsible, demurrage was payable in respect of the time occupied in unloading beyond the fixed number of lay days.*

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Appeal by the plaintiffs from the judgment of the Queen's Bench Division (Denman, Charles, and Vaughan Williams, J.J.) ordering judgment to be entered for the defendants (reported *ante*, p. 13, 25 Q. B. D. 320).

The action was brought by indorsees of a bill of lading for a cargo of barley in bulk, shipped on board the defendants' steamship, to recover a sum of money paid by them under protest in respect of a claim by the defendants for demurrage.

The facts are fully set out in the report in the court below, and are also shortly stated in the above head-note.

Oct. 28, 30.—*Cohen, Q.C.*, and *Pyke* (*E. V. Bullen* with them), for the plaintiffs.

Bucknill, Q.C., and *J. V. Austin*, for the defendants.

The arguments were the same as in the court below. The following additional authorities were cited: *Furnell* v. *Thomas*, 5 Bing. 188; *Hansen* v. *Donaldson*, 1 Court of Sess. Cas., 4th series, 1066; Smith's Mercantile Law, 5th ed., 294 (cited with approval in *Erichsen* v. *Barkworth*, 7 W. R., at p. 97, 3 H. & N., at p. 894); 1 Maude and Pollock, 4th ed., 410.

Cur. adv. vult.

Oct. 31.—Lord ESHER, M.R.—This is an action brought by shipowners for demurrage, and is based upon a stipulation in the bill of lading. The bill of lading contains many stipulations, and several of them are independent stipulations. By this contract the freighter agreed to pay demurrage under certain circumstances. The contract to pay demurrage is in the ordinary form, which has received judicial construction on several occasions. It has been held over and over again that where the lay days are fixed, the demurrage contract is a contract by the freighter to pay demurrage at a certain rate if the ship is detained beyond the specified lay days. That is to say, that the freighter will pay for the ship not being handed back to the shipowner for use at the expiration of the lay days. That contract has been stated to be an absolute and independent contract. By the word "absolute" the judges meant to distinguish it from a conditional contract. The contract was, therefore, an unconditional one, there being only one circumstance which must exist before the freighter's obligation to pay demurrage arises—namely, the commencement and running out of the lay days; and if, at the end of that time, the ship is not handed back to the shipowner, the freighter must pay demurrage. The courts have applied the same principles of construction to this contract as they would to any other contract. If a person agrees to pay a sum of money upon the happening of an event, he must pay upon that event happening. The shipowner proves his case upon showing that the lay days have expired and the ship has been detained beyond them. It lies upon the freighter to show some reason why he is excused from paying. There is a case where, there having been a breach, the freighter is excused. It amounts to the old plea of confession and avoidance. The burden of proof lies upon the freighter. The excuse for the breach in the case of this or any other contract, whether maritime or not, is that the plaintiff, by some fault of his, has prevented the defendant from performing his part of the contract. The stipulation in the present contract is that the ship shall be unloaded at the expiration of a certain number of days. If the shipowner prevents the cargo being taken out of the ship, the freighter is excused. This is a rule of the common law as well as of equity, and is founded on natural justice, that a man cannot be sued for not performing a contract which the party suing has prevented him from performing.

It is said that that excuse arises in the present case, inasmuch as the unloading of the cargo was the joint act of the shipowner and the freighter, and the shipowner has not performed his part, and that, therefore, the shipowner has prevented the ship from being unloaded in the specified time. Now it is true to say that ordinarily the delivery of the cargo, unless the contract otherwise provides, is the joint act of the shipowner and the freighter. In the absence of any stipulation to the contrary, the law assigns certain parts of the delivery to each party. The shipowner takes the cargo to the rail of the ship, and the consignee takes it at the rail. In the present contract the share devolving upon each party has been altered by the custom of the port, and has therefore become part of the contract. The freighter had undertaken to do something which is usually done by the shipowner. The cargo was a cargo of barley in bulk, and in order to have the barley delivered properly, by the custom of the port the freighter had to supply sacks in which his men put the barley, and then the shipowner took the sacks of barley to the rail of the ship and delivered them to the freighter. It was contended that the shipowner failed to perform his part of the unloading owing to a default on his part or on the part of someone for whom he was responsible. The words "those for whom he is responsible" refer at any rate to persons representing the shipowner in his absence, and include the master of the ship, for whose wrongful act the shipowner would be responsible. How much further those words go I am not prepared to say. It is not necessary to say whether they would include the case of the crew refusing to work. This, however, seems to me to be clear, that if the delivery is prevented by persons who are not the shipowners' servants, or by circumstances over which he has no control, that is the same as if some physical event or accident over which he has no control prevents the delivery. Now it is clear that if some physical event or accident beyond his control prevents the delivery, the shipowner is not reponsible. If, for instance, the lower cargo-owner is prevented by some event beyond the control of the shipowner from taking out his cargo in time, the delay is not caused by the default of the shipowner, and the lower cargo-owner is not excused. If, therefore, the delay is caused by persons over whom the shipowner has no control, the shipowner is not in default, and the freighter is not excused for the breach of contract which has occurred. The above views have been expressed in every case arising upon the demurrage clause. Those views have been expressed in cases where no fixed time has been specified for unloading, and where, therefore, a reasonable time is to be allowed. Where a reasonable time is to be allowed, many circumstances have to be taken into consideration which could not be when the days are fixed. Circumstances such as the superincumbent cargo, the weather, the conduct of the parties, would have to be considered, and no definite rule can be laid down in such a case. But when dealing with cases of that description judges have always distinguished them from cases where the time is fixed. I have merely stated the proposition laid down by Lord Ellenborough, Lord Tenderden, and other judges.

That reduces the question to this, was the unloading prevented by any default on the part of the shipowner or of those for whom he was responsible? A good working test has been stated by Lopes, L.J., in the course of the argument. Was the act one which could not have been foreseen, and which was done by

persons over whose acts the shipowner had no control whatever? Here the master stevedores employed the men to unload the ship. The shipowner employed the master stevedore. The shipowner had entered into a contract with the master stevedore; he could not control him or interfere with him; the master stevedore was not his servant. The men employed by the master stevedore are not the servants of the shipowner. It was the act of those men, their breach of contract of service with the master stevedore, which prevented the discharge within the stipulated time. For that wrongful act the shipowner was in no way responsible. There was, therefore, no default on the part of the shipowner, and the freighter was not relieved from his contract to pay demurrage. The appeal must, therefore, be dismissed.

LINDLEY, L.J.—I am of the same opinion. The question in this case may be put thus:—Does the risk of a strike fall on the shipowner or the merchant? There is nothing specified in the contract about a strike. The contract bound the merchant to discharge the cargo within a specified number of days. By the stipulation in the contract the merchant undertook the risk of unloading within a certain number of days. The terms of that stipulation were unconditional. It was an absolute contract. Then comes the question whether there is any implied condition in the contract. It was said that the shipowner must be ready and willing to perform his part of the discharge, and if he was not, then the merchant was excused from paying demurrage. The authorities seem to me to show clearly that that contention is not well founded. The proposition is far too wide. If it were a true proposition the decision in *Thiess* v. *Byers*, 24 W. R. 611, 1 Q. B. D. 244, would be wrong. I conceive that there is an implied condition in the contract under which the merchant would be exonerated from paying demurrage—namely, that the shipowner or those for whom he is responsible do not prevent the merchant from unloading. If the plaintiffs could show that such a state of things existed in the present case, they would be right. The plaintiffs must go the length of contending that the shipowner is responsible for the strike of the dock labourers. That is not so. The dock labourers are not the shipowner's servants. I cannot say that the shipowner is precluded from claiming demurrage by reason of the strike of dock labourers, who are not his servants. The general principles which are applicable to the construction of all contracts are equally applicable to the construction of maritime contracts. I agree that this appeal must be dismissed.

LOPES, L.J.—This action is by merchants against shipowners to recover back demurrage paid by the plaintiffs under protest. The facts have been stated. I will not restate them, but I wish shortly to express my opinion upon the case, which is an important one. Three questions arise. First, what is the contract? Secondly, has there been a breach of it? Thirdly, is that breach excused?

The contract is an independent and absolute contract, and not a conditional contract. It is a contract creating an absolute obligation in the merchant to have the goods unloaded within a specified time, whatever the circumstances may be, unless the shipowner or those for whom he is responsible are in fault. There is an essential difference between cases where a specific time is allowed for loading and unloading and cases where the lay days are not specified. In the former cases the time is limited without reference to subsequent events; in the latter the question whether the merchant has been duly diligent must be determined by reference to the conditions under which he has actually worked.

There is, then, as I have said, an absolute contract on the part of the merchant to have the cargo unloaded within a specified time. In such a case the merchant takes the risk. The contract is, to use the words of Brett, L.J., in *Porteus* v. *Watney*, 27 W. R. 32, 3 Q. B. D. 543, that if the ship is not able to discharge the whole of her cargo within the given number of days after she is at the usual place of discharge, he will pay for the delay, however the delay may be caused, unless it be by default of the shipowner.

If such is the contract, it is clear that the plaintiffs have broken it. But it is said the breach is excused, because it is attributable to the default of the ship. If that could be made out it would establish the plaintiffs' case.

The master at the port of Bristol employed a master stevedore; that master stevedore employed dock labourers. It is not suggested that the master was wanting in care and caution in selecting those whom he employed. The dock labourers, however, struck as others, also dock labourers, employed by the plaintiffs. It is said the ship was responsible for the conduct of these dock labourers. I cannot come to this conclusion. I can find no default in the ship The strike was an unforeseen occurrence, over which the ship had no control. It was an event which the master had no reason to anticipate, an event which no reasonable care and caution on his part could have prevented. It was, to use the expression which I used during the argument, and which is approved by Lord Esher, M.R., in his judgment, an unforeseen occurrence, and nobody's fault, and was in my opinion one of those risks which the merchant contracted to bear; just as much as in *Randall* v. *Lynch*, 2 Camp. 352, it was held he should bear the risk of delay arising from the crowded state of the place at which the ship was to load or discharge; or the risk of the frost, as in *Barrett* v. *Dutton*, 4 Camp. 333; or the risk of bad weather preventing access to the ship, as in *Thiess* v. *Byers*; or the consequence of the acts of the Government of the place prohibiting export or preventing communication with the ship, as in *Barker* v. *Hodgson*, 3 M. & S. 267.

I can find no fault in the shipowner or in those for whom he is responsible which can excuse the breach of contract by the plaintiffs.

The appeal, therefore, fails.

Appeal dismissed.

Solicitors for the plaintiffs, *Whites & Co.*, for *Henry Brittan & Co.*, Bristol.

Solicitors for the defendants, *W. A. Crump & Sons.*

From Q. B. Div. Aug. 7, 1890.

"THE ACCOMAC." (*a*.)

Shipping—Charter-party—Exception of negligence in the navigation of the ship in the ordinary course of the voyage.

By an exception in a charter-party shipowners were exempted from liability for damage to the cargo resulting from "any act, negligence, or default whatsoever of pilots, master, or crew in the navigation of the ship and in the ordinary course of the voyage." After the arrival of the vessel at the port of discharge, the cargo, while still undischarged, was injured in consequence of the negligence of the chief engineer of the ship.

Held, that this was not within the exception, as it had

(*a*.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

not occurred "in the navigation of the ship," and that the defendants were liable.

Appeal from the decision of Butt, J.

The plaintiffs chartered the defendants' vessel, *The Accomac*, to carry a cargo of rice from Rangoon to London. The charter-party contained an exception from liability for "any act, negligence, or default whatsoever of pilots, master, or crew in the navigation of the ship and in the ordinary course of the voyage."

The Accomac on her arrival went into the Victoria Dock to discharge her cargo, and while there one of her bilge pumps, which had proved defective on the voyage, was removed by some workmen employed by her owners for this purpose. In order to take out the pump it was necessary to remove a cock which closed one of the pipes connected with the ballast tanks. The cock had not been replaced when the chief engineer of *The Accomac* opened the sea cock in order to fill the ballast tanks and forgot to close it. The result was that when the ballast tanks were filled the water rose to the level of the pipe from which the cock had been removed, and passing through it, injured the cargo.

The plaintiffs claimed damages for the injury.

Butt, J., gave judgment for them, holding that the injury was caused by the joint negligence of the workman and the chief engineer.

The defendants appealed.

Barnes, Q.C., and *Joseph Walton*, for the appellants.—The exception in the charter-party discharges the defendants from liability. The cargo was not discharged, and therefore the voyage was not completed.

They cited *Bruce* v. *Nicolopulo*, 3 W. R. 483. 11 Ex. 129; *Barker* v. *McAndrew*. 13 W. R. 779, 34 L. J. C. P. 191; *Laurie* v. *Douglas*, 15 M. & W. 746.

Finlay, Q.C., and *Hollams*, for the respondents.—The exception has no application. The damage did not occur in the navigation of the ship, or in the ordinary course of the voyage.

Lord ESHER, M.R.—I have no doubt that in this case the charter-party voyage was not over when this occurrence took place. But the question which we have to decide is, what is the meaning of the exception in the charter-party, and whether what has happened brings this case within it? The exception is not an exception of any act, neglect, or default of the master or crew during the voyage. Even if that were so, still the act, neglect, or default must be the act or default in a certain particular during the voyage—namely, "in the navigation of the ship." Therefore, the question is, Was the neglect which has occurred neglect in the navigation of the ship? I think the chief engineer was negligent, though I think that others also were negligent. But, in my opinion, the neglect of the chief engineer was not neglect "in the navigation of the ship," for neglect is not "in the navigation of the ship" unless it is neglect in absolutely navigating the ship. Now, in this case, was the vessel being navigated when the neglect occurred? She was not, it is true, at the end of the charter-party voyage, but she was not sailing. She was finally and intentionally moored in dock, and not intending to sail till after the cargo was discharged. It is quite true that if she had broken away from her moorings she might have needed navigating again; but at the time of this occurrence she was hard and fast at her berth in the docks, and was to remain there until after her cargo had been taken out of her. Therefore, I do not think that the neglect here was neglect in the navigation of the vessel within the meaning of the exception. In my opinion *Laurie* v. *Douglas* does not apply to this case, but it is impossible to say whether I can agree with that decision at all without knowing the reasons on which it was based.

I think the test suggested by Butt, J., is absolutely conclusive of the case. Here two negligences produced the damage—namely, the negligence of the engineer and that of the workmen who had disconnected the pump. But it is impossible to say that these workmen, who were the servants of independent contractors, were assisting to navigate the ship, and therefore it is plain that the neglect of the chief engineer was not neglect in the navigation of the ship. For these reasons I am of opinion that this case does not fall within the terms of the exception in the charter-party now before us, and that this appeal must be dismissed.

LINDLEY, L.J.—I am of the same opinion. I do not think that anyone could, without torturing words out of their ordinary meaning, come to the conclusion that the negligence relied upon was negligence "in the navigation" of the ship. We have been invited to come to a contrary conclusion upon the authority of *Laurie* v. *Douglas*. I certainly do not mean to say that that case was wrongly decided; it may be that the fact that the vessel had broken away from her moorings may distinguish it from this case, but if that decision leads to any different conclusion from that at which we have arrived in this case, I can only say that I do not agree with it.

BOWEN, L.J.—I am of the same opinion. Assuming that the damage was caused by the negligence of the chief engineer alone, and not by his act jointly with that of the workmen of the independent contractors, was that act of the chief engineer done during the voyage? It may have been done during the charter-party voyage. That, however, is not enough. The question still remains, Was it done "in the navigation" of the ship? It seems to me plain that it was not. When the act was done the navigation was over, according to the ordinary and accepted meaning of the term.

I therefore agree with what has been already said, and think that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Hollams, Son, & Coward.*

Solicitors for the defendants, *W. A. Crump & Son.*

High Court of Justice.

Chan. Div. Chitty, J. — Dec. 4.

FRAMES v. BULTFONTEIN MINING CO. (LIMITED). (a.)

Company—Directors' remuneration—Net profits for the year—Voluntary winding up—Reconstruction—Profit on sale of undertaking to new company.

A provision in a company's articles remunerating the directors for their services by a percentage on the net profits of each year applies only to profits made by the company as a going concern, and not to a profit realized on the sale of its undertaking to a new company in a voluntary winding up, with a view to reconstruction.

Rishton v. Grissell, *L. R.* 5 *Eq.* 326, 16 *W. R. Ch. Dig.* 86, *approved.*

(a.) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

Action.

This was an action by the plaintiff as one of five directors of the defendant company against the company for a sum equal to one-fifth of three per cent. on the net profits of the company for the year ending the 31st of May, 1888, as remuneration for his services as director, under the 57th article of association below stated. The only point argued was as to the meaning of the expression "net profits of the company for such year."

The defendant company, which will sometimes be referred to as the old company, was formed for the acquisition and working of diamond mines in South Africa, and the selling, leasing, or otherwise disposing of any mines, diamonds, or any other real and personal estate of the company, and by the articles the directors had power to sell and otherwise dispose of all or any parts of the property of the company.

The 57th article, so far as material, was as follows:—

"As remuneration for their services the directors shall be paid in each year out of the funds of the company either a sum of £300 or a sum equal to three per cent. on the net profits of the company of such year, whichever shall be the larger sum."

The accounts of the company were made up to the 31st of May in each year.

The question arose under the following circumstances:—

On the 13th of April, 1888, the company passed a resolution to wind up voluntarily with a view to reconstruction. The liquidators were empowered to enter into an agreement, according to a draft submitted to and approved by the general meeting, for a transfer of the business and undertaking of the old company to a company called the New Bultfontein Mining Co. (Limited).

On the 2nd of May the old company and the liquidators agreed to sell their undertaking, property, and assets to the new company at the price of £624,800, to be paid in shares of the new company, to the intent that such shares might be distributed amongst the members of the old company in proportion to their ordinary shares therein. The ordinary share capital of the old company was of the nominal amount of £142,000, and the plaintiff claimed, *inter alia*, one-fifth of three per cent. on the difference between this amount and the agreed purchase-money of £624,800, contending that this difference was a net profit of the year.

Byrne, Q.C., and *Levett*, for the plaintiff.—This difference is clearly a profit of the year. Suppose the mines had been worked out. Any amount realized beyond the nominal amount of capital would have been divisible as profits: *Lee* v. *Neuchatel Asphalte Co.*, 37 W. R. 321, 41 Ch. D. 1. The winding up cannot stop the plaintiff's right to previous profits.

Maclean, Q.C., and *Ingle Joyce*, for the company.—"Profits" must refer to the ordinary revenue profit and loss account—*i.e.*, profits out of which dividends are properly payable. The point was really decided in *Rishton* v. *Grissell*, L. R. 5 Eq. 326, 16 W. R. Ch. Dig. 86.

Byrne, Q.C., in reply.—In the present case selling the mines at a profit was one of the direct objects of the business, and such profit is within article 57.

CHITTY, J., stated the facts, and continued:—The plaintiff alleges, and for the purpose of my decision I will assume, that there was a large profit on this sale. This profit, if any, is represented by shares, but their value can, if necessary, be ascertained on inquiry. On this profit the plaintiff claims one-fifth of three per cent., contending that it was a net profit of the company within the meaning of article 57. Now, in the first place, article 57 is addressed to the case of a going company, and does not apply to a winding up. Unquestionably there were powers of sale in the articles under which the directors might have sold—for instance, a particular mine—and if they had done so while the company was still a going concern, the transaction would, no doubt, have been brought into the profit and loss account for the year. But the article has no application to a sale made, not under these powers, but under the paramount statutory power of the company in the winding up.

A somewhat similar point was brought before Wood, V.C., in *Rishton* v. *Grissell*. The Vice-Chancellor refused to allow the claim in that case, and I think he was right in so doing. I observe also that the remuneration of the directors is for their services. Now this sale by the company is in no way attributable to the services of the directors, so, for that reason also, the profit made on this sale is altogether outside the article. For these reasons I disallow this claim.

Claim disallowed.

Solicitors for the plaintiff, *Goldberg & Langdon.*

Solicitors for the defendants, *Hollams Sons, Coward, & Hawksley.*

Chan. Div. Chitty, J. — June 20; July 30, 1890.

In re EYTON.
BARTLETT *v.* CHARLES. (*a.*)

Administration—Separate account—Stop order—Contribution res judicata*—Breach of trust—Priority.*

A fund was carried over to the separate account of the defendant in an administration action and her issue, with a direction to pay the dividends to the defendant for life, and the defendant mortgaged her interest under the order to persons who had obtained stop orders. It was afterwards discovered that when the order was made the defendant was jointly liable with the testator for a breach of trust which had been made good out of the testator's estate. The plaintiff, a beneficiary, sought to obtain contribution from the defendant to the extent of a moiety of the liability, and to have this claim satisfied out of the funds carried over to the separate account, notwithstanding the stop orders.

Held, that, as between the plaintiff and the incumbrancers, the matter was res judicata, *and that the incumbrancers were entitled to rely on the order releasing the fund in question from the general questions in the action, and that, under the order, the defendant had a clear title, and the incumbrancers were entitled to priority.*

Motion.

This was a motion in an action to administer the estate of P. E. Eyton.

Mrs. Charles, the defendant, was entitled to an annuity under the will of Eyton. A sum of £802, the amount apportioned in respect of her annuity, had been directed to be carried over to a separate account, entitled, "The account of the perpetual annuity of the defendant, A. P. Charles, and her issue," with a direction to invest in Consols, and pay the dividends thereon to her "during her life." The words, "or until further order," were omitted.

Mrs. Charles shortly afterwards charged her interest in favour of two incumbrancers, who obtained stop orders, dated respectively the 16th of December, 1886, and the 14th of February, 1887.

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

It was afterwards found out that at the time when the order was made for carrying over the fund to the separate account above-mentioned the defendant Charles was jointly and severally liable with the testator for breaches of trust which had wholly been made good out of the testator's estate.

The plaintiff, the present applicant, a beneficiary under the will, was present at the making of the order, but was not then aware of the defendant's or the testator's liability for the breach of trust.

This was a motion to obtain contribution from the defendant to the extent of a moiety of the liability, and to have the claim satisfied out of the funds carried to a separate account notwithstanding the stop orders.

Whitehorne, Q.C., and *E. Ford*, for the motion, cited *Birks* v. *Micklethwait*, 12 W. R. 505, 33 Beav. 409; *Noble* v. *Stom*, 7 W. R. 709, 29 Beav. 409.

Russell Roberts and *Maidlow*, for the persons who had obtained stop orders, said it was too late now for the plaintiff to set up a paramount claim: *Rice* v. *Rice*, 2 W. R. 139, 2 Drew. 73.

Whitehorne, Q.C., replied.

CHITTY, J.—The real point in this case is this. On the faith of this order of the 12th of August (*i.e.*, the order carrying over the fund to a separate account), made in the presence of the present applicant, other persons have honestly advanced their money, and they say that in those circumstances they were entitled to give credit to the order of the court, which not only set the funds apart, but ordered payment of the dividends arising from these funds to the defendant Charles, and consequently they were entitled to act, and have acted, as if these funds were wholly free from this or any other paramount claim. Whether they are right in that contention is the question I have to decide. I think they are right. Where a fund is carried over to a particular separate account "it is" (as was said by Lord Langdale in *In re Jervoise*, 12 Beav. 209) "released from the general questions in the cause, and becomes marked as being subject only to the questions arising upon the particular matter referred to in the heading of the account"; Then he mentions the consequences of that proposition.

Now the respondents rely on the order of the court, which is equivalent to a judgment. There is no declaration, but it is an order which shows the clear title of the defendant, Mrs. Charles, the annuitant. I think I should be introducing an evil practice if I were not to accede to their argument. There is no authority that Mr. Whitehorne, or his junior, with all their research, have been able to produce to the contrary, and the case of *In re Jervoise* shows the general principle as to a separate account. It is well known that bankers and others, when they see an order of the court carrying over a fund to a separate account, will deal with persons named in that account, thinking they can do so safely. Of course the mere fact that bankers think they can deal safely with a particular customer is not sufficient to justify me in saying that these parties are right, but I think it is right in principle. When the court has appropriated the money, and has said in an order that that is the money of the annuitant, Mrs. Charles, and said that, too, in the presence of the present claimant, who being there was bound, if there was some paramount claim, to bring it forward, I think the persons who were dealing on the faith of the orders of the court are entitled to be protected. Mr. Whitehorne said it was not easy to bring forward the claim before. I cannot attend to that. There might have been some inquiry, or some stoppage of the funds, before the orders were made.

In my opinion it would be erroneous to introduce any such principle as that which the applicants contended for, and I think that those who do give faith to the orders of the court, and who say, in substance, it is *res judicata*, and *res judicata* in the presence of those who are entitled to oppose and say the order ought not to be made, ought to be protected.

The result, therefore, is that although this claim would be a good claim as against the defendant Mrs. Charles, and although the money might have been recalled or stopped from the separate account if the contention had only been between the defendant Mrs. Charles and the present applicants, I think the present applicants come too late as against these incumbrancers. I think Mr. Maidlow was right as to the principle on which the court ought to act, and I think the present case is stronger than the one of *Rice* v. *Rice*, which he referred to, because the respondents to the motion have the order of the court, in substance, in their favour. Therefore that part of the application I must refuse.

A declaration was eventually made that the plaintiff was entitled to contribution to the extent of a moiety, and that "without prejudice to the stop orders," the dividends accruing on the fund standing to the separate account were to be applied in satisfaction of this claim.

Solicitors, *Daubeny & Mead*, for *W. Smith & Sons*, Weston-super-Mare; *Kennedy, Hughes, & Kennedy*; *Lickorish & Bellord*.

Chan. Div. North, J. — May 14, 15, 1890.

In re ALSBURY.
SUGDEN *v.* ALSBURY. (*a.*)

Company—Capital—Income—Reserve fund—Interim *dividend—Bonus—Tenant for life—Remainderman.*

A testator possessed of shares in a company gave his property upon trust as to one moiety of the income for his daughter, and as to the other moiety for his wife during widowhood, and after her decease or second marriage upon trust to divide the corpus *among his children. He died in* 1884, *having had one child only.*

The company had power by resolution to increase its capital, but no such resolution was ever passed. The directors were empowered to create a reserve fund out of profits, to declare dividends with the sanction of the company in general meeting, and to declare interim *dividends in the interval between general meetings; but no dividend was to be declared except out of profits. In* 1884 *the reserve fund amounted to* £3,000. *In* 1888 *it had risen to* £9,000. *In* 1889 *a special bonus or* interim *dividend amounting to* £15,000 *was paid to the shareholders, extraordinary expenses amounting to about* £5,000 *were incurred, and the reserve fund was reduced to* £2,000; *but there was no evidence to show that* £7,000 *of the* interim *dividend came out of the reserve fund.*

Held, that the whole of the interim *dividend was income, and not capital; and as such belonged to the tenants for life.*

Originating summons.

The question to be decided was whether a sum divided among the shareholders of a company as "special bonus," and paid to them as "*interim* dividend," belonged as income to the persons entitled

(*a.*) Reported by JAMES TRUSTRAM, Esq., Barrister-at-Law.

for life to shares settled by the will of a deceased shareholder, or as capital to the persons entitled in remainder to those shares.

By his will George Alsbury gave his residuary estate to trustees upon trust for sale and conversion as soon as they should deem it expedient, and to invest as therein mentioned, and to pay one moiety of the income to his daughter and the other moiety to his wife, so long as she should continue unmarried, and after her decease or second marriage upon trust to divide the *corpus* between his children, including the daughter above mentioned.

The testator died on the 25th of October, 1884, having had one child only, the daughter mentioned in his will. His estate included fully paid-up shares of £50 each in the Kempton Park Racecourse Co. (Limited), which were transferred into the names of his trustees, and remained unsold.

The articles of association of the Kempton Park Racecourse Co. (Limited), which was formed in 1877, empowered the company, by resolution passed at a general meeting, to increase its capital by the issue of new shares, and the material provisions were as follows:—

"The directors may, with the sanction of the company in general meeting, declare a dividend, to be paid to the members in proportion to their shares, provided that in case of the creation of any shares with any preference, priority, or other privileges, regard shall be had thereto in the declaration and payment of dividends.

"The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they may think proper as a reserve fund, for acquiring property for the company, or providing for the payment of rents and the due performance of covenants, or for meeting contingencies, or for equalizing dividends, or for repairing or maintaining the property of the company, or forming an insurance fund, or for all or any of the purposes aforesaid, or for any other purposes of the company they may think fit; and the directors may invest the sum so set apart as a reserve fund upon such securities and in such manner as they may determine.

"The directors may, if they think fit, in the interval between general meetings, declare and pay an *interim* dividend of such amount as they may think justified by the business of the company.

"No dividend shall be declared except out of the profits of the company."

At the close of the year ending the 31st of October, 1884, a "reserve fund" was created; and a sum of £3,000, made up of profits which remained after payment of dividends, and which had been carried to a "suspense account," was placed to the account of the "reserve fund."

In the year 1887 this fund was increased to £6,000, at which amount it remained until the beginning of the year ending the 31st of October, 1889.

In the years 1884, 1885, 1886, 1887, and 1888, *interim* dividends and bonus sums were paid to the shareholders. Extraordinary expenditure was incurred in those years; and this was charged either in the revenue accounts of the years in which it was incurred, or in the revenue account of a succeeding year.

At the beginning of the year ending the 31st of October, 1889, a sum of £3,000 was added to the "reserve fund," which then became £9,000. In April of that year a special bonus or *interim* dividend, amounting to the sum of £15,000, was paid to the shareholders. During that year extraordinary expenditure amounting to £4,928 was incurred. In November of that year the "reserve fund" amounted to £2,000 only.

No resolution had been passed by the company for the purpose of increasing its capital.

The summons was taken out by the trustees of the will for the purpose of determining whether the sum paid as special bonus or *interim* dividend in respect of the shares bequeathed by the testator ought to be treated as capital or income. The defendants to the summons were the widow and daughter of the testator.

Oswald, for the trustees.

Cozens-Hardy, Q.C., and *Beddoes*, for the widow.—The sum must be treated as income. The "reserve fund" was made up of profits, and could be dealt with as income: *Bouch* v. *Sproule*, 36 W. R. 193, 12 App. Cas. 385. No resolution had been passed to increase the capital of the company; and the directors could not pay away capital. Assuming, however, that the £9,000 reserve fund was capital as between the tenant for life and those entitled in remainder, the extraordinary expenses, amounting to about £5,000, ought, as between those persons, to be regarded as paid out of the £9,000.

Napier Higgins, Q.C., and *MacSwinney*, for the daughter.—The treatment of the reserve fund determines the question whether it is to be considered capital or income, and whether payments out of that fund must be regarded as payments in the nature of capital or of income: *Bouch* v. *Sproule*. In this case the reserve fund was treated as floating capital. The special bonus or *interim* dividend must be looked upon as a payment in the nature of capital to the extent to which it came out of the reserve fund.

They referred to *Ward* v. *Combe*, 7 Sim. 634.

Cozens-Hardy, Q.C., replied.

NORTH, J.—At the beginning of the year ending October, 1889, a sum of £6,000 was standing to the credit of the reserve fund. A further sum of £3,000 was then added to the reserve fund, so that it was increased to £9,000. At the end of the year it amounted to £2,000 only, so that £7,000 was gone. The sum of £15,000 was paid as dividend in April, 1889; and supposing that £7,000 out of the reserve fund was used in payment of that dividend, £8,000 of the dividend came out of annual income. But I do not know that £7,000 of that reserve fund did go to pay the dividend. I have no means of ascertaining out of what fund the dividend was paid. The report for the year mentions that extraordinary expenditure to the amount of about £5,000 was incurred, which clearly would be payable out of the reserve fund. Probably no distinction was made between the one set of payments and the other with respect to what fund they were drawn from, but it is impossible to say that as much as £7,000 of the dividend did come out of the reserve fund. I do not think it necessary, however, to examine into this question further, for it seems to me that in any event the whole of the dividend is income, and not capital. I come to this conclusion from the case of *Bouch* v. *Sproule*, which contains a clear exposition of the law, and which points to the conclusion that this is income, although it was there held that the sum then in question, was capital, and not income. The question arose there in respect of a sum divided by a company, which seems to have been formed under articles resembling the articles of association of the company in the present case. The directors there had power, before recommending any dividend, to set aside out of profits such sum as they might think fit as a reserve fund for meeting contingencies, equalizing dividends, or repairing or maintaining works, with a provision that the directors might invest the sum so set apart. The facts are stated by Lord Herschell. They are

shortly as follows:—In the accounts of the company for the year beginning the 30th of June, 1874 (two years before the testator's death), there was standing to the credit of a reserve fund £100,000, made up of undivided profits of previous years. In August, 1880, the £100,000 was standing to the credit of the reserve fund, having been there ever since 1874; the whole of it, therefore, arose in the testator's lifetime. The directors, then, having this money in their hands, proceeded to carry out a scheme by which the capital of the company would be increased. The way in which they proposed to do it was by declaring a bonus dividend of £2 10s. a share, being equal to £7 10s. for every three shares, and then creating 18,400 new shares of £10 each, upon which £7 10s. per share was to be paid up concurrently with the payment of the bonus dividend. As Lord Herschell says, at p. 389: "This would allow of one new share being allotted in respect of every three existing shares, and the bonus dividend would pay the £7 10s. on each such new share." Then he says, at p. 391: "The case came, in the first instance, before Kay, J. He considered that it might be open to doubt whether the bonus, at the time it was declared, belonged to the tenant for life, or was to be regarded as an accretion to capital, though, on the authority of *Paris* v. *Paris*, 10 Ves. at p. 188, he inclined to the latter opinion. But he came to the conclusion that the bonus had been capitalized with the consent of the tenant for life, and that she had agreed that the shares should be treated as capital of the testator's estate, so as to avoid raising this question. The Court of Appeal reversed this judgment. They held that there was no evidence to show that the tenant for life had agreed to relinquish any of her rights, and that the bonus belonged to her, and having been invested by the trustees in shares of the Consett Co., those shares became her property. I quite concur with the Court of Appeal in thinking that there is no evidence that the tenant for life relinquished her right to the bonus if she was ever entitled to it. And, in my judgment, the sole question for determination is whether this bonus is to be regarded as income passing to the tenant for life under the trusts or the will, or an accretion to capital, to the income of which alone she was entitled, and which enured after her death for the benefit of the remainderman." Then he considers the cases, and, in doing so, makes some important observations. Speaking of the case of *Brander* v. *Brander*, 4 Ves. 800, he says, at p. 393, "I think the decision in *Brander* v. *Brander* proceeded on the ground that Fry, L.J., accurately states as the foundation of the judgment in *Irving* v. *Houstoun*, 4 Paton's Scotch Appeals, 524, viz., that the accumulated profits had become part of the floating capital of the concern. But they had become so, not by reason of any declaration of the company that they should be so, but only in the sense that, having accumulated, they were, *de facto*, used as part of its capital. In this sense, however, all accumulated profits which are in use for the purposes of the business of any company may equally be said to form part of its floating capital. And I think that the learned counsel for the appellants were well founded in saying that the greater part, if not the whole of the accumulated profits of the Consett Iron Co., the division of which has given rise to this controversy, were in this sense a portion of the capital of the company." Using the words in the same sense, I think that in this case the reserve fund was in that sense a portion of the capital of the company.

Then he says, at p. 397: "I quite agree with the court below that, apart from the authorities to which I have alluded, the general principle, for the determination of such a question as that before us, and in my opinion the only sound principle, is that which is well expressed in the judgment of Fry, L.J.: 'When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital.'" Then Lord Herschell proceeds: "And it appears to me that where a company has power to increase its capital and to appropriate its profits to such increase, it cannot be considered as having intended to convert, or having converted, any part of its profits into capital when it has made no such increase, even if a company having no power to increase its capital may be regarded as having thus converted profits into capital by the accumulation and use of them as such."

These observations apply here. The company has power to increase its capital; but it has passed no resolution to do so, and has not increased its capital. The case is quite different from one where, the company not having power to increase its capital, the fact of its retaining profits and using them as capital is treated as an appropriation of them to such purpose. Lord Herschell then considers the particular transaction before them, the details of which are immaterial in this case, and he sums up at p. 399: "I cannot, therefore, avoid the conclusion that the substance of the whole transaction was, and was intended to be, to convert the undivided profits into paid-up capital upon newly created shares. And the form in which the operations were effected points in the same direction." Then Lord Watson says, at p. 401: "In a case like the present, where the company has power to determine whether profits reserved, and temporarily devoted to capital purposes, shall be distributed as dividend, or permanently added to its capital, the interest of the life tenant depends, in my opinion, upon the decision of the company. I entirely concur in the observations made upon this point by Lord Hatherley (then Vice-Chancellor) in *In re Barton's Trust*," 16 W. R. 392, L. R. 5 Eq. 238. Then he adds: "In my opinion that rule must obtain whether the profits with which the company is dealing belong to the current year, or have been previously reserved for the purpose of its business." Then Lord Bramwell says, at p. 405: "The truth is, as said by the Court of Appeal, that a trader, whether sole or corporate, trades with all the money he has got, let him have got it how he may. A sole trader with a capital of £10,000, who makes in a year a profit of £2,000 and spends £1,000 only, leaving the other £1,000 in his business, may well in the next year be said to have a capital of £11,000; not so where there is a partnership, whether an ordinary partnership or an incorporated partnership. There the undivided profits of any period, a year or shorter or longer time, continue to be undivided profits unless something in the articles of partnership or some agreement by all the partners makes them capital. They do not become capital by effluxion of time or by their being used in the trading." Then he puts another instance: "For example, a company makes a profit of £10,500 in a year. Suppose its capital to be £200,000, it divides the £10,000, giving five per cent. to its shareholders; trading with the £500 as with its other funds. It does this for four years with the same result of profit

and dividend. At the end of the fourth year its undivided profits, including those brought forward, are £12,000, and it can and does pay six per cent. to its shareholders; can there be a doubt of its right to do so? Is it not the fair and just thing as between a tenant for life and remainderman? I say yes, and if true for four years it is true for forty. I think the right rule would be that contended for by Mr. Rigby. Make the date of the division the date for considering the right"; and Lord Fitzgerald, taking the same view, says, at p. 408: "The reasoning and the decision of Lord Hatherley" (then Vice-Chancellor) "in *In re Barton's Trust*, then, directly apply."

Now that case bears directly on the present case. There a sum arising from the undivided profits of previous years, amounting to £100,000, had got to the credit of a reserve fund in the lifetime of the testator. If the effect of that sum being carried to the account of a reserve fund was that it had become capital, the decision of the Court of Appeal that it was profit would have been wrong. It is true that that decision was reversed, but it was reversed on a different ground. The House of Lords took a different view of the subsequent action of the company in distributing a bonus dividend and allotting new shares. It was considered by the House of Lords that that transaction amounted to an appropriation of accumulated profits to capital, and that the company had power to, and did, decide that the accumulated profit should be capital. The House of Lords did not differ from the Court of Appeal on the ground that the money had been appropriated to capital by being carried to a reserve fund, they took the same view as the Court of Appeal as to that. The only question discussed before the House of Lords was whether the profits had been capitalized by the company by the distribution of the bonus and the issue of new shares. Therefore that case was decided in the House of Lords upon a transaction to which I can find no parallel in the present case. Here I find that the money paid to the trustees, from whatever source it came, whether from the reserve fund or the profits of the year, was dealt with as an *interim* dividend declared by the directors. Except as an *interim* dividend the directors had no power to pay it at all; although a general meeting might have confirmed what the directors had done.

The only other point is that, in the minutes of the resolution passed by the directors when they appropriated this £15,000, it was not expressed to be an *interim* dividend, but a special bonus. In my opinion that makes no difference if the money came from what at the time was profit. The whole came from either profits made in the year or profits put by under the name of a reserve fund. In the reports it had been the practice to call a part of the money divided by the name of "bonus." It was the practice to pay a smaller fixed dividend, and a bonus in addition, rather than to pay a variable dividend. In my opinion the use of the phrase "special bonus" makes no difference. It meant that it must not be taken that the bonus which had at first been 2½ per cent., then 5 per cent., and then for some years 10 per cent., would continue at so large a sum as was then being divided, and that the shareholders must not calculate on having so large a sum again. Whatever the intended meaning of the words used was, we know what the facts were. On the principle of the decision in *Bouch* v. *Sproule* in this case there was an appropriation by the directors of part of the accumulated profits to the payment of an *interim* dividend, and no appropriation by the company to capital; and even if the sum divided, or any part of it, came from the reserve fund, it was, as between the persons interested in the testator's estate, income and not capital.

Solicitors, *Arthur Cheese*; *W. A. Holcombe*, for *T. E. Jones*, Manchester.

Chan. Div. } May 3, 1890.
Stirling, J. }

In re WELLS.
MOLONY *v.* BROOKE. (*a.*)

Executor—Retainer—Receiver—Administration action by creditor.

The executor's right of retainer is not to be interfered with by the appointment of a receiver on the motion of creditors in an administration action, because the executor may and will probably exercise such right to the prejudice of the general body of creditors. To establish a case for the appointment of a receiver, it must be shown that the assets are being wasted.

European Assurance Society *v.* Radcliffe, 26 *W. R.* 417, 7 *Ch. D.* 733, *and* Harris *v.* Harris, 35 *W. R.* 710, *commented on and explained.*

Motion.

William Wells, of Holme, the testator, died on the 1st of May, 1889, having by his will appointed Lord Brooke and Admiral Wells his executors and trustees of his real estate. Lord Brooke alone proved the will. The testator died entitled to a large estate in the county of Huntingdon, which was mortgaged for large sums. This estate, Holme Wood, was subject in particular to a mortgage debt for £120,000, which was owing to Lord Brooke and Admiral Wells as the trustees of the will of the great uncle of the testator, William Wells, of Redleaf, under whose will one Hubert Wells was entitled to the Redleaf Estate, subject to a life interest of his father, G. G. Wells.

The testator, William Wells, of Holme, died possessed of considerable personal estate, which included the life interest above mentioned of G. G. Wells. This life interest had been purchased by the testator some years previously.

A creditors' action for the administration of the testator's estate had been brought by one of the mortgagees, who moved *ex parte* on the 25th of April, 1890, for the appointment of a receiver of the personal estate of the testator in order to prevent Lord Brooke and Admiral Wells from exercising any right of retainer of the mortgage debt of £120,000.

It was then stated on behalf of Lord Brooke that he had been required by his *cestui que trust*, H. Wells, to exercise such right of retainer, and that H. Wells had taken out an originating summons to have any question as to the right of retainer determined. Lord Brooke did not oppose the appointment of a receiver.

An order for a receiver was made on condition that the plaintiff in the action should accept service of notice of motion from H. Wells, who, having been since added as a defendant, now moved to discharge the former order.

Sir H. Davey, Q.C., *Rigby, Q.C.*, and *Swinfen Eady*, for the motion.—The court will not interfere with the executor's legal right of retainer. It has not been shown that the appointment of a receiver is necessary. The assets are not being wasted, and the motion is directed only against the exercise of the right of retainer. Lord Brooke is compelled to exercise such right.

In the course of the argument *European Assurance*

(*a.*) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

Society v. *Radcliffe*, 26 W. R. 417, 7 Ch. D. 733; *Philips* v. *Jones*, 28 SOLICITORS' JOURNAL, 360; *Harris* v. *Harris*, 35 W. R. 710; *Sandes* v. *Heathfield*, 23 W. R. 331, L. R. 19 Eq. 21; *In re Hubback*, 33 W. R. 666, 29 Ch. D. 934; *In re Jones*, 34 W. R. 249, 31 Ch. D. 440; *In re York, Atkinson* v. *Powell*, 35 W. R. 609, 36 Ch. D. 233; Judicature Act, 1873, ss. 18, 25, were referred to.

Graham Hastings, Q.C., and *B. Fossett Lock*, for the plaintiff.—The plaintiff is entitled, as the plaintiff in a creditors' action, to the assistance of the court. He is practically a *cestui que trust* of the executors. The court will not discharge an order made in favour of one creditor, and without opposition on the part of the executors, at the instance of another creditor: *Talbot* v. *Hope-Scott*, 6 W. R. 269, 4 K. & J. 96; *Richmond* v. *White*, 27 W. R. 878, 12 Ch. D. 361.

H. B. Buckley, Q.C., and *F. P. Onslow*, for Lord Brooke.

STIRLING, J.—This is an application to discharge an order which I made last week for the appointment of a receiver of the estate of William Wells, late of Holme, in the county of Huntingdon. The action is brought by a creditor on behalf of himself and all other creditors against the legal personal representative of the testator, and against a trustee of the will, who is named as an executor, but has not proved. These were the only defendants when the order was made, but since then other persons, including the present applicant, have been added as defendants, and are now parties to the action. I do not discharge the order which I made, as I said, yesterday week, on the ground that any of the parties to the proceedings were guilty of any impropriety when they came here and asked for the appointment of a receiver, or that they withheld anything from the court of which the court ought to have been informed. Certainly, as far as regards what took place in court, there was no impropriety whatever, because I was informed by the learned counsel engaged, of all the facts which appear to me now on this hearing really material to the decision of the case. The application was one for a receiver, and I was informed on the one hand that the executor was not unwilling, to say the least—perhaps I may go as far as to say was willing—that the receiver should be appointed; but on the other hand, that he could not consent, because the present applicant insisted that the right of retainer legally vested in him, the executor, should be exercised in his favour, and that, further, a summons had been taken out by the present applicant for the purpose of enforcing that right. Under these circumstances, seeing that the executor was not unwilling that the assets of the testator should be distributed in the manner which is favoured, if I may say so, by a court of equity, where lawfully it can be done—that is to say, in such a way as to produce equality among the various creditors—I thought the best course to take was to appoint a receiver, and at the same time to protect the interests of the then absent party by imposing a term upon the plaintiff in the action that he should accept short notice of motion to discharge the order which I made. I did not make that order altogether without consideration, but I am bound to say now, having further considered the matter and heard the arguments, I think I should have done better if I had simply directed the motion to stand over in order that the present applicant might be brought here. However, the present applicant immediately gave notice of motion. An application was made to me to stay the completion of the order until this motion was heard, and the order has not been completed, still less has anything been done under it, and the position of the assets is precisely the same at this moment as it was yesterday week, when the order was made, and no party has as yet been prejudiced. Now I have to consider whether it is really right and proper that a receiver should be appointed on the present occasion.

The position of matters is this. The defendant, Lord Brooke, who is the legal personal representative of the testator, has vested in him and Admiral Wells, as trustees of the settlement, a debt due from the testator's estate. The beneficiaries under the settlement, of which Lord Brooke and Admiral Wells are trustees, say this: "You, Lord Brooke, by virtue of your position as executor, have acquired at law the right of retaining out of the legal assets of the testator the debt which is legally due to you, and we insist that that legal right you shall use for our benefit"; and they have taken out a summons in this branch of the court for the purpose of having that question determined.

The summons is not ripe for hearing, but it is obvious that there is a question to be considered upon it, and it is not right that anything should be done to prejudice the position of the present applicant until that question is determined.

Now the effect of appointing a receiver is this, that the assets will be intercepted before they reach the hands of the executor, and it may be, I do not say necessarily that it will be, that by that means assets which would otherwise be applicable in payment of the debt due to the trustees of the settlement will be prevented from being so applied.

The present applicant, therefore, has an interest in seeing that no order is made which would prejudice the right which he claims, and he comes here and says that no sufficient ground has been shown for the appointment of a receiver. Now the state of the matters is this—namely, the appointment of a receiver was not made by consent. The executor expressly says that he is very willing to submit to the appointment of a receiver, and is very willing to abstain from exercising his right of retainer if he can properly do so, but that while this question is pending between him and the beneficiaries under the settlement of which he is a trustee he cannot consent to any order which would prejudice their rights; therefore he does not consent, and the order cannot be treated as a consent order.

The only question is whether any ground other than that of consent can be shown for obtaining the order. Now it is admitted, and it is common ground to all parties, that Lord Brooke has not been guilty of any impropriety as regards the assets; he has not wasted them, or done anything which is wrong in any way, and the only question which arises is this, whether it is right and proper that a receiver should be appointed simply on the ground that Lord Brooke may exercise the legal right of retainer which is vested in him to the prejudice of the general creditors of the testator. The question in that precise form does not seem to have been the subject of decision; but there are certain decisions which have been referred to which appear to me to indicate clearly the course which I ought to take under the circumstances. In the case of the *European Assurance Society* v. *Radcliffe* it was decided by the late Master of the Rolls that "where an executor or administrator, after the commencement of a creditors' administration action and before judgment, has voluntarily paid any creditor in full, the rule in equity and not at law must now prevail, under the Judicature Act, 1873, s. 25, sub-section 11, and he will accordingly be held to have made a good payment and will be allowed it in passing his accounts, even though he may have had notice of the action before payment." That decision has recently been followed by

the Court of Appeal. But the Master of the Rolls at the conclusion of his judgment said this:—"The only way to prevent such payments being made is by the plaintiff, upon issuing the writ, immediately applying for and obtaining a receiver." That was a *dictum* only, but I believe that I am right in saying that upon that *dictum* many applications for receivers were made and were acceded to both by the late Master of the Rolls and also by other judges of the Chancery Division, and that in none of these cases was any resistance offered to the application. But that came to an end upon a decision of the Court of Appeal, in the year 1884, in the case of *Phillips* v. *Jones*. There the application was made for the appointment of a receiver to the Vice-Chancellor of the County Palatine of Lancaster, and the only ground alleged for asking for a receiver was that the executors would not admit assets, and that they would be entitled, according to the settled rule in equity, before judgment in the action to pay in full any creditor whom they might choose to prefer. Reliance was placed on the power given to the court by sub-section 8 of section 25 of the Judicature Act, 1873, to appoint a receiver by an interlocutory order in all cases in which it shall appear to the court to be just and convenient that such order should be made; and on the observation made by Jessel, M.R., in *European Assurance Society* v. *Radcliffe*; Bristowe, V.C., however, declined to appoint a receiver, and the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) affirmed his decision. The court said that "sub-section 8 of section 25 of the Judicature Act only gave the court power to appoint a receiver in aid of existing rights. The words 'just and convenient' must be construed with reference to the existing law of the country. To accede to the present application would amount to a reversal of the decision of the House of Lords in *Darston* v. *Lord Orford*, Prec. in Ch. 188, Colles, 229, which established the right of an executor to pay a creditor in full after the institution of a suit to administer the testator's estate, but before decree. The observations of Sir George Jessel, M.R., in *European Assurance Society* v. *Radcliffe* were only *dicta*, not necessary to his decision in that case; if they were intended to be a decision that in any creditors' administration action, without making any special case, merely because that executor would not admit assets a receiver would be appointed, they were inconsistent with the course of authority." The matter does not rest there, because in the case of *Harris* v. *Harris* an application was made to Chitty, J., for the appointment of a receiver on the like grounds, and what his lordship said was this: "The principle is, that a plaintiff in an administration action is only entitled to *interim* relief against the administrator or executor when a case is shown of assets being wasted. The law allows the administrator or executor to prefer one creditor to another, and there is no equity which entitles the court to interfere, except after judgment for administration. That is the law, and it is a curious state of things, and I do not say that I approve of it. I cannot, however, accede to the plaintiff's application, nor do I think that he would fare better in the Court of Appeal. I will, however, if the plaintiff still desires it, give leave to serve short notice of motion."

There the matter stopped; but that is a clear statement by the learned judge of the principle on which these applications ought to be dealt with. It is that the plaintiff in the administration action is only entitled to relief against the adminstrator or executor when a case is shown of assets being wasted. Now here there is no such case made. Then it is said that these cases only relate to the preference by an executor or administrator of one creditor to another, and that here I have to deal with the right of the executor to retain for his own debts. No doubt that is a difference, and it is a substantial difference, because although the judgment for administration would interfere with the executor's right to prefer one creditor to another, it does not interfere with the creditors' right of retainer, therefore there is a substantial difference between the two. But it seems to me in principle one case governs the other. The Court of Appeal in *Phillips* v. *Jones* says that the legal right of an executor to prefer one creditor to another ought not to be interfered with. It seems to me that in like manner I ought not to interfere with the legal right of the executor to retain in satisfaction of his own debt. In coming to that conclusion in the present case I feel strongly that if I abstain from appointing a receiver the general creditors are not likely to be prejudiced, whereas if I do continue the present order, and appoint a receiver, the applicants in this case may be prejudiced. As I have already pointed out, by the appointment of a receiver assets applicable for the payment of the applicants' debt may be diverted from the hands of the executor, he is not thereby precluded at the proper time from asserting his right of retainer, and there is every ground to believe that he will, if he can do so, exercise it in favour of the general creditors who are represented by the plaintiff.

I think, therefore, that, with the view of keeping the matter *in statu quo*, and not prejudicing any right, I ought to discharge the present order; but for the sake of saving expense I will allow the motion to be again brought on after the decision upon the summons which has been taken out by the present applicant. As regards costs, it seems to me I shall be doing justice if I make them costs of the action.

Solicitors, *Hastie & Co.*; *H. A. Dowse*; *Frere & Co.*

Q. B. Div. (Stephen and Hawkins, JJ.) Oct. 27, 28; Nov. 14.

REG. v. BISHOP OF LONDON (No. 2). (a.)

Ecclesiastical law — Reredos — "Representation" under Public Worship Regulation Act, 1874 (37 & 38 *Vict. c.* 85), *ss.* 8, 9 — *Second representation — Alleged similarity—Bishop's discretion*—Mandamus.

In May, 1888, *a "representation" had been made to the Bishop of London under sections* 8 *and* 9 *of the Public Worship Regulation Act*, 1874, *that the Dean and Chapter had set up in St. Paul's Cathedral Church images or sculptured subjects which tended to encourage ideas and devotions which were alleged to be of a superstitious kind, and to be unlawful. The bishop refused to transmit this "representation," on the ground that the case was the same as the* Exeter case (Phillpotts *v.* Boyd, 23 *W. R.* 491, *L. R.* 6 *P. C.* 435). *A* mandamus *was granted by a divisional court directing the bishop to transmit the representation; but this decision was reversed by the Court of Appeal, and the matter is now pending before the House of Lords.*

A second representation was presented to the bishop, stating that the images had in fact encouraged ideas and devotions of an idolatrous kind, and that idolatrous regard had been in fact paid to them. The bishop refused to transmit this second representation, on the ground that it was in substance the same as the former.

On a rule for a mandamus *to the bishop to transmit the representation,*

Held, by Stephen, J., *that the* mandamus *ought to go, as the second representation differed materially from the*

(a.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

former, inasmuch as it asserted that the images had, in fact, led to idolatry, whereas the former representation only asserted that they tended to idolatry.

Held, by Hawkins, J., *that the* mandamus *ought not to go, on the ground that, if the new matter disclosed a new offence, it was not within the Act at all; if it did not, then it was substantially the same as the former. Further, that, as the bishop had stated in his answer that he "had considered the whole circumstances of the case," his opinion formed thereon was not open to appeal.*

The court being divided in opinion, the rule for a mandamus *was discharged.*

Rule calling on the Bishop of London to show cause why a *mandamus* should not issue ordering him to transmit to the persons complained of a "representation" under sections 8 and 9 of the Public Worship Regulation Act, 1874, with respect to the reredos erected in St. Paul's Cathedral.

On the 4th of May, 1888, a former "representation" had been made to the bishop by the prosecutors, to the effect that the Dean and Chapter of the Cathedral church of St. Paul, in the City of London, had introduced and set up upon the altar-piece or reredos of the cathedral, an image or sculptured subject representing our Lord upon the Cross, in a conspicuous position, and also an image or sculptured subject representing the Blessed Virgin Mary with the Child in her arms immediately above the communion table; that the said images or sculptured subjects tend to encourage ideas and devotions of an unauthorized and superstitious kind, and are unlawful.

The bishop, in his reply, delivered in pursuance of section 9 of the Act, refused to transmit the "representation," upon the ground chiefly that the main question at issue in the case had already been decided in the *Exeter case* (*Phillpotts* v. *Boyd*, 23 W. R. 491, L. R. 6 P. C. 435). A rule for a *mandamus* ordering him to send forward the "representation" was made absolute by the Divisional Court, Pollock, B., dissenting (*Reg.* v. *Bishop of London*, 23 Q. B. D. 414, 37 W. R. Dig. 72). This decision was reversed by the Court of Appeal (38 W. R. 214, 24 Q. B. D. 213), and the case is now pending before the House of Lords.

In the meantime the present "representation" was sent to the bishop, and it differed from the former "representation" in this, that, whereas the former "representation" set out that the images or sculptured subjects tended to encourage ideas and devotions of an unauthorized and superstitious kind, the present "representation" set out that they had done so in fact. The present "representation" stated "that the said images or sculptured subjects have, in fact, encouraged ideas and devotions of an idolatrous and superstitious kind, and have been, in fact, abused, and idolatrous and superstitious regard and reverence have been, in fact, paid to them, and these allegations we are prepared to establish by evidence, and that the setting up of the images has, in fact, brought about violations of the 22nd article."

The bishop being of opinion that this second "representation" was in effect the same as the former one, declined to entertain it, and gave his reason as follows:—"That we, having considered all the circumstances of the case, consider that proceedings should not be taken for the following reason—viz., that the questions raised in this case are identical in substance with those raised in the former case, on which an appeal is now pending before the House of Lords."

The prosecutors then obtained the present rule for a *mandamus* to the bishop, directing him to proceed on the "representation."

The bishop filed an affidavit in answer, and in it he stated "that after considering the whole circumstances of the case according to the provisions of the Public Worship Regulation Act, I was and am of opinion that the main question raised in the first representation is identical with the main question raised by the present representation—viz., whether certain portions of the reredos of St. Paul's Cathedral are or are not illegal, and that it appears to me that it was highly inexpedient that the present representation should be allowed to proceed until it was determined by the House of Lords whether the first representation should proceed or not, and I submit that my decision, based on this opinion, is a good and valid decision under the provisions of the Act."

Sir R. E. Webster, A.G. (*Jeune, Q.C.*, and *Coward* with him), showed cause.

Moulton, Q.C. (*Danckwertz* with him), in support of the rule.

Jeune, Q.C., and *Coward*, for the dean and chapter.

Sir W. G. Phillimore, for the dean.

Cur. adv. vult.

Nov. 14.—STEPHEN, J.—In this case I am sorry that my brother Hawkins and myself have not been able to agree. He thinks that no *mandamus* ought to go; I think it ought to go. The court being divided, the result is that there will be no rule for a *mandamus*. The question turns upon the bishop's statement of his reasons for not allowing the representation to proceed, and in those reasons and in his affidavit the bishop says that the first representation was substantially the same as the present, and practically identical with it, and that the charge in the second representation, that superstitious reverence has, in fact, been paid to these sculptured figures or images, does not in substance distinguish the cases, and that it was a charge common to both representations that the sculptured figures were illegal.

These are the reasons why the bishop declines to proceed on this representation, and there can be no doubt of the good faith of the bishop in the matter. I think, however, that that view was arrived at without considering, as the statute requires, "all the circumstances of the case," and that he came to this decision under a mistake. It has escaped the bishop's attention that the representation in the second case goes considerably beyond the representation in the first, and the charge in the second is entirely different from the charge in the first. The second contains a charge that the images in question not only tend to superstitious reverence, but that, in fact, they have been made the objects of superstitious reverence.

That is a separate and distinct charge, and the bishop has, I think, failed to see that there are two different charges, and that the second raises questions of law and fact which are not raised on the first, so that there is a considerable difference between the two representations. The overlooking this difference appears to me to run through and vitiate the reasons of the bishop. I consider, therefore, that in the present case the complainants are entitled to proceed upon their representation, and that, therefore, this *mandamus* ought to go.

HAWKINS, J., read the following judgment:—On the 17th of June last a rule *nisi* was granted by a divisional court calling upon the Bishop of London to show cause why a *mandamus* should not issue commanding him to transmit a copy of a representation of Sir Christopher Robert Lighton and three others to the persons complained of—viz., the Dean and Chapter of St. Paul's—and proceed thereon further in accordance with the Public Worship Act, 1874, or, in the alternative, why a *mandamus* should not issue commanding him to proceed to consider the whole of

the circumstances of the case affecting such representation, without considering any other circumstances or taking into consideration reasons other than the circumstances of the case.

This rule came on for argument before my brother Stephen and myself early in the present sittings, and we now have to give our judgments upon it.

The representation referred to in the rule was made and sent to the bishop on May 1, 1890. On May 9 the bishop duly stated in writing and deposited in the registry of the diocese his opinion touching the said representation and his reason therefor. Such opinion and reason were as follows:—"We, Frederick, by Divine permission Bishop of London, having, in pursuance of the provisions of the Public Worship Regulation Act, 1874, considered the whole circumstances attending the above representation, are of opinion that proceedings should not be taken thereon for the following reason—viz., that the questions raised in this case are, in substance, identical with those raised in the case of the representation of 'Allcroft and others against the Dean and Chapter of St. Paul's,' and the application for a *mandamus* by Allcroft and others against us, and that such application is now pending on appeal to the House of Lords, and will shortly be ready for hearing by that tribunal."

It is necessary, in order thoroughly to understand this case, that I should now shortly describe the proceedings in the case of *Allcroft and others*, referred to by the bishop.

On the 4th of May, 1888, one Allcroft and three others made a representation to the bishop complaining of the Dean and Chapter of St. Paul's respecting the introduction and setting up of identically the same images or sculptured subjects as are made the subject of Sir C. Lighton's representation, charging simply (in paragraph 4) that each of the said images or sculptured subjects "tends to encourage ideas and devotions of an unauthorized and superstitious kind, and is unlawful; and, in paragraph 5, that the said images or sculptured subjects are respectively additions to the fabric, ornaments, or furniture of the Cathedral church, and are decorations forbidden by law."

On the 23rd of May, 1888, the bishop duly stated in writing his opinion that, having considered the whole circumstances of that representation, he was of opinion that proceedings should not be taken thereon, and he stated at length his reasons for such opinion, the principal reason being that substantially the principal at issue had been already decided in *Phillpotts* v. *Boyd*, in which it was held that the reredos in Exeter Cathedral showing a figure of our Lord in the act of ascending to heaven was held to be lawfully erected, and that in his view it could not be said that one reredos offered serious temptations to idolatry and the other did not. With that opinion Allcroft and his fellow complainants were dissatisfied, and obtained from a divisional court a *mandamus* to compel the bishop to take further proceedings upon their representation. On appeal made by the bishop, the Court of Appeal, on the 17th of December, 1889, reversed the judgment of the Divisional Court, and against this reversal an appeal to the House of Lords is now standing for argument.

It was not, of course, open to the learned counsel for Sir C. Lighton to contend before us against the judgment of the Court of Appeal, nor do I think he could have hoped, if the two representations of Allcroft and Sir C. Lighton and the questions raised thereon were substantially identical, successfully to contend that the opinion of the bishop with the reason assigned—viz., that the latter representation ought not to be proceeded upon until the earlier one had been finally adjudicated upon by the House of Lords—were not unimpeachable. It was contended, however, that the representations were not identical either in form or in substance, and for these reasons—first, that the new ornaments introduced into the representation of Sir C. Lighton in paragraphs 5 and 6 in themselves furnished fresh and distinct grounds of complaint which were not to be found in Allcroft's representation; and, secondly, that the additional matters introduced into paragraph 4 and the statements in paragraphs 5 and 6 were, at all events, new circumstances not present to the bishop's mind in the earlier case, and which of themselves required the fresh consideration of the bishop. I propose to deal with these reasons in their order. First, do the new statements in the representation of Sir C. Lighton furnish new ground of complaint against the Dean and Chapter, and, if so, is such new ground of complaint one over which the bishop has jurisdiction under the 8th section of the Public Worship Act? For if no such new ground of complaint is shown, or if, being shown, the bishop has no jurisdiction over it, no duty is cast upon him to take cognizance of it. Now, the new or additional circumstances introduced into Sir C. Lighton's representation may be shortly stated as follows—viz., that, though the images when first erected may have been innocent and harmless, and may not then have had any tendency to encourage idolatrous ideas or devotions, they are now in danger of being abused and idolatrous reverence is in the future likely to be paid to them; that, in fact, such images have since their erection encouraged such idolatrous ideas and devotions, and that superstitious regard and reverence have been, in fact, paid to them; and, moreover, that the setting up of the images has tended to bring about, and has brought about, breaches of the 22nd Article of Religion, and so it was contended that even if lawful in their origin they have become unlawful by reason of the new matters now charged. That the law by some proceeding or other will interfere to prevent the idolatrous worship of images, however lawful their origin may have been, and however innocent their tendency, cannot, I am afraid, be questioned. In delivering the judgment of the Privy Council in *Phillpotts* v. *Boyd*, Lord Hatherley said:—"Their lordships desire it to be clearly understood that nothing decided in this case affects the question of superstitious regard being paid contrary to the 22nd Article of Religion to any representations or images that are or may at any time be set up in churches. The law will at all times be sufficiently strong to correct and control any such abuse." In *Clifton* v. *Ridsdale*, 1 P. D. 358, Lord Penzance says:—"I doubt whether any narrower or more exact definition of what is lawful and what unlawful can, for practical purposes, be framed than that which is set forth in the case of *Phillpotts* v. *Boyd*. But, adhering to that decision, and each case standing on its own circumstances, it is, I think, to be presumed that the Court of Appeal would not hesitate to adjudge even painted windows or paintings portraying the same subject to be unlawful if it were satisfied, from the mode in which the subject was treated, the place which they occupied, or other the incidents in surrounding circumstances, that they were in real danger of adoration, worship, or superstitious reverence. So long as they are free from this charge and fulfil no other function but that of fitly decorating the church, they are free from objection; the moment that, from any cause, whether residing in the objects themselves, or arising among those who worship in the church, the danger of their adoration is made manifest, I conceive that they cease to be innocent and fall under the charge of illegality."

What is to be done in such a case I do not pretend

to say; whatever the law is upon the subject it must, of course, be obeyed; but I trust in any event some other alternative will be found open to the dean and chapter than the removal or destruction of objects in themselves beautiful and elevating erected by lawful authority, having in themselves, in the bishop's opinion, no tendency to promote the superstitious reverence of reasonable persons, but which may yet be proclaimed unlawful and calculated to sap the foundation of the Established Church simply because some erratic or capricious persons have in their folly or ignorance offered idolatrous worship to them. Assuming, however, that the images would be rendered unlawful by reason of the matters complained of in paragraphs 5 and 6 of the representation, such complaints do not appear to me to come within the cognizance of the bishop upon such proceedings as those instituted by Sir C. Lighton and his fellows. The jurisdiction conferred upon the bishop by the 8th and 9th sections of the Public Worship Act, 1874, is confined to such matters as are specifically pointed out in the 8th section—viz., to complaints—"(1) That in such church any alteration in or addition to the fabric, ornaments, or furniture thereof has been made without lawful authority, or that any decoration forbidden by law has been introduced into such church." "(2) That the incumbent has used or permitted to be used unlawful ornaments of the minister," &c. "(3) That the incumbent has failed to observe the directions contained in the Book of Common Prayer relating to the performance of services," &c.

We have only to deal with the first of these matters of complaint, the essential elements of which are the making without lawful authority of alterations or additions to the fabric, ornaments, or furniture, or the introduction of forbidden decorations. The continuance of alterations or additions not unlawful when made, but which have since become so, or the continuance of decorations not forbidden when they were introduced, but which have since become so, is not pointed at in the section. To continue a thing already made is not to make it, nor is the continuance of a thing already introduced to introduce it. Now, the bishop has already, in *Allcroft's case*, substantially expressed his opinion, based upon the authority of *Phillpotts* v. *Boyd*, that the images set up upon the reredos in question were not unlawful when set up. By that opinion, which is substantially repeated in the present case, we are, for the purposes of this case, bound. It follows, therefore, if my interpretation of the language of the statute is correct, that the bishop is not bound to take cognizance of the new matter introduced into the present representation as constituting a new offence. In short, it comes, in my mind, to this. If the new matter discloses a new and distinct offence, it is not one within the jurisdiction of the bishop under the Public Worship Act. Stripped of such new matter, the two cases are in substance identical. But it may be argued that even if the new matter does not furnish in itself a ground of complaint, at least it ought to be regarded as some evidence that the images had from the first a tendency to provoke idolatry, and, therefore, the bishop was bound to consider them as "circumstances" of the case.

My answer to this argument is that the bishop in his statement and in his affidavit alleges that he has "considered the whole circumstances attending the representation." Why are we to be asked to say he has not done so? I refuse to come to such a conclusion. If he has honestly considered them, and upon them and them only he has formed the opinion upon which his action is to depend, he has fulfilled the only obligation cast upon him by the law, and the opinion so formed is not open to appeal. The statement of the bishop's reason for his opinion is not essential to the validity of it, but still, with other objects in view which I need not now consider, the Legislature has required that the bishop's reasons shall be deposited in the registry of the diocese, and if the bishop were to disobey the law and refuse to observe its requirements in this respect, a *mandamus* no doubt would lie commanding his obedience. But in this case he has registered his reason which influenced him in forming his opinion, and against that reason there is again no appeal. Both the opinion and the reason may be good or bad, but they are, I am satisfied, the *bonâ fide* opinion and reason of the bishop, based on the whole circumstances of the case, and there is no evidence to satisfy my mind that his judgment has been in the least influenced by any other circumstances or considerations. In this state of things to issue a *mandamus* commanding the Bishop of London to send forward the representation in the teeth of his opinion that he ought not to do so, or to compel him to consider the circumstances of the case and no others when I am satisfied he has already done so, is not what reason or the law requires, and therefore I think this rule ought to be discharged.

The court being divided in opinion the rule for a *mandamus* was discharged.

Rule discharged.

Solicitors for the bishop and dean and chapter, *Lee, Bolton, & Lee.*

Solicitors for the dean, *Brooks, Jenkins, & Co.*

Solicitors for the applicants, *Wainwright & Baillie.*

Q. B. Div. (Day and Lawrance, JJ.) — Oct. 27, 28.

OVERSEERS OF PUTNEY v. LONDON AND SOUTH-WESTERN RAILWAY CO. (*a*.)

Poor rate—Railway company—Deficiency in the course of an undertaking—Lands occupied but not used—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 133.

A railway company, in the course of completing a portion of their line, purchased and took certain properties which were outside the limits of deviation for the indirect purpose of buying out opposition to the undertaking, and not for actual use in the undertaking. A deficiency in the poor rate was thereby created.

Held, that the railway company were liable to make good the deficiency under section 133 *of the Lands Clauses Consolidation Act,* 1845.

This was a special case stated by the consent of the parties to determine whether the defendant railway company was liable to make good a deficiency in the rates of the parish of Putney caused by the said defendants or their predecessors having taken certain lands in that parish for the purposes of their railway, whereby the neighbouring property generally had been depreciated in value.

The question arose under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), section 133 of which is in the following terms: "If the promoters of the undertaking become possessed by virtue of this or the special Act, or any Act incorporated therewith, of any lands charged with the land tax, or liable to be assessed to the poor rate they shall from time to time until the works shall be completed and assessed to

(*a*.) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

such land tax or poor rate be liable to make good the deficiency in the several assessments for land tax and poor rate by reason of such lands having been taken or used for the purpose of the works, and such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the special Act."

In the present case part of the property in question consisted of a row of houses called The Cedars. These houses had been purchased by the company, but, being outside the limits of deviation, had not been taken or used in the construction of the line. Most of the tenants left the houses at the end of the tenancies, and the houses had either remained unoccupied or had been relet by the defendants and reassessed by the assessment committee.

Jelf, Q.C., for the plaintiffs.—We rely on section 133 of the Lands Clauses Consolidation Act, 1845, and contend that the defendants are liable to make up the deficiency in the rates caused by their having taken the houses, although they have not, in fact, used the houses for the purposes of the railway. The only question which the rating authority has to be satisfied upon is the completion of the works: *Governor and Guardians, &c., of Bristol* v. *Mayor of Bristol*, 35 W. R. 619, 18 Q. B. D. 549. All the property was essential to the undertaking and taken for the purpose: *Barnes* v. *Southsea Railway Co.*, 32 W. R. 976, 27 Ch. D. 536.

Balfour Browne, Q.C., for the defendants.—The company are not liable for this deficiency. The houses are outside the limit of deviation, and some of them have not been used at all. It is essential to prove that the lands were taken for the purposes of the railway, which is not the case here: *Stratton* v. *Metropolitan Board of Works*, 23 W. R. 447, L. R. 10 C. P. 76.

DAY, J.—This is an action for the recovery of moneys alleged to be due in respect of a deficiency of rates for property at Putney, caused by the railway company having become possessed of land liable to poor rate. The main portion of the property is a row of houses facing the Thames, called The Cedars, which had a garden in front common to all the houses. There are some difficulties in construing section 133 of the Lands Clauses Act, but I need not anticipate any which may arise in other cases. The general effect of the section is, that while a railway is in the course of construction, a company, if possessed of lands liable to be assessed to the poor rate, are liable from time to time, and until the completion and assessment of the works, to make good the deficiency in the assessments caused by the taking of lands; and on the whole I am of opinion that the plaintiffs in this case have established their right to recover. The defendants were the "promoters" of the undertaking. They "became possessed of these lands by virtue of their Act." They acquired the leases and the reversion of the leases by purchasing the interests of landlords and tenants, and the tenants had attorned to them. The railway company are in possession of all the houses, and they must be so by virtue of their Act, for they could not do it by any other way. They did not take all the houses in the sense of working in them or putting materials in them while constructing their line, but they were in receipt of the rents and profits, or entitled to receive them, and they had no other power to take them than that conferred by their Act. In the contracts of conveyance it was set out that these properties were taken for purposes incidental to the undertaking. The company could not, therefore, now be heard to say that that was not the case. On the contrary, it must be taken that it was so, and as there had been a deficiency in the poor rate in consequence of the houses having been taken, that deficiency must be made good. The company would have credit for all rates which they had paid, and as the works are now completed their liability to make good such deficiency ceases. There must be judgment for the sum of £1,986 1s. 9d. now claimed.

LAWRANCE, J., concurred.

Solicitors for the plaintiffs, *Bircham & Co.*

Solicitor for the defendants, *W. Reeve.*

House of Lords.

From C. A. (England). Aug. 5, 1890.

BELL-COX v. HAKES. (*a.*)

Practice — Appeal — Habeas corpus—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 19.

Where a person has been discharged by the High Court under a writ of habeas corpus, *the Court of Appeal has no jurisdiction, under section* 19 *of the Judicature Act*, 1873, *to entertain an appeal from such order.*

Decision of the Court of Appeal *reversed* (Lords Morris *and* Field *dissenting*).

This was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.), reported 36 W. R. 12, 20 Q. B. D. 1, reversing the decision of the Queen's Bench Division.

In June, 1886, a suspension was published and served on the appellant, Mr. Bell-Cox, by which he was suspended from his clerical office for six calendar months. In the same month he disobeyed that suspension, and in July was pronounced to be in contempt, and a *significavit* was issued.

On the 2nd of May, 1887, a writ *contumace capiendo* was issued, and Mr. Bell-Cox was arrested under that writ on May 4. Thereupon an application was made for a *habeas corpus* in the Queen's Bench Division, and under the new procedure in relation to *habeas corpus* the Queen's Bench Division made the rule absolute, and directed the release of the appellant.

The respondent Hakes appealed, and the Court of Appeal reversed that decision.

Mr. Bell-Cox appealed.

The appeal was first argued at great length in July, 1889, before Lord Halsbury, C., and Lords Fitzgerald, Herschell, and Macnaghten.

Sir H. Davey, Q.C., Sir W. Phillimore, and *Hansell*, for the appellant.

Jeune and *Danckwerts*, for the respondent Hakes.

Sir E. Clarke, S.G., and *R. S. Wright*, appeared for Lord Penzance.

The death of Lord Fitzgerald took place before judgment was delivered, and the appeal was re-argued before Lord Halsbury, C., and Lords Watson, Bramwell, Macnaghten, Morris, and Field. The point considered was whether an appeal lay from the Queen's Bench Division to the Court of Appeal under the circumstances above stated.

Sir W. Phillimore and *Hansell* (*Sir H. Davey, Q.C.*, with them), for the appellant.—There was no power in the Court of Appeal to replace in custody,

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

and under section 19 of the Judicature Act, 1873, no appeal is given from an order granting a discharge under a *habeas corpus*. This, too, is a criminal matter, and therefore no appeal lies by section 47 of the Judicature Act, 1873: *Ex parte Woodhall*, 36 W. R. 655, 20 Q. B. D. 832; *Reg.* v. *Barnardo*, 38 W. R. 315. 23 Q. B. D. 305; *O'Shea* v. *O'Shea*, 38 W. R. 374, 15 P. D. 59. This is new to all constitutional law. *Swinfen* v. *Swinfen*, 5 W. R. 203, 1 C. B. N. S. 364, affords an analogy. The respondent Hakes was in no way affected; it is an order directed to the gaoler, and he has therefore no *locus standi*. As to the question of costs, *Dodd's case*, 6 W. R. 537, 2 De G. & J. 510, 525, 532, was referred to.

Jeune, Q.C., and *Danckwerts*, for the respondent Hakes.—Section 19 of the Judicature Act, 1873, gives a right of appeal in clear terms in all cases with certain exceptions. This strengthens the general rule: *Walsall Overseers* v. *London and North-Western Railway Co.*, 27 W. R. 189, 4 App. Cas. 36, *per* Lord Cairns; *Enraght's case*, 6 Q. B. D. 376, 29 W. R. Dig. 78; *Green* v. *Lord Penzance*, 30 W. R. 218, 6 App. Cas. 657; *Reg.* v. *Barnardo*, 38 W. R. 315, 24 Q. B. D. 283; *Needham* v. *Needham*, 1 Phillips, p. 643; *Dugdale's case*, 2 E. & B. 129; *Rodger* v. *Comptoir d'Escompte*, 19 W. R. 449, L. R. 3 P. C. 465. The cases before the Privy Council are—*Attorney-General of Hong Kong* v. *Kwok-a-Sing*, 21 W. R. 825, L. R. 5 P. C. 179; *Reg.* v. *Mount*, 23 W. R. 572, L. R. 6 P. C. 283.

Yeo v. *Tatum*, L. R. 3 P. C. 696, 19 W. R. P. C. Dig. 14; *Witt* v. *Corrcoran*, 24 W. R. 501, 2 Ch. D. 69; *Great Western Railway Co.* v. *Swindon Railway Co.*, 32 W. R. 957, 9 App. Cas. 787; *Crawcour* v. *Salter*, 30 W. R. 329, were also referred to.

Sir W. Phillimore replied.

The House took time for consideration.

Aug. 5.—Lord HALSBURY, C.—Probably no more important or serious question has ever come before your lordships' House. For a period extending as far back as our legal history the writ of *habeas corpus* has been regarded as one of the most important safeguards of the liberty of the subject. If, upon the return to that writ, it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused a person detained might, according to *Ex parte Partington*, 13 M. & W. 679, make a fresh application to every judge or every court in turn, and each court or judge was bound to consider the question independently, and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question. No writ of error or demurrer was allowed: *City of London case*, 8 Rep. 121.

In days of technical pleading no informality was allowed to prevent the substantial question of the right of the subject to his liberty being heard and determined. The right to an instant determination as to the lawfulness of an existing imprisonment and the twofold quality of such a determination that, if favourable to liberty, it was without appeal, and if unfavourable it might be renewed until each jurisdiction had been exhausted, have from time to time been pointed out by judges as securing in a marked and exceptional manner the personal freedom of the subject. It was not a proceeding in a suit, but was a summary application by the person detained. No other party to the proceeding was necessarily before or represented before the judge except the person detaining, and that person only because he had the custody of the applicant, and was bound to bring him before the judge to explain and justify, if he could, the fact of imprisonment. It was, as Lord Coke described it, *festinum remedium*. The Act of Charles II., commonly called the Habeas Corpus Act, did but provide remedies and penalties to enforce the known state of the law and to prevent its evasion. It was confined to criminal cases or alleged criminal cases, and provided that except in cases of treason and felony plainly expressed upon the face of the warrant its strongest provision should have operation. But the Act 56 Geo. 3, c. 100, supplied the omission to provide for cases where the cause of detention was neither crime or debt. The preamble of the Act recites both the efficiency and quickness of the remedy in these words: "Whereas the writ of *habeas corpus* hath been found by experience to be an expeditious and effectual method of restoring any person to his liberty who hath been unjustly deprived thereof; and whereas extending the remedy of such writ and enforcing obedience thereunto and preventing delays in the execution thereof will be advantageous to the public; and whereas the provisions made by an Act passed in England in the thirty-first year of King Charles the Second, intituled 'An Act for the better securing the liberty of the subject, and for prevention of imprisonment beyond the seas,' and also by an Act passed in Ireland in the twenty-first and twenty-second years of his present Majesty, intituled 'An Act for the better securing the liberty of the subject,' only extend to cases of commitment or detainer for criminal or supposed criminal matter,—Be it therefore enacted, &c. . . . That where any person shall be confined or restrained of his or her liberty (otherwise than for some criminal or supposed criminal matter, and except persons imprisoned for debt or by process in any civil suit) within that part of Great Britain called England, dominion of Wales, or town of Berwick-upon-Tweed, or the isles of Jersey, Guernsey, or Man, it shall and may be lawful for any one of the barons of the Exchequer of the degree of the coif, as well as for any one of the justices of one bench or the other, and where any person shall be so confined in Ireland it shall and may be lawful for any one of the barons of the Exchequer, or the justices of one bench or the other in Ireland, and they are hereby required, upon complaint made to them . . . ." Then follow the provisions with which we are familiar.

The Act proceeds thus: "And be it further enacted by the authority aforesaid that in all cases provided for by this Act, although the return to any writ of *habeas corpus* shall be good and sufficient in law, it shall be lawful for the justice or baron before whom such writ may be returnable to proceed to examine into the truth of the facts set forth in such return by affidavit or by affirmation (in cases where an affirmation is allowed by law) and to do therein as to justice shall appertain; and if such writ shall be returned before any one of the said justices or barons, and it shall appear doubtful to him, on such examination, whether the material facts set forth in the said return or any of them be true or not, in such case it shall and may be lawful for the said justice or baron to let to bail the said person so confined or restrained, upon his or her entering into a recognizance with one or more sureties, or in case of infancy or coverture or other disability, upon security by recognizance in a reasonable sum to appear in the court of which the said justice or baron shall be a justice or baron upon a day certain in the term following, and so from day to day as the court shall require, and to abide such order as the court shall make in and concerning the premises; and such justice or baron shall transmit into the same court the said writ and return together with such recognizances, affidavits, and affir-

mations; and thereupon it shall be lawful for the said court to proceed to examine into the truth of the facts set forth in the return in a summary way by affidavit or affirmation (in cases where by law affirmation is allowed), and to order and determine touching the discharging, bailing, or remanding the party." It will be observed that the judge is to satisfy himself, and if he is satisfied that the matter returned is matter which, if true, would be a good return, he is to do what justice requires—*i.e.*, if he thinks the imprisonment lawful to remand to custody; if otherwise, to enforce the immediate liberation. If, on the other hand, he is doubtful, he may hold to bail. The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom.

I have insisted at some length upon the peculiarities of the procedure, because I think one cannot suppose that the Legislature intended to alter all the procedure by mere general words, without any specific provision as to the practice under the writ of *habeas corpus* or the statutes which from time to time have regulated both its issue and its consequences. I do not deny that the words of section 19 literally construed are sufficient to comprehend the case of an order of discharge made upon an application for discharge upon a writ of *habeas corpus;* but it is impossible to contend that the mere fact of a general word being used in a statute precluded all inquiry into the object of the statute, or the mischief which it was intended to remedy. In the great case of *Stradling* v. *Morgan*, 1 Plow. 198 B, the Court of Exchequer Chamber was called upon after verdict to construe the statute upon which the action was brought, and which used the words "any treasurer, receiver, or minister accountant," and the Court held that, however wide the words, the statute must be taken not to have meant to use the words in their absolute generality, and yet all agreed that the receiver in question was within the words of the statute. In the argument and the judgment illustrations are given of the principle upon which statutes ought to be expounded, which have many times since been referred to as satisfactory in reason and common sense. Thus the word "presently" answer to the creditor—*i.e.*, immediately in a statute—has been construed to mean not that the extenders shall immediately pay but immediately become debtors. The words "no writ shall abate by exception of nontenure of parcel but for the quantity of the nontenure which is alleged," was held to mean only some writs shall not abate, which determination is quite contrary, it is said, to the text. So the Statute of Marlbridge enacts that "none from henceforth shall cause any distress that he has taken to be driven out of the county where it was taken," and says, further, "if the lord presume to do so against his tenant he shall be grievously punished by amercement." Yet in 1 Henry 6 it was held that "if one had a manor in one county, and a person holds lands which he has in another county of this manor, that it was lawful for the lord to distrain for the services and to carry the distress to the manor into the other county where the manor is, notwithstanding the said statute. And yet it seems contrary to the letter of the Act, as it is, in truth, contrary to the generality of the letter of the Act. But the judges have expounded the intent of the makers of that Act not to extend to the lord, but where the seigniory and tenancy are in the same county. So that by such exposition made according to the intent of the Act the generality of the words is abridged."

From these and similar examples a canon of construction has been arrived at which has often been quoted, but which is so important with reference to the question now before your lordships that I quote it once again: "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded on the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion."

If the Judicature Acts are looked at by the light of such principles as are here indicated, I cannot conceive it to be possible that the framers of those Acts had in their minds the dealing with such an important branch of the law of this country by the use of one word, the necessity for the use of which is amply satisfied by the other provisions of the Acts in question. It was the known and well-settled state of the law that a discharge under a writ of *habeas corpus* was final, and the Act from which I have quoted in the latter part of the third section calls upon the court to "order and determine touching the discharge of the party detained." Undoubtedly the construction of these words would have been, according to the then known course of the law, a final and absolute discharge, and if it had been expressed in words the Judicature Acts could not have dealt with such a discharge without repealing the statute. Neither of the statutes 31 Car. 2 nor 56 Geo. 3 is referred to in the voluminous schedules of those Acts, and I am brought to the conclusion that they were intended to deal with the cases of hostile litigants, each representing a personal interest, and without hearing or giving an opportunity to be heard it would be impossible for the High Court to adjudicate. This is a proceeding on the part of the court itself examining the lawfulness of the imprisonment for itself, and though it may, it is not bound to do more than satisfy itself of the lawfulness or unlawfulness of an imprisonment. It is upon this part of the case that I think the absence of a proper appellant is important. I admit at once that if I were to assume an appeal it would be easy to find a person who might appropriately represent the interests of those who authorize the imprisonment. The original complainant, the judge, or even the gaoler, might properly fill that character; but when the nature of the transaction is such that there is no one whom the court would be bound *ex debito justitiæ* to hear, I think it reflects some light upon the nature of the proceeding, and whether the court must regard it as a proceeding in which there cannot be a right of appeal, it can hardly be disputed that no machinery is provided for giving effect to an appeal against a discharge under a writ of *habeas corpus*.

Is it possible that the Legislature, intending to give an appeal for the first time, and upon a matter of such supreme constitutional importance, yet left the matter unprovided for? I cannot think so. The Court of Appeal, indeed, disregard this consideration as being immaterial, since they are of opinion that the appeal is certainly given, and that they are bound so to declare the law, whatever may be the consequences; but, though I quite agree with that

proposition, if I am to assume an appeal certainly given, yet it surely is one mode of arriving at the intention of the Legislature to consider whether the machinery provided by the statute is appropriate to the alleged intention.

The section under construction I think was framed with a view to the creating of a Court of Appeal, and giving the powers necessary for the exercise of the jurisdiction so created. If in the words themselves, or in the ancillary machinery to the exercise of the jurisdiction, it can be discovered that the Legislature did not intend the exercise of the jurisdiction in a particular case, it is no straining of the words to assume the limit which the Legislature has thus expressed by the limitation of the machinery. The case of *Kwok-a-Sing*, in the Privy Council, appears to me to be entirely irrelevant. If it were an authority at all, it would only be relevant to show (what it was hardly contended could be shown) that an order of discharge under a writ of *habeas corpus* was always open to review, and independently of the Judicature Act. But in truth there are two grounds upon which that decision is intelligible.

Apart from any practical determination of existing litigation, the Judicial Committee can do what the High Court cannot do — *i.e.*, give advice upon abstract propositions of law. Secondly it can advise the exercise of Her Majesty's prerogative with respect to the appeals from her colonial courts in matters where undoubtedly no appeal lies. Indeed, the particular discussion arose in that case upon a criminal charge, and the real point in debate was, whether a discharge before a court having no jurisdiction was a case under the provisions of 31 Car. 2. In the case of *Reg.* v. *Mount* the Judicial Committee were giving an opinion as to the course to be pursued where in the particular colony no provision had been made for carrying out a sentence of penal servitude, although that question assumed the form of an appeal. But, as I have said, both these cases are irrelevant, or they prove too much, and when the relation to the colonies is borne in mind it is obvious that neither case can have any relevancy to the true construction of the 19th section of the Judicature Act. I am quite at a loss to understand what relation *Dugdale's case* has to the matter in hand. A misdemeanant convicted and sentenced gave bail in error, and by mistake was permitted to be at large, when, as afterwards turned out, he had not complied with the conditions under which alone he could have been permitted to be at large. The proceedings which released him were without jurisdiction, and the court having jurisdiction remanded him to custody. Technically, I think it was an escape, and he was recaptured to undergo his imprisonment on an existing judgment which had not been qualified or set aside, and the execution whereof had only been interrupted by mistake.

It would be a very small point here to decide as to the costs for the purpose of founding jurisdiction; but I am of opinion that, if the court had no jurisdiction to entertain the appeal, they had no jurisdiction to award costs, I desire to express no opinion whether a new *significavit* can be followed by a new order of arrest; that is a question which does not now arise, and may hereafter arise, and I wish to keep myself quite free to decide that question when it shall arise. Whether it can or cannot does not seem to me to reflect any light upon the question now under debate. I entertain no doubt that the writ delivered to the sheriff is spent by the execution by the sheriff of the mandate therein contained, and certainly cannot be made the foundation for a fresh arrest, or for a detention which has once by lawful authority been declared to be unlawful. As to the power to retake, it is enough to say that the sole authority which Mr. Jeune's industry and ability have been able to discover is impliedly an authority the other way, inasmuch as the writ in the *Registrum Brevium* recites an unlawful deliverance from prison as the ground and foundation of the right to recapture. Except so far as may be inferred from what I have said as to the argument which would imply a repeal of the Habeas Corpus Act, I do not desire to express any opinion upon what the law would be if a refusal to discharge should be the subject of appeal. Upon the merits of this appeal I have of course formed no opinion. The preliminary point has alone been argued, and I will only say that, if it be true, as one of the parties contends, that there has been a disobedience to the law obstinate and persistent, I have no doubt that the law is or can be made strong enough to deal with it. But your lordships are here determining a question which goes very far indeed beyond the merits of any particular case. It is the right of personal freedom in this country which is in debate, and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed, and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may only be arrived at by the last court of appeal.

For these reasons I move your lordships that the judgment of the Court of Appeal be reversed.

Lord BRAMWELL.—I think that this appeal should be allowed, on the ground that the Court of Appeal had no jurisdiction to entertain the appeal to them. That an appeal from a decision of a judge or court on the grant or refusal of a writ of *habeas corpus*, and on the adjudication on its return, would be reasonable, this case abundantly shows. I do not say so on account of the original question between the parties (the particulars of which are wholly unknown to me), but on account of the question which has resulted from the application for a writ of *habeas corpus*. A court of competent jurisdiction has decided that the appellant has broken the law, and has suspended him from the exercise of his functions as a priest. He has deliberately disobeyed the orders of the court, on no ground except that he chose to do so; he has been sent to prison for his contumacy. And the question, on the return to a writ of *habeas corpus*, for the Divisional Court and Court of Appeal was, whether that imprisonment was lawful or not; in other words, whether he was to be punished or go unpunished. This is a serious question, and there can be no doubt that out of proceedings on writs of *habeas corpus*, and on application for them, most serious questions may and do arise, much more important than the majority of those which are the subject of appeal. However, as has been said, we have got on without such appeals hitherto, and might continue to do so and thrive. I say without such appeals, for, with all respect, I cannot agree that going first to a judge of one court, and then, on being refused by the judge, going to a court, or, being refused by one court, going to another, was or is an appeal. The court applied to, after refusal by a judge or other court, was not exercising an appellate jurisdiction in entertaining the application. It was exercising a primary jurisdiction. It need not have heard of the former application, nor known of the materials on which it was founded; and, indeed, those before it might be different from the former. If, indeed, such a proceeding was an appeal, that appeal

exists still. Clearly, where the first application is to a single judge, and where to the High Court, the Lord Chancellor could grant the writ refused by them on application to him, and *vice versâ*. Whether, if one division of the High Court, before the Queen's Bench, Common Pleas, and Exchequer Division were fused, had refused the writ, then another division would have been bound to entertain an application for one, I know not. If yes, then the Judicature Act left the matter as it was before. Anyhow, there is the possibility of a second application now as of right, so that there is the less need for an express appeal to supply the want of being able to try more than one tribunal. The second application may be "improper," as Cotton, L.J., says, but it is one that may be made and must be entertained. Still the question is, has the Judicature Act provided such an appeal? That it has done so intentionally I think no one can suppose. It is impossible that if an appeal had been intended there should not have been some particular provisions as to its procedure up to and after the final order, and there are none.

The very able and learned arguments of Mr. Jeune and Mr. Danckwerts have shown or suggested that in some cases, perhaps, a reversal of an order to discharge a person brought up on a writ of *habeas corpus* might leave him subject to proceedings for restoring him to custody; for instance, where a sentence is unexpired, and possibly Mr. Cox may in some way be got at, I do not know. But there are some cases where the discharge is of such a character that its effect cannot be undone. I say that the absence of specific procedure in the Judicature Act to enforce an order reversing an order of discharge on a writ of *habeas corpus*, and the possible futility of such reversal, is a strong argument to show that an appeal does not lie. I cannot, with great submission, agree that the court may reverse, though no good may come of it. If no good may come of it eventually, I think the argument is strong to show that the power is not given. Of course, if the statute in express terms said the appeal should lie, it must be obeyed. But when the question is one of construction, surely it is a good argument to show that a particular construction would be futile. What is the substance of the appeal? I speak of where there is a discharge. There may be a writ without a previous rule *nisi*, or with one. It cannot be contended that an appeal will lie where there is a rule *nisi*, and not where there is not. Indeed, where there is a rule *nisi* on sufficient *primâ facie* materials, and the body is brought up, or the matter is discussed as though it were, it seems to me it would be wrong to discharge the rule *nisi* if there were an appeal, and the discharge was revoked.

In this case the Queen's Bench Division made absolute the rule for a *habeas corpus*, and also ordered that the appellant should be discharged without being brought up. How can it be right to discharge the rule for the *habeas corpus*? What is the consequence? Does the bringing up of the body become unlawful, or would it have been if the writ had issued and the body been brought up? These considerations show that the substantial question is whether the order for the discharge of the body which is to be brought up, or treated as though brought up, was right. When there is an order of discharge I have a difficulty in seeing how a court of appeal can undo that order. The body is gone. The Court of Appeal cannot reverse what has been done. It cannot give the judgment that ought, if right, to have been given—viz., that he be remanded. He is not there. No doubt power could be given to it to remedy the error. But without express power it can do nothing. It does not issue the process from the Ecclesiastical Court, nor the writ *de contumace recapiendo*, if there is one.

As to the case of *Reg.* v. *Dugdale*, I do not understand it. I have no notion where the prisoner was or what was done with him. On these grounds I think an appeal was not intended. But then there are the words of the statute, "The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order of her Majesty's High Court of Justice, or any judges or judge thereof." I have an indistinct misgiving whether in awarding or disposing of a writ of *habeas corpus* a judge of the High Court or the High Court itself is acting as a court or judge of a court of judicature. There is no *lis*; there is no action; these proceedings are entitled *ex parte*. No doubt section 16 transfers the power to grant writs of *habeas corpus*, but is that power a power of judicature? Section 19 speaks of a judgment or order—*i.e.*, an order in the nature of a judgment. This is only a doubt; but, further, I think the proper way of dealing with section 19 and section 18 is to consider their object to be to establish a Court of Appeal, not to make things appealable of a character not appealable before.

The section begins, "The Court of Appeal shall have jurisdiction," &c. Section 18 transfers certain powers to it, in which are certainly not included the power of hearing an appeal from a decision as to a writ of *habeas corpus*. I do not say that appeals do not lie in cases where they did not before. I say that to give such appeals was not the object of sections 18 and 19. But still further, though the words are there, though they comprehend in words the case of an appeal from a decision on the return of a writ of *habeas corpus*, yet, if the result would be futile, or lead to an absurdity, the right way of dealing with those words is to put a limit on them. As, for instance, thus, shall "have jurisdiction to hear appeals from any judgment or order appealable, or where the Court of Appeal, or the court appealed from, can execute the order or judgment of the Court of Appeal."

I submit that this is perfectly legitimate. All judges who have had occasion to speak of it have unhesitatingly dealt in this way with section 38 of 30 & 31 Vict. c. 131. And see Maxwell on Statutes, 242, where many cases to the same effect are collected. On these grounds I think this judgment should be reversed. My reasons would, perhaps, apply to a case when the prisoner had been remanded, but I limit my opinion to where he has been discharged. Of course, I think that part of the order appealed from which orders payment of costs to Mr. Hakes, the appellant, in the Court of Appeal, should be reversed, as there was no jurisdiction to entertain the matter at all. Even if there was, I do not see why he should have costs from Mr. Cox. True, I think that Mr. Hakes was a proper appellant if there could be an appeal, though the question was not one between him and Mr. Cox. And that is one of the difficulties I feel as to whether there could be an appeal. Of course, it is right to give him an opportunity of being heard against the discharge and of informing the court as to the facts, but not him exclusively. Suppose he had died or left the parish? In the result I think the question is, Is there an appeal from an order discharging a person brought up on *habeas corpus*? That sections 18 and 19 of the Judicature Act are directed to the establishment of a court of appeal, and not to making a matter the subject of appeal not formerly so, and different in kind and character from those previously the subject of appeal. That if an order of discharge is a judgment or order of judicature, and so within the very words of section 19, a limitation must be put on them ex-

cluding such appeals to avoid the futility, inconvenience, and incongruity which would otherwise result.

Lord HERSCHELL.—The preliminary question argued upon the hearing of this appeal is one of great importance. It touches closely the liberty of the subject and the protection afforded by discharge from custody under a writ of *habeas corpus*.

The law of this country has been very jealous of any infringement of personal liberty, and a great safeguard against it has been provided by the manner in which the courts have exercised their jurisdiction to discharge under a writ of *habeas corpus* those detained unlawfully in custody. It will be convenient, before proceeding to an examination of the section of the Judicature Act upon which this case turns, to state briefly the mode in which the courts have administered the law in relation to that writ. It was always open to an applicant for it, if defeated in one court, at once to renew his application to another. No court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each court exercised its independent judgment upon the case, and determined for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained in custody might thus proceed from court to court until he obtained his liberty. And if he could succeed in convincing any one of the tribunals competent to issue the writ that he was entitled to be discharged, his right to his liberty could not afterwards be called in question. There was no power in any court to review or control the proceedings of the tribunal which discharged him. I need not dwell upon the security which was thus afforded against any unlawful imprisonment. It is sufficient to say that no person could be detained in custody if any one of the tribunals having power to issue the writ of *habeas corpus* was of opinion that the custody was unlawful.

This was the state of the law at the time the Judicature Act was passed. If the contention of the respondent is to prevail, that statute has effected a grave constitutional change. The discharge from custody by a court of competent jurisdiction no longer avails to protect from further proceedings. The propriety of the discharge may be questioned in the Court of Appeal, and even if that court should concur with the court below, an appeal would lie to your lordships' House; so that, although the court of first instance and the Court of Appeal should concur in thinking the custody illegal, their decisions might be set aside by a majority of this House. It is not easy to exaggerate the magnitude of this change; nevertheless it must be admitted that if the language of the Legislature, interpreted according to the recognized canons of construction, involves this result, your lordships must frankly yield to it, even if you should be satisfied that it was not in the contemplation of the Legislature.

Reliance is naturally placed by the respondent upon the broad general words of the 19th section: "The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of her Majesty's High Court of Justice." It cannot be denied that an order for the discharge of a person in custody such as was made in the present case, is, *primâ facie*, an order to which this section applies. It does not come within any of the exceptions to which reference is made in the section. It was, indeed, somewhat faintly argued by the learned counsel for the appellant that this was an appeal in "a criminal cause or matter" within the meaning of section 47. But, in my opinion, they failed to establish this proposition. And if there were nothing in the statute which could be appealed to as showing that the Legislature intended some further limitation to be put upon the general words used, I think it might be impossible to resist the respondent's contention. But the section contains two clauses. That which confers the right of appeal and the jurisdiction to hear and determine it is immediately followed by a provision which is obviously intended to make the power of review complete and effectual by furnishing the means of enforcing it. The learned judges in the court below considered that it was quite immaterial to inquire what would be the effect of their judgment, or how it could be enforced. If an appeal were given in such a case as the present in specific terms, I should agree with them. It would then be their duty to entertain it and to pronounce their judgment, even if there were no means of compelling obedience to it.

But the attention of the learned judges does not appear to have been drawn to the language of the second branch of the section, or to the bearing which it might have upon the construction to be put upon the earlier words. It cannot, I think, be denied that, for the purpose of construing the enactment, it is right to look not only at the provision immediately under construction, but at any others found in connection with it which may throw light upon it, and afford an indication that general words employed in it were not intended to be applied without some limitation. The enactment following the words which confer jurisdiction to hear and determine appeals gives to the Court of Appeal, for the purposes of the "enforcement of any judgment or order made on any such appeal," all the power, authority, and jurisdiction by the Act vested in the High Court of Justice.

The first observation I have to make is this. I think it must be held that the Court of Appeal has no power to enforce its judgments beyond that which is here conferred. Even if it be conceded that, in the absence of any such provision, some authority to enforce its judgments might be implied, it would be contrary to sound principles of construction to extend by implication the express powers given. The court, then, has the same power to enforce its judgments as the High Court, and is not empowered to use any further or other means. It appears to me, therefore, legitimate and relevant to inquire whether, in any particular class of cases, the Court of Appeal has been left powerless to enforce its orders in case its conclusion should differ from that arrived at by the court below.

The case with which we have to deal is an order discharging a person from custody under a writ of *habeas corpus*. It was said, indeed, that the order of the Queen's Bench Division was twofold, and might be treated as two separate orders—first, to bring up the body of the applicant, and, second, to discharge him from custody. I shall revert to this argument presently, but, for the moment, I shall treat it simply as an order discharging from custody. Has the Court of Appeal any power effectually to review such an order, and to undo what was done by the court below? For the reasons I have already given I think this must be determined by the answer to the further question, Has the High Court any power to enforce an order for the arrest of a person at large, under such circumstances as the present, or in any like case? It needs no argument to prove that the High Court is destitute of any such power. It has inherited the combined powers of the courts whose functions were transferred to it, but none of these had any jurisdiction or authority to review a discharge by a competent court under a writ of *habeas corpus*, or to enforce the arrest of one thus freed from custody. And I need hardly add that they possessed no general power of arrest for the purpose of enforcing their

judgments. It seems to me to follow that, however wrong the Court of Appeal might think a discharge to have been, it would be powerless to order a re-arrest, or, at least, to enforce such an order.

Great reliance was placed upon the case of *Reg.* v. *Dugdale*, which it was said showed that the Court of Queen's Bench had the power to order the re-arrest and commitment to custody of a person improperly discharged. In that case the defendant had been convicted and sentenced to two years' imprisonment at the quarter sessions. He brought error on this judgment, which, however, was in part affirmed by the Queen's Bench, and, having been bailed pending the suit, he was remanded to custody. He then took the necessary steps to carry the writ to the Exchequer Chamber, and obtained his discharge by acknowledging recognizances before Platt, B., at chambers under 8 & 9 Vict. c. 68 and 9 & 10 Vict. c. 24. These recognizances, however, did not comply with the statutes, under which alone he was entitled to be out on bail pending the appeal. The discharge was, in fact, without jurisdiction. For the purpose of testing the question of jurisdiction a rule was obtained to show cause why he should not be again apprehended and recommitted to the custody of the keeper of the house of correction, "in execution of the judgment in this prosecution." This rule was made absolute, but he was not arrested merely by virtue of this rule. A warrant was granted by Erle, J., for his recommittal, reciting the judgment and sentence, and stating the recommittal to be "in execution of the judgment in the said prosecution." The defendant in that case was at large during the currency of a valid sentence and judgment, having been set free pending an appeal by a learned judge acting without jurisdiction. I am unable to see the bearing of that case upon the present, or how it shows that when a prisoner has been discharged from custody, under a writ of *habeas corpus* by a court of competent jurisdiction, there can be any power in the court to issue a warrant for his recommitment.

The counsel for the respondent called attention to ord. 48, r. 4, and insisted that this supplemented the power conferred on the Court of Appeal by the section under discussion. That order provides that the Court of Appeal shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, "and to make such further or other order as the case may require." It was these latter words which were relied on. I think it is a somewhat extravagant proposition that a rule such as this would enable the court to order the re-arrest of a person discharged under a writ of *habeas corpus*, and to enforce its order. I think it impossible to hold that it gave any such authority or enlarged the power to enforce its order which is vested in the Court of Appeal by the 19th section of the Act. It was argued, however, that it was unnecessary to empower the Court of Appeal to remit to custody a person erroneously discharged by the court below, seeing that as soon as the order of that court was reversed, the person discharged might again be arrested by the sheriff; and, indeed, that it would be his duty, upon receiving notice of the order of the Court of Appeal, so to arrest him. No authority was cited, nor could any precedent be appealed to in support of this proposition, and I find myself wholly unable to assent to it. Where the sheriff has taken the person named in the writ and handed him to the gaoler for custody under it, his duty is at an end, save in the case of an escape. And the suggestion that a discharge by a court of competent jurisdiction becomes, when its order is reversed by a superior court, equivalent to an escape will not bear examination.

It was said that the writ commanded the sheriff to attach the body of the appellant "until he shall have made satisfaction for the contempt," and that, no such satisfaction having been made, the writ was still in force and effectual to authorize his re-arrest. But the limitation, "unless he shall have been sooner discharged by a court of competent jurisdiction," must be applied in this case just as much as if the warrant had been to attach the person named for a definite term. Then it was said that the appellant might be arrested again, inasmuch as the sheriff had not yet notified to the justices how he had executed the precept. I am unable to follow this argument. In the present case the sheriff would make a true and sufficient return by stating that he had attached the appellant by his body, and delivered him to the gaoler for safe custody under the writ. And if he were to add that the prisoner had been discharged from custody by the High Court of Justice, the return would, in my opinion, none the less be good and sufficient. When the sheriff returns that he has not executed the writ, and that the party cannot be found within his bailiwick, the court is empowered by sections 4, 5, 6, and 7 of the 5 Eliz. c. 23 (which by section 1 of the 53 Geo. 3, c. 127, is made applicable to writs *de contumace capiendo*) to award successive writs of *capias* with heavy pecuniary penalties until the person named in the writ has yielded his body to the gaol and prison of the sheriff. But when once he has yielded his body or been taken into custody, and has been discharged by a court of competent jurisdiction, I can find no authority for the subsequent arrest.

Next it was argued that he might be re-arrested under a writ *de contumace recapiendo*. But it is clear from the terms of that writ that it would be inapplicable to such a case as the present. Godolphin describes it as a writ whereby an excommunicated person who had been "unduly delivered" may be again committed to prison. The writ itself (as set out in *Registrum Brevium*), after stating that a complaint had been received from the bishop that the person named had been liberated from prison *in lesionem libertatis ecclesiasticæ et nostri contemptum manifestum*, directed that they should be taken again *nisi modo legitimo a prisone prædicta deliberati fuerint*. It is clear that a person discharged by a court of competent jurisdiction has been delivered *modo legitimo*, and not in contempt of the Sovereign. Finally, it was said that a new writ *de contumace capiendo* might be issued under the *significavit;* but when a writ has been once issued in conformity with the provisions of the 53 Geo. 3 I am at a loss to understand what warrant there would be for issuing a second writ. The truth is, that if your lordships were to hold that the person named in the writ could be arrested again, after his discharge by a competent court, on the ground that his custody was unlawful, you would not be declaring a law which has hitherto existed, but inventing a fresh power which has never yet, and, indeed, never could have been exercised, in order to meet the altered circumstances created by the jurisdiction which the Court of Appeal is alleged to possess. It may be that there could be another *significavit* in the ecclesiastical suit, followed by another writ *de contumace capiendo*. But so there might have been before the Court of Appeal pronounced its judgment just as well as now. The utmost that can be said is, that if an application were made to the High Court for discharge from custody under that writ, the court would, in all probability, defer to the opinion expressed by the Court of Appeal in the present case on any point of law. But deference in a subsequent proceeding to an expression of opinion by a higher court in a previous proceeding is as far as possible removed

from the enforcement of the judgment pronounced in that proceeding. The function of a court of appeal is to deal with the judgment before it for review, and not to pronounce opinions on a point of law which may remove a difficulty from the path of a litigant in future proceedings. That the exposition of the law by the Court of Appeal might have the suggested effect of removing a barrier to the further action of the Ecclesiastical Court is a mere incident of the present case, not applicable to the class of cases in general, and it is with the general question whether an appeal lies in such cases that we have to deal.

I am driven, then, to the conclusion that, where a person has been discharged by the High Court under a writ of *habeas corpus*, the Court of Appeal has no power effectually to interfere with the action of the court below. The judgment of the higher court cannot in anywise affect the discharge, or restore to custody the person liberated. It is incompetent to give effect to its judgment, and cannot undo that which it holds to have been wrongly done by the order appealed from.

I think it is impossible ro read the section your lordships have to construe without seeing that the power to hear and determine an appeal, and the power to enforce the judgment of the Court of Appeal in case it should differ in opinion from the court below, were intended to be co-extensive. And I cannot think that it was ever contemplated that an appeal should be entertained from any class of orders when that which was affected by them could never be effectually interfered with. The jurisdiction of the courts whose functions were transferred to the High Court to discharge under a writ of *habeas corpus* was well known, and if it had been intended that an appeal should lie against such an order, I think that provision would have been made to enable the Court of Appeal to restore to custody the person erroneously discharged. In the absence of such a power the appeal is futile, and this appears to me to be a sufficient reason for holding that the Legislature did not intend the right to hear and determine appeals to extend to such cases. It was said that it sometimes happens that events subsequent to the judgment of a court of first instance render it impossible for the Court of Appeal to remove the effect of the judgment below, even though it should hold that judgment to have been a wrong one, and that it could not be contended that on this account the judgment could not be appealed against. This is no doubt true, and many illustrations of it might be given. But the difficulty there arises from the accidental circumstances of the particular case. Here it is inherent in the nature of the order itself in all cases in which a person is discharged from the custody of the law. This distinction appears to me to be a vital one.

I ought to notice the decisions of the Privy Council which were strongly pressed upon your lordships, though I confess I do not think they have any great bearing upon the present case. It was said that the Privy Council had in these cases reversed the judgment of the court below, which had discharged a prisoner under a writ of *habeas corpus*. But it must be observed, in the first place, that the power of the Privy Council to enforce its judgments is conferred in very different terms to those which we have been considering (see 3 & 4 Will. 4, c. 41, s. 21). And next, no question arose there as to the power of the Privy Council to entertain the appeals, and indeed no such question could be raised. Her Majesty in Council may entertain an appeal by any person aggrieved by the action of her colonial courts, and might well determine a question of law, for the purpose of guiding those courts in the future. The relation of the Queen in Council to the colonial courts differs altogether from the statutory relation of the Court of Appeal to the High Court of Justice.

It was contended by the learned counsel for the respondent that, inasmuch as the Legislature has, by the Judicature Act, limited the number of courts to which application for a writ of *habeas corpus* might be made, it had, by way of compensation, given an appeal against the orders made in all such cases. I do not think that such an explanation of the legislation can be sustained. The remedy of *habeas corpus* would be sought in a majority of cases in a criminal cause or matter, where admittedly no appeal has been given. It will be seen that the reasoning which has led me to the conclusion that an appeal will not lie from an order discharging a person from custody under a writ of *habeas corpus* has no application to an appeal from an order refusing to discharge the applicant. I intend to express no opinion whether there is an appeal in such a case. That question does not arise here, and any opinion expressed upon it would be extra-judicial. I refer to it only because it was suggested that, if there was an appeal in the one case, it was scarcely to be conceived that there should not be an appeal in the other. I do not think so. There would be, to my mind, nothing surprising if it should turn out that an appeal lay by one whose discharge had been refused; but that there was no appeal against a discharge from custody. It would be in strict analogy to that which has long been the law. The discharge could never be reviewed or interfered with, the refusal to discharge, on the other hand, was always open to review; and although this review was not, properly speaking, by way of appeal, its practical effect was precisely the same as if it had been.

Another argument was submitted, to which I ought, perhaps, to refer. It was urged that the Court of Appeal could, at all events, deal with the costs in the court below, and that an appeal lay, if only for the purpose of enabling them to do so. But when once the conclusion is reached that, in orders of this description, it was not intended that there should be an appeal on the merits, I think it impossible to hold that it was intended that an appeal should lie merely for the purpose of dealing with costs. There remains the contention that the proceedings in the present case were irregular, that there ought to have been first a rule to bring into court the body of the applicant, and then a rule to discharge him from custody. It was said that, if this course had been pursued, there might well have been an appeal from the first of these rules, as the Court of Appeal would have full power to enforce their judgment, in case they considered that there was no ground for bringing up the body of the applicant. It is unnecessary to determine whether an appeal would lie from an order for a writ of *habeas corpus* if it were brought to the Court of Appeal before there had been a discharge under it. No such point arises here. But the respondent argues that it was not competent for the High Court to discharge the prisoner without having him first brought before them. It was admitted that the procedure adopted was sanctioned by the Crown Office Rules of 1886; but it was suggested that the rule which gives sanction to this course was *ultrà vires*, inasmuch as the presence in court of the person whose custody was in question was essential to the jurisdiction of the High Court to discharge him. No such point was raised on the argument in the present case in the Queen's Bench Division, and the respondent has failed to satisfy me that the rule was *ultrà vires*.

I do not think that the authorities cited support the view that what was undoubtedly the practice was

essential to the jurisdiction. I think that the judgment appealed from should be reversed.

Lords WATSON and MACNAGHTEN concurred.

Lord MORRIS.—I am of opinion that the Court of Appeal rightly decided the preliminary question of jurisdiction raised before them, and that they had jurisdiction to entertain and decide the appeal from the order of the High Court of Justice made upon an application for a writ of *habeas corpus*. The order of the Queen's Bench Division, dated the 20th of May, 1887, orders "that a writ of *habeas corpus* issue directed to the gaoler of her Majesty's prison at Walton-on-the-Hill in the county of Lancaster, commanding him to have the body of" the appellant "before this court immediately after the receipt of the said writ, then and there to undergo and receive all and singular such matters and things as the said court shall then and there consider of and concerning him," and further ordering that the said appellant "be discharged out of the custody of the said gaoler as to his detention by virtue of a writ *de contumace capiendo*, issued from the Chancery of Lancashire, without being brought up personally before this court." The question turns on the construction of the 19th section of the Supreme Court of Judicature Act, 1873. By the 16th section of that Act the whole of the jurisdiction of the several courts enumerated, amongst which is the Court of Queen's Bench, was transferred to the High Court of Justice. The section collects into the new court all those various jurisdictions. That under section 19 an order refusing a writ of *habeas corpus* can be appealed from and can be heard and determined by the Court of Appeal, was not argued against at your lordships' bar on the part of the appellant, and could scarcely, in my opinion, be so argued after the various decisions on such appeals in the Court of Appeal and in your lordships' House. Why, then, should not an order granting a writ of *habeas corpus* and discharging the prisoner be also appealed from under section 19? The argument that no appeal lies in such a case appears to me fallacious upon two grounds: first, because it goes upon the view that the Court of Appeal has no power under the Act and present rules, and (what is, I think, involved) could not acquire power by rules which could be lawfully made under the Act, to order a person who had been wrongfully released from legal custody on writ of *habeas corpus* to be retaken and replaced in his former custody under the former commitments; secondly, because, even if it had not the power, that would not affect the jurisdiction of the Appeal Court to hear, and the obligation to determine, the appeal, and reverse, so far as it could, the illegal order appealed from.

As to the first ground, there is, to my mind, a confusion between the order made on any appeal and the power, authority, and jurisdiction for the enforcement of that order. Section 19 undoubtedly gave the Appeal Court power to make orders that could not have been made before—*i.e.*, on appeals from interlocutory orders of the Common Law Division, and for the enforcement of those orders the Appeal Court was to have the powers of enforcement the former courts had in respect, not of such orders (for there could not have been any such), but of the orders they lawfully could make, such powers as attachment, sequestration, &c. If the Appeal Court made an order that the discharged prisoner should attend in court on a specified day, and if he did not he could be attached and brought up under attachment, being then in court, whether attending voluntarily and then ordered in custody, or brought up in custody under the attachment, the question would be as to the order the court could then make and not the power of enforcing such order. Why could not the Court of Appeal then lawfully re-commit him? No question of enforcement would arise, for, *ex hypothesi*, he was before the court in custody.

Thus, the question turns on the nature of the order the Court of Appeal could lawfully make, and not at all on the enforcement of the order made. The importance of this view appears to me to lie in this, that the limitation by reference to the power vested in the High Court applies only to enforcement, which is not in question, and not to the nature of the order, which is the point in question. The nature of the order the Court of Appeal may make is prescribed by ord. 58, r. 4, which (*inter alia*) says the Court of Appeal "shall have power to make any order which ought to have been made," and which would, in this case, be to re-commit the prisoner. I cannot concur with the argument applying the limitation introduced by reference to the powers of the High Court to the "order" to be made, which in many cases must be essentially new, instead of to the enforcement of it, to which alone the limitation is applied by the second paragraph of the section. But now I will assume that there would not be under the express words of the 19th section power to enforce the order. Does that necessarily limit the appealable matter? In my judgment, No. The real limits of the appealable matter are defined by the first sentence of section 19, dealing with jurisdiction to hear and determine; the second sentence is ancillary only to that which is defined by the first sentence, and can neither extend nor restrict it. The exceptions made, such as by section 47 of criminal matters, show a clear intention that every order, not expressly excepted in the Act, should be subject to be appealed from. Now, the argument for the appellant engrafts a new exception not mentioned, but said to be implied—and why so? by reason of a sentence intended not to cut down the prior subject-matter, but to extend to the entire of it. The first sentence of section 19 taken by itself would clearly include the order in this case. The second sentence in ancillary only, and is intended to be co-extensive with the first, and if in the result it was not co-extensive, then, in my opinion, the maxim should come in, *Quando lex aliquid alicui concedit conceditur et id sine quo res ipsa esse non potest.* Whenever anything is authorized to be done by law, and it is impossible to do that thing unless something else not authorized by express terms be also done, then that something else will be supplied by necessary intendment. But, without applying this maxim, there is surely at least power to formally reverse the former order. If the order is within the section and the subject of appeal, it cannot be taken out of it by reasoning based on practice or procedure; and if alteration in the latter (namely, practice or procedure) be wanted the judges have, in my opinion, full power to make rules as to the practice and procedure suitable for all *habeas corpus* cases; and if by the present rules the order reversing the order of the Queen's Bench cannot be effective to put the appellant back in prison again, that goes merely to its effect, not to the jurisdiction to make it. I see no reason why a rule could not be made by the judges under the Judicature Act whereby in such a case as the present the sheriff could be directed to retake the party discharged and render him to prison, there to remain under the original writ *de contumace capiendo*. If so, the absence of such a rule should not affect the jurisdiction to hear the appeal. I confess I am not at all impressed with the arguments derived from "the liberty of the subject" or "constitutional changes." In the first

place, no appeals lie from any judgment of the High Court to the Court of Appeal in criminal matters, and it has been decided that what is criminal matter should be taken in its widest sense.

Next, Mr. Jeune, in his very able argument, referred to two cases before the Privy Council. In the first, *Reg.* v. *Mount*, an appeal was entertained from the judgment of the Supreme Court of Victoria holding that the return to the writ of *habeas corpus* was bad, and ordering the discharge of the prisoner and setting him at large. Again, in the *Attorney-General for Hong Kong* v. *Kwok-a-Sing*, on appeal from two orders of the Supreme Court of Hong Kong, whereby the prisoner was twice released from custody on writs of *habeas corpus* on appeal, while the first order was confirmed, the second was reversed. Of course, I am aware that these appeals were not brought under a statute, but on petition to Her Majesty referred to the Privy Council. But I fail to see why, if it was not unconstitutional to reverse an order of discharge of a prisoner on writ of *habeas corpus* under the advice of the Judicial Committee of the Privy Council, it is unconstitutional to do so by the Court of Appeal or by your lordships' House, provided the intention of the Legislature as conveyed by the words of the section of the statute cover the case. The intention of the Legislature in this case, as in others, should be governed by *Id voluit quod dixit;* and I cannot attempt to express my opinion better than in adopting the words of Lord Cairns, C., on the construction of this same 19th section in the case of the *Overseers of Walsall* v. *London and North-Western Railway Co.*, as follows: "I do not think it is open to doubt that these clear and definite words of the Legislature must have their full effect given to them. You have here on the one hand a rule of the Queen's Bench Division, and on the other hand an enactment that every rule of the Queen's Bench Division is to be open to appeal." In the same case Lord O'Hagan says: "We are acting in our judicial, not in our legislative capacity, and we are not free to act on speculation or theory as to what law would be wisest." I say for myself my duty is *jus dicere*, not *jus dare*, when construing a statute. I consequently concur in the unanimous judgment of the Court of Appeal that they had jurisdiction to hear and to determine the appeal in this case.

Lord FIELD.—I am of opinion that the order of the Court of Appeal, so far as it relates to the point of jurisdiction, is correct, and ought to be affirmed. I think that, when the Legislature gave to that court jurisdiction "to hear and determine appeals from any order of the High Court," it rendered all orders in *habeas* subject to appeal. I arrive at this result by applying to this statute to the best of my ability the well-known and settled rules of construction. Admittedly, the word "order" used in the 19th section is comprehensive enough in its literal sense to include the order now in question; but it seems to me that the Legislature has not left the matter standing there, it has reduced the generality of the word "order" to specific orders by making careful specific exceptions. All orders not excepted, and therefore orders in *habeas* in civil causes or matters, are thus, in my opinion, included. In order to arrive at the exceptions the framers of the Act must have passed in review the nature and characteristics of all the various orders which it was competent to the High Court to make, and it has divided those in which an appeal should not be given from those which were to be so liable.

Now the admitted rules of construction lay down that I am not at liberty to infer an intention contrary to the literal meaning of the words of a statute, unless the context, or the consequences which would ensue from a literal interpretation justify the inference that the Legislature has not expressed something which it intended to express, or unless such interpretation (in the language of Parke, B., in *Beck* v. *Smith*, 2 M. & W. 191) leads to any manifest "absurdity or repugnance," with this superadded qualification, that the absurdity or repugnance must be such as manifested itself to the mind of the law-maker, and not such as may appear to be so to me: Willes, J., in *Motteram* v. *Eastern Counties Railway Co.*, 8 W. R. 77, 7 C. B. N. S. 58. See the authorities collected in Maxwell on the Interpretation of Statutes, c. 9, s. 1. These principles were not, indeed, denied by the appellant's counsel at your lordships' bar, but they argued that, as well from the consequences which would ensue if such an order were liable to appeal, as from the context of the statute itself, it was apparent that the Legislature had not included or intended to include the "order" now in question in the enacting part of section 19.

In support of this argument it was correctly stated, as some of the noble lords who have addressed your lordships have already pointed out, that at the time of the passing of the Act it was the undoubted right of a subject detained in custody to question by *habeas* the lawfulness of his detention before every one of her Majesty's courts in succession, without regard to the refusal to discharge by any one or more of them, and that if any one court came to the conclusion that the applicant was entitled to be discharged, no other court had any power of modification or reversal. It was argued, therefore, that if the Judicature Act had to be construed as giving a right of appeal to the Crown or prosecutor, that would be so manifest and unreasonable an encroachment upon the rights and liberty of the subject, and so manifestly repugnant, that it could not have been intended. It was not denied that *habeas* in some shape or stage was within the contemplation of the Legislature as coming within some of the provisions of the Act in question. Indeed, as Lord Bramwell has pointed out, the jurisdiction of the High Court to issue writs of *habeas*, and to remand, hold to bail, or discharge, does not exist unless it is conferred by section 16. So that *habeas* is clearly within the provision of that section. Moreover, it was (in my judgment advisedly) conceded by the appellant's counsel in their arguments before the Lords Justices that, if upon application for *habeas* an order of remand was made, such an order was included in the word "order." Indeed, this has been so decided, for an appeal was held to lie from an order of attachment in *habeas* in a civil matter (*Reg.* v. *Barnardo*), and no appeal to lie from an order of remand in a criminal matter as being within the exceptions in sections 19 and 47: *Reg.* v. *Alice Woodhall*.

Now, I quite agree that it does not follow, of necessity, that because an order of remand is liable to appeal an order of discharge is so. The two orders are, as has been relied upon by some of your lordships, very different in their nature and consequences. But the admitted intention to include one form of order in *habeas* seems to me to render it highly improbable that the eminent lawyers who are thus shown to have had some forms of order in *habeas* in their minds, and were thoroughly acquainted with their several peculiar characteristics, would not, if they had intended to except an order of discharge, have guarded against the alleged encroachment upon the liberty of the subject by adding that order to the exceptions which they have so carefully specified, some of which do not seem to me to vie in importance with it. I also feel the weight of the argument which has commended itself to some of your lordships—viz.,

the giving in such a matter a new right of appeal as against a subject where none in point of form, if not in substance, existed before; and if nothing in the shape of an equivalent had been given the argument would, although not conclusive to me in face of the actual language of the statute, have derived great additional force. But I cannot conceal from myself that the Legislature has still left to the subject a recourse in succession to such a number of the highest tribunals in the land as, in my judgment, effectually prevents any hurtful consequences from any new limitation which they have effected. Whether strictly appeals or not, the subject has still the right of obtaining a practical review of any improper refusal of his application, not only by the Lord Chancellor and by individual judges, but also by a court composed of as many judges as the president may think it right to convene. The Legislature has also given, in my judgment, an appeal to an applicant unjustly committed or held to bail, a new right of enormous advantage.

For these reasons it appears to me that the appellant's argument, in this respect, fails, and that to construe the 19th section as inclusive of the order of the Divisional Court is imputing a reasonable view to the Legislature rather than anything like absurdity or repugnance. If ever there was a statute to which these elements ought not to be imputed without great necessity, or to which the rules justifying the departure from the literal meaning on the ground of absurdity or repugnance should be carefully and sparingly applied, the Judicature Acts seem to me to claim that place. But it was further argued that, even if an order for discharge be an order to which the first part of the 19th section would, taken by itself, apply, and that the respondents' contention to that effect was impossible to be resisted, the provisions of the section which follow show that the Legislature intended some further limitation to be put upon the general words of the first part, and that such limitation was to be found in what was alleged to be the case, that the applicant having once been discharged by the Divisional Court from detention under the writ *de contumace capiendo* of the 4th of May, 1887, there was no process of any court or courts, ecclesiastical or lay, or ecclesiastical and lay, by which the applicant could again be brought up *ad subjiciendum* until he should in the words of the writ, "have made satisfaction for the contempt" of which he has been adjudged guilty, and that to suppose therefore that the Legislature intended to confer a right of appeal which was said to be absolutely futile was again to suppose an absurdity rendering it necessary to add or to vary the literal words of the statute. But, although this argument is entitled to very great weight, I am unable to yield to it for several reasons. In the first place, the words at the end of section 19 relied upon in this view do not appear to me to be restrictive, but rather ancillary to the jurisdiction already created. It is "for the purposes of and incidental to that jurisdiction" that the Appeal Court is to have all the powers, authority, and jurisdiction by the Act vested in the High Court. These words seem to me to be words of complement, and not of curtailment. Neither am I satisfied by the appellant's argument that any such grave blot as it supposes does, in fact, under the circumstances in evidence in this case, rest upon the administration of justice in this country, and that no means exist whereby a contumacious subject can be compelled to pay obedience to the authority of the established tribunals of the land. I have listened with care to the arguments upon this point, and I have carefully examined the authorities cited on both sides.

In the result I am unable at this moment to say whether the authority of the spiritual court to signify the persistent contempts and disobedience of the appellant is exhausted, so that a new *significavit* and a new temporal writ may not issue. One of the noble lords who have preceded me appears to think such a view is possible. Neither can I say whether a new writ *de contumace capiendo* may not issue upon the existing *significavit*, or whether, the existing writ not having been returned, an arrest may or may not be made under it, or, if that writ is exhausted, whether an *alias* may or may not issue. These questions are of a highly technical character. But this I can say, and it seems to me to answer the objection, that whether the appellant's or the respondents' views in this respect are correct, the matter could not have appeared so unmistakably clear to the framers of the Act as to induce me to suppose that upon these grounds they intended what they have not expressed, and have expressed what they did not intend. I do not propose to discuss the authorities here—not from any want of respect, but because any opinion which I may have formed upon the questions raised does not appear to me to bear upon the only question now before your lordships, which is one of the jurisdiction of the Court of Appeal, and not of what ought to be done upon the appeal. It also appears to me that ord. 58, r. 4, forms another answer to the appellant's contention upon this head. The Court of Appeal has held (rightly or wrongly, for that point has not yet been argued) that the Divisional Court erred in discharging the appellant from custody, and that the order *nisi* obtained by him should have been discharged instead of being made absolute. It may be true, and probably is, that the Court of Appeal has no process by which it can do what the court below ought in that event to have done, but *restitutio in integrum* is the right of every successful appellant (*Rodger* v. *Comptoir d'Escompte*), and the Appellate Court, by doing part of that which the court below in the case supposed ought to have done—viz., by discharging the order *nisi* wrongfully obtained—will not only free the respondent from an erroneous decision which must stand very much in the way of any future attempt to enforce the obedience of the appellant, but will also settle the construction of the statutes of Elizabeth and Geo. 3. In the case of *Reg.* v. *Mount*, although the respondents had been discharged from custody, and had presumably placed themselves outside the jurisdiction of the colonial court, the Judicial Committee did not hesitate to reverse the judgment below.

The appellant's counsel also raised some minor points in bar of jurisdiction, but they were not sufficiently weighty to induce me to alter my view, which is, that your lordships have the jurisdiction, and therefore the duty, to determine the appeal.

Order appealed from reversed; order of the Queen's Bench Division restored. The respondent Hakes to pay the costs of this appeal and in the courts below.

Solicitors for the appellant, *Brooks, Jenkins, & Co.*

Solicitors for the respondent Hakes, *Girdlestone, Peterson, & Todd.*

Solicitor for the respondent Lord Penzance, *The Solicitor to the Treasury.*

Court of Appeal.

From Chan. Div. Dec. 6.

In re LANGHAM'S CONTRACT. (*a.*)

Vendor and purchaser—Succession duty—Sale of expectancy in real estate—"Free from incumbrances"—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *s.* 42.

The heir-presumptive of an owner in fee simple of real estate contracted to sell his expectancy "free from incumbrances." The contract contained no express stipulation as to the succession duty to become payable in respect of the vendor's succession.

Held, as between the vendor and the purchaser, that the purchaser was liable to bear such succession duty.

Cooper *v.* Trewby, 8 *W. R.* 299, 28 *Beav.* 194, *approved.*

Appeal from Stirling, J.

This appeal raised a question as to the liability to succession duty as between vendor and purchaser on a contract for sale under the following circumstances.

Sir J. H. Langham, the present owner of an estate in fee simple in possession of the Langham Hotel (subject to a lease thereof for an unexpired term of seventy years held by the Langham Hotel Co.) was a widower, aged eighty-eight years, and without issue. He was a lunatic so found, and was believed to have made no will. Herbert H. Langham was at present the heir-presumptive of Sir J. H. Langham.

On May 16, 1890, Herbert H. Langham entered into a contract in writing with the Langham Hotel Co., the material parts of which contract were as follows:—"(1) Mr. Herbert H. Langham shall sell, and the Langham Hotel Co. shall purchase, the fee simple of the freehold land and premises . . . known as the Langham Hotel . . . as the same are now held by the company, and to which the said Herbert H. Langham is entitled in reversion expectant on the death of Sir J. H. Langham, Bart., intestate and without issue, and contingently on the said Herbert H. Langham surviving him. (2) The interest of the said Herbert H. Langham, as defined in clause 1, shall be sold free from incumbrances." The contract also contained a stipulation that the vendor should effect and should assign to the company a policy on his life payable in the event of his predeceasing Sir J. H. Langham.

The company, as the purchasers under this contract, insisted that the vendor was thereby bound to pay or provide for the succession duty payable on the death of Sir J. H. Langham. The contract contained no express stipulation as to the payment of the succession duty.

On a summons under the Vendor and Purchaser Act, 1874, Stirling, J., sitting in chambers, held, on the authority of *Cooper* v. *Trewby*, 8 W. R. 299, 28 Beav. 194, that the duty was payable by the purchasers.

The purchasers appealed.

A. E. Dryden, for the appellants.—The Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 42, makes the succession a charge upon the land. The vendor has contracted to sell, and the purchasers to buy, "free from incumbrances," and it is, therefore, the duty of the vendor to pay or provide for the succession duty. *Cooper* v. *Trewby* cannot be supported on principle. [FRY, L.J.—The sale is a sale *in præsenti*, and the succession duty is not an existing incumbrance.] What is sold is the expectancy, and that is an interest to arise *in futuro*, and carries with it incumbrances to arise *in futuro*. On a sale by the tenant for life and the reversioner jointly, in an open contract, the purchaser is bound to pay the succession duty: Dart's Vendors and Purchasers, 6th ed., p. 667.

Bliss v. *Putnam*, 7 Beav. 40, was also referred to.

Graham Hastings, Q.C., and *C. C. Tucker*, for the respondent, were not called on.

LINDLEY, L.J.—This appeal raises the question, as between a purchaser and a vendor of an expectant interest in real estate, which of the two is liable to pay succession duty?

The vendor in this case has got no estate in the property which is the subject-matter of the contract, but he is the heir-presumptive of a gentleman who is seised of that property in fee simple in possession, and who has no issue. The vendor, therefore, has a mere expectancy, a chance of succeeding to the property in question, and he has contracted to sell that free from incumbrances. Now at present there are no incumbrances whatever, and it may be there never will be any, and it may be there will be. If the vendor should become the successor of the present owner, then there will be a liability for succession duty, but if he never succeeds, of course there will not. The question we have to decide is, whether under this contract which of the two, the purchaser or the vendor, is to be exonerated from the payment of succession duty. The contract says nothing about succession duty, it only states that what is sold is sold free from incumbrances. *Cooper* v. *Trewby*, which I think is right, clearly covers this case, which is not even so strong a case as that.

BOWEN and FRY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellants, *Gedge, Kirby, & Millett.*

Solicitors for the respondent, *Pearce, Jones, & Co.*

App. Bankruptcy. Dec. 5, 12.

Ex parte BOARD OF TRADE.

In re GRIFFIN. (*a.*)

Bankruptcy—Discharge—Omission to keep proper books—"Business"—One or two transactions—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-section* 3 (a).

When a court of bankruptcy is considering whether a bankrupt has "omitted to keep such books of account as are usual and proper in the business carried on by him" within the meaning of section 28, *sub-section* 3 (a), *of the Bankruptcy Act*, 1883, *proof that he engaged in one or two building transactions is sufficient proof that he carried on the business of a builder if it be shown that he intended the one or two transactions to be followed by similar transactions.*

Appeal by the Board of Trade from an order of Mr. Registrar Giffard, granting the bankrupt an absolute order of discharge.

The report of the official receiver stated that the bankrupt had omitted to keep proper books of account; that he had contracted debts without having any reasonable expectation of being able to pay them; that he had brought on his bankruptcy by rash and hazardous speculation; and that he had been guilty of misconduct with reference to an execution.

The bankrupt was a civil engineer. He entered into certain contracts for making roads. In October,

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

1888—his only property, independently of what he was earning by making roads, being an equity of redemption, which the official receiver found to be worth not more than £100—he bought half an acre of land for £135 with the intention of building thereon seven cottages. He employed a builder and advanced him money; but the builder failed, and the bankrupt was obliged to complete the building himself, though he had at the time no available capital. He then sold the land and cottages at a loss. In April, 1889, while he owed money to various creditors under the road contracts, he undertook the building of a house, and all the money he received under the road contracts he spent on the building, without paying his existing debts.

One of the questions which arose on the appeal was whether the registrar ought to have suspended the order of discharge, on the ground that the bankrupt had omitted to keep proper books of account.

Muir Mackenzie, for the Board of Trade.

H. Reed, for the bankrupt.

Lord ESHER, M.R., after coming to the conclusion that the bankrupt had been guilty of rash speculation and also of misconduct, and that on those grounds the order for his discharge ought to have been suspended, continued:—It was next said that the bankrupt had offended against sub-section 3 (*a*) of section 28 of the Bankruptcy Act, in that he "omitted to keep such books of accounts as are usual and proper in the business carried on by him." As to road contracting I am not certain that that is a business in which it is usual to keep kooks; that is a question on which more evidence might have been given, and we cannot decide it now. It is, however, clear that building is a business in which it is usual and proper to keep books. The question then arises, Did the bankrupt carry on the business of a builder? It was argued that one or transactions do not make a business. The registrar seems to have acceded to this argument, and to have laid it down as a rule that where you prove only two transactions you do not prove a business. I am of opinion that that is too drastic a statement. If the one or two transactions were isolated transactions, undertaken without any intention that they should be followed by other similar transactions, I think that would not amount to a business. But if a transaction is such as if repeated would make a business, and if it is undertaken with the intent that it should be the first of a series of similar transactions, I think that one transaction constitutes a business. But in this case it has not been satisfactorily proved that the two building transactions were part of an intended series.

We think that, on the ground of rash speculation and misconduct, the bankrupt's discharge ought to be suspended for twelve months.

LOPES and KAY, L.JJ., concurred.

Appeal allowed.

Solicitor for the appellants, *Solicitor to the Board of Trade.*

Solictitor for the respondent, *Dain.*

High Court of Justice.

Chan. Div. Chitty, J. — Dec. 6, 9.

In re GRAHAM'S TRUSTS, (*a*.)

Practice — Payment into court — Affidavit — Notice to persons interested—Trustee Relief Act, 1847 (10 & 11 *Vict. c.* 96)—*Chancery Funds Consolidated Rules*, 1874, *r.* 34—*Chancery Funds Amended Orders*, 1874, *ord.* 5—*Supreme Court Funds Rules*, 1884, *rr.* 2, 41 *Supreme Court Funds Rules*, 1886, *rr.* 2, 41.

Under the present practice (dating in this respect from the 1st of March, 1884) *a trustee who pays money into court under the Trustee Relief Act, being no longer required to state in his affidavit the names of the persons interested, need not serve them with notice of such payment in, the Chancery Funds Amended Orders*, 1874, *ord.* 5, *which directed such notice, being, as from such date, rendered nugatory owing to the repeal of the Chancery Funds Consolidated Rules*, 1874, *by the Supreme Court Funds Rules*, 1884, *r.* 2.

In re Stening, 50 *L. T. N. S.* 586, 32 *W. R. Dig.* 217, *explained and distinguished.*

Quære, *whether the Chancery Funds Amended Orders*, 1874, *ord.* 5, *is repealed by the Supreme Court Funds Rules*, 1886, *r.* 2.

Petition.

This was a petition for the payment out of court of a sum of £2,060 16s. 6d. Consols paid in under the Trustee Relief Act.

The petition was unopposed, the trustees being the only respondents, and there was no doubt as to the title of the petitioner, but the question arose whether, in accordance with order 5 of the Chancery Funds Amended Orders, 1874, notice of the payment into court ought not to have been served on certain persons mentioned in the affidavit made on such payment in as possibly entitled to a charge on the said fund.

It appeared by such affidavit that the petitioner came of age on the 17th of October, 1890, having while still an infant purported to charge the said fund in favour of two persons named Hargreaves and Marks by deeds post-dated the said 17th of October, 1890, but the trustees were unaware of any subsequent ratification of such charges, and to the best of their knowledge and belief the only persons entitled to the said sum were the petitioner and such persons (if any) entitled under him as thereinbefore mentioned.

The evidence filed on behalf of the petitioner showed that the charges of Hargreaves and Marks were nugatory, and the petitioner submitted that notice of the payment in need not be given to them under order 5 aforesaid.

Maclean, Q.C., and *Prior*, for the petitioner.—The Trustee Relief Act directs persons paying money into court under its provisions to file an affidavit shortly describing the instrument creating the trust. Then the Chancery Funds Consolidated Rules, 1874, r. 34, directs the person making such affidavit to set forth (*inter alia*) "the names of the persons interested in or entitled to the money or securities, and their places of residence to the best of his knowledge and belief." This rule was revoked on the 1st of March, 1884, by the Supreme Court Funds Rules, 1884, r. 2. The Chancery Funds Amended Orders, 1874, ord. 5 (Ann. Prac. Supp., p. 12), directs the same person to forthwith give notice of such payment into court to the several persons named in his affidavit

(*a*.) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

to be made in pursuance of rule 34 aforesaid and the Trustee Relief Act as interested in or entitled to such money or securities. This order has never been expressly revoked, but rule 34, on which alone it can operate, is gone, and it is therefore ineffective. The note in Ann. Prac. Supp., p. 29, citing *In re Stening*, 50 L. T. N. S. 586, 32 W. R. Dig. 217, is clearly wrong, and is not borne out by the decision. The present practice is regulated by rule 41 of the Supreme Court Funds Rules, 1886, which repeats in effect rule 41 of the Rules of 1884, and does not require the names of the persons interested to be stated. Further, order 5 is inconsistent with the Supreme Court Funds Rules, 1886, and is therefore revoked by rule 2 (Ann. Prac. Supp., p. 16).

Methold, for the respondents.

CHITTY, J.—The form of affidavit to be used by a trustee who desires to lodge funds in court is given in rule 41 of the Supreme Court Funds Rules, 1886, and this is a subsisting rule. That form of affidavit does not require the trustee to state the names of the persons interested in or entitled to the money or securities, or their places of residence to the best of his knowledge and belief. In the abrogated Chancery Funds Consolidated Rules, 1874, the form of affidavit was given in rule 34, and it was required that it should state the above particulars. Now I must take it that when the rules of 1886 were framed, the matter came before those who had authority to frame them, and that they deliberately left these particulars out of the affidavit.

Now the Chancery Funds Consolidated Rules, 1874, r. 34, is clearly abrogated, but it appears that the Chancery Funds Amended Orders, 1874, ord. 5, which required a person having made a payment or transfer of moneys or securities into or a deposit of securities in court under the Trustee Relief Act to forthwith give notice thereof to the several persons named in his affidavit to be made in pursuance of this rule 34 and the said Act as interested or entitled to such money has never been in terms repealed. The question is, however, whether it has any effect now. It is clear it has not. As the trustee is not required according to the existing form of affidavit to state the names and addresses of the persons interested, it follows that he cannot be required forthwith to give notice to the several persons named, and the result is that he need not do so.

The alteration in the rule was probably deliberate, because there was often great difficulty in serving the notice. In many cases the money was only paid in because the trustee could not discover the person entitled, and, of course, he could not serve them with notice. Again, he often might know the names, but could not give the addresses. A further reason is, that as the matter must come before the court in any case the proper service of parties will be attended to as a matter of course before the money is paid out. [His lordship then, after referring to the facts, and holding that no notice need be served, continued:—] Pearson, J., in *In re Stening*, gave no decision inconsistent with what I have said, but merely thought it desirable that notice should be served at as early a period as possible in the particular case in order to protect the trustees and to prevent the initiation of useless litigation. I leave Mr. Maclean's second point untouched, though it is very possible that Chancery Funds Amended Orders, ord. 5, is repealed by the Supreme Court Funds Rules, 1886, r. 2.

Order as prayed.

Solicitors for all parties, *Johnson, Budd, & Johnson.*

(1893) 2 Ch. 449

Chan. Div. } Romer, J. } Nov. 26-29; Dec. 1, 6.

BELLAMY v. WELLS. (a.)

Injunction — Club — Nuisance — Crowds — Cabs — Whistling.

A proprietary club was established at which entertainments consisting of pugilistic encounters were given, which caused the collection of large crowds outside the club. The noise of the shouting of the crowd, and the frequency on all nights, and until early in the morning, of whistling from the club for cabs, which, in their turn, created much noise in driving to the club, prevented the tenants and occupiers of adjoining houses from sleeping at night. In an action brought by the owners, lessees, and occupiers of a neighbouring house against the proprietor of the club,

Held, that the nuisance from the crowds and cabs was the reasonable and probable consequence of the defendant's acts, and that an injunction ought to issue to restrain it, as well as the whistling for cabs during certain hours.

Trial of action.

The plaintiffs were the owners, lessees, and occupiers of No. 33, Gerrard-street, Soho, and the defendant was the proprietor of a sporting club known as the Pelican Club, which was erected on the site of Nos. 34 and 35, Gerrard-street and opened in February, 1890. The action claimed an injunction restraining the defendant, his servants and agents, from using or permitting to be used the premises in question for the purpose of glove fights, boxing contests, music, or other sports or entertainments, or in any other manner, or for any other purpose whereby a nuisance might be occasioned to the annoyance and injury of the plaintiffs. Boxing contests were from time to time held at the club, on which occasions large crowds collected, and created noise and disturbance. Besides this the club was continually kept open to an early hour in the morning, and cabs were constantly whistled for during the night, and made much noise in coming to the club. Concerts were also occasionally given at the club, and singing and music was frequently indulged in by the members, but the claim as to this part of the case was dismissed. The other details of the facts of the case appear sufficiently from the judgment.

Sir E. Clarke, S.G., Neville, Q.C., and *Rowden*, for the plaintiffs.—The best definition of the rights of an occupier to restrain such a nuisance as this is contained in *Walter* v. *Selfe*, 4 De G. & Sm. 322, at p. 323, where the circumstances under which an injunction is granted is where "the ordinary comfort of existence" has been interfered with. As to whether the club can be held liable for the nuisance created by the people coming there, *The King* v. *Moore*, 3 B. & Ad. 184, is in point, and shows that where this is the probable consequence of the defendant's act he is liable. *Walker* v. *Brewster*, L. R. 5 Eq. 25; *Inchbald* v. *Robinson*, 17 W. R. 459, L. R. 4 Ch. App., p. 397; and *Reinhardt* v. *Mentasti*, 38 W. R. 10, 42 Ch. D. 685, are all to the same effect. The real question in all these cases is, Is the neighbour in fact injured? There is no objection to people turning night into day if they like to do so, but they must be careful not to injure their neighbours in so doing.

Sir Richard Webster, A.G., Haldane, Q.C., and *Swinfen Eady*, for the defendant.—The street in question, up to a few years ago, was a noisy one, and was a thoroughfare before Shaftesbury-avenue was

(a.) Reported by J. W. GREIG, Esq., Barrister-at-Law.

opened. In all cases of nuisance arising from use of a place in a certain way, the character of the neighbourhood has to be taken into consideration. If any nuisance arose from the cabs which came to the club, that is a matter over which the club proprietor has no control, and for which he is not liable, nor is he liable for the crowds collected on the occasion of the glove contests. [ROMER, J.—As to the crowds three questions arise: (1) Whether in fact a nuisance was created by them; (2) whether the collection of crowds was a probable result of the action of the club; and (3) whether the fights and contests to which the crowds might be due, have been of so frequent occurrence as to justify the interference of the court.]

Haldane, Q.C.—As the contests were quite legal, we are not liable for the collection of crowds. As to the complaints of the noise of the whistle, the language of the cabmen, and the noise of the cabs, these are but the ordinary incidents of London life, and must be submitted to.

Sir E. Clarke, S.G., in reply.—The defendant is entitled to whistle so long as he does not annoy other people, which in our case he does.

ROMER, J.—This is an action to restrain a nuisance by noise alleged to be committed by the defendant, as proprietor of a club called the Pelican Club, whose premises are situate in Gerrard-street, Soho. The plaintiffs are the occupants and owners of No. 33, Gerrard-street. The club is a proprietary one, and the business of the club is carried on by the defendant alone for his own benefit, he alone receiving the profits derived from it, so that, beyond question, if any nuisance is caused by the club the defendant is responsible for it. The case sought to be established by the plaintiffs may be divided into three heads—First, nuisance caused by certain boxing contests held at the club; secondly, nuisance caused by the whistling for the cabs and carriages for members leaving the club, and the noise of the cabs and carriages themselves; and, thirdly, nuisance caused by music and singing in the club and applause consequent thereon. With regard to the boxing contests, the facts are these:—The club is one formed for the purpose (*inter alia*) of affording entertainments to its members by boxing contests for large money prizes between celebrated professional pugilists. These contests are held from time to time in the season between October and August, in the basement of the club premises, generally about midnight or later. No complaint is made by the plaintiffs of any nuisance by noise arising directly from the contests, but it is said that they cause a large and rough crowd to assemble in Gerrard-street, which remains for hours until the early morning after the contests are decided, and which blocks up the street and makes a great noise by cheering, hooting, and whistling, especially when the combatants and their friends arrive at or leave the club, and when the result of the contests is announced and during the time that the police are endeavouring to cause the crowd to move on or to disperse. Three of these contests, which admittedly took place for large sums of money between well-known pugilists, were held, the first in November, 1889, before the club premises were fully opened to the members, the second in February, 1890, on the occasion of the club premises being formally thrown open to the members, and the third in June. And the result of the evidence of the plaintiffs' witnesses was that each of these three occasions caused a large mob to assemble, whose noise created an intolerable nuisance to the occupiers of No. 33, Gerrard-street, and the surrounding houses, and prevented sleep until a late hour in the morning. Now on the question whether or not, on the three occasions I have referred to, the crowd, in fact, caused a nuisance by noise to the occupiers of No. 33, after hearing the witnesses on both sides I have come to the conclusion that the plaintiffs have proved such nuisance.

It remains, then, for me to consider the point whether the defendant can be held responsible for this nuisance. On his behalf it was said that he had not invited the crowd, and did not desire its presence. This is true.

But the question appears to me to turn upon this—whether the collection of the crowd under the circumstances was not the probable consequence of the defendant's acts, for, if it was, then he is answerable, whatever may have been his object or desire, on the principle pointed out by Littledale, J., in the well-known pigeon-shooting case of *The King* v. *Moore*. And the same principle is referred to in the case of *Walker* v. *Brewster*. Now, I think that the collection of this crowd was a probable consequence of the defendant's acts and one which (again to cite Littledale, J.) the experience of mankind would lead anyone to expect as the result. This appears to me to follow on consideration of the following facts. As appears from the evidence, these contests require at least a month's training on the part of the combatants, who are selected amongst the most distinguished of their calling, and a somewhat long notice has to be given to the competitors of the day on which the combat will take place between them, and this day so becomes known to their numerous friends and admirers, who appear to take a deep interest in the result of the contest, and flock to the spot where the combatants can be seen and the result most speedily known. Moreover, the club is a large one, numbering (as appears from the evidence) about 1,200 members, and notice of each approaching contest is given to the members some considerable time beforehand, and through them would naturally become well known to the numerous class who take an interest in pugilistic encounters. For instance, the notice given for the contest on the 27th of June is in evidence, and was clearly given before the 4th of June. Again, the defendant himself evidently contemplated that the result of his acts would be the assemblage of a crowd on these occasions, for on each of the three he gave previous notice to the police, so that they might be prepared with extra force to deal with the apprehended assemblage, and the police authorities made arrangements accordingly. And, lastly, I refer to the fact that on each of the three occasions, as also on the only other somewhat similar but less formidable occasion of the 31st of March, the prognostications of the defendant were amply fulfilled, and a mob did collect. It further appears from the evidence that, unless the defendant be restrained by injunction, the occasions of nuisance I have referred to will probably be repeated, for the arrangements of the club are that these special contests shall take place at least four times in the course of each season, which commences some time in October and ends at the end of July, or thereabouts.

Under these circumstances, and having regard to the serious nature of the nuisance, as proved by the plaintiffs' witnesses, being one taking place and preventing sleep on the part of those suffering from it for some time before and for some hours after midnight, I have come to the conclusion that the plaintiffs are entitled to an injunction on this head, for it certainly cannot in my judgment be successfully contended by the defendant that, in holding these contests and so collecting noisy crowds at the late hour he does, he is using the club premises in an ordinary way or is not materially interfering with the ordinary comfort of existence of the occupiers of No. 33, "according to plain and sober and simple notions among the English people" (see judgment of Shad-

well, V.C., in the well-known case of *Walter* v. *Selfe*). The next complaint of the plaintiffs I have to consider is with reference to the whistling for cabs and carriages, and the noise caused by the cabs and carriages driving up to and away from the club. As to this there is again a conflict of testimony. I will first state what is the result I have arrived at, after seeing and hearing the witnesses on both sides and considering their evidence. The club is what is called a late one, and was described by one of its members (a witness for the defendant) as a Bohemian club. It appears to be largely frequented after midnight, and remains open until a very late (or early) hour in the morning. Members are leaving from time to time, and frequently (on some nights, of course, not so often as on others) at all hours after twelve up to as late as six in the morning. During these hours, from time to time, cabs are whistled for by the usual loud street whistle familiar to us all, and then the cabs answer to the whistle and pass rapidly to the club over the adjacent street, which is here paved with cobbles. Often, in answer to the whistle, two or more cabs race for the fare, and this causes additional noise, often varied by the violent language of the cabman who fails to secure the fare. The effect of the loud noises caused by the cabs, and the whistling repeated night after night at divers times between midnight and six in the morning, has been, in my judgment, to wake up repeatedly between those hours and almost every night those occupants of the houses near the club who sleep in rooms fronting on the street, and to cause a nuisance to them, and in particular to the occupants of No. 33, and an injury to the lessee and freeholders of No. 33 by lowering the rental value of that house (which is let out to the occupants as weekly tenants), and by making it difficult to procure tenants except of an inferior class, and at reduced rents. This being the conclusion of fact I have come to on this part of the case, it follows that an injunction must go against the defendant. For him it was urged that every householder has a right to call cabs to his house for the convenience of himself and guests, and to use a whistle for the purpose. The answer is that, whatever may be the right of a householder when using his house in an ordinary way, the present is in no wise an user of an ordinary or common kind. The defendant is carrying on a large business as a club proprietor and a business of a peculiar kind. It is not the ordinary practice of the occupier of a house in London to keep it habitually open for numerous guests up to five or six every morning, and to call cabs for those guests by whistles at frequent intervals between midnight and five or six a.m. Counsel for the defendant urged that even in the quietest parts of London the occupants of a house must occasionally suffer, without complaint, from a ball at a neighbour's kept up late, and from the noise arising from the calls of the linkmen and the arrival and departure of the carriages and cabs of the guests. That is because the balls are not frequent, and people in London must and do act on the give-and-take principle and reasonably. But those who have been kept awake by the noise of a neighbour's assembly know that it is not pleasant, even for a single night, and no inhabitant would be bound to submit to his rest being disturbed night after night because his neighbour chose to indulge in over-lavish hospitality.

I should observe that an attempt was made on behalf of the defendant to make out that Gerrard-street was a noisy street; but on the whole evidence I think it appears that that street is not at all an exceptionally noisy street, and certainly the noises suggested to arise from other houses in the street, such as the Italian Club and the French Club, and from cabs going to the railway stations through the street, could not be compared with or excuse the noises complained of by the plaintiffs in this action. I may add that, assuming a nuisance by noise to arise from the club to the occupiers of No. 33, who are weekly tenants, it is clear that the case is one entitling the owners and lessees of that house to sue as co-plaintiffs, and indeed that proposition was not contested by the defendant's counsel. [His lordship then proceeded to examine the part of the case relating to alleged nuisance arising from music and singing in the club, and held that it was not substantiated by the evidence.]

I have now to consider the form the injunction must take on those parts of the case on which the plaintiffs have succeeded. It requires care in framing in order not to press upon the defendant unduly or beyond what is absolutely required to protect the plaintiffs. It will go in the following form—and it will be seen that I have limited the injunction, in the case of the whistling and cabs, to the hours between midnight and 7 a.m., as I think it is from the noise within those hours that substantially the plaintiffs are suffering:—"An injunction to restrain the defendant from carrying on or permitting to be carried on by himself, his manager, or agents, the business or concern of the Pelican Club on club premises in the pleadings mentioned so as to cause a nuisance by noise to the plaintiffs (other than the plaintiff Isabella Phillips), or any of them, as owners, lessee, or occupiers of the premises No. 33, Gerrard-street, Soho, or any of the tenants or under-lessees of the plaintiffs Bellamy, Tylden, and Eliza Turner, or any of them, as owners or lessee of the last-mentioned premises, (1) by cabs or carriages driving to or leaving the club premises and the whistling for carriages or cabs to the club between the hours of midnight and 7 a.m.: and (2) by any crowd caused to be assembled by the boxing contests or entertainments held at the club premises." The injunction thus limited will not in any way prevent the defendant from efficiently carrying on the business of the club in a reasonable manner. This is not a case for inquiry as to damages, nor was any asked for by the plaintiffs' counsel.

Solicitors for the plaintiffs, *Holt, Beecer, & Co.*

Solicitors for the defendant, *Hastie.*

Q. B. Div. (Hawkins and Stephen, JJ.) — Nov. 7, 13.

In re LOCAL GOVERNMENT ACT, 1888.
Ex parte LEICESTERSHIRE COUNTY COUNCIL. (a.)

County council—Quarter sessions—Standing joint committee—Police districts—Police Act, 1840 (3 & 4 *Vict. c.* 88), *ss.* 3, 27—*Local Government Act,* 1888 (51 & 52 *Vict. c.* 41), *ss.* 3, 9, 28, 30, 81.

The power of altering police districts, which, under the Police Act, 1840, *was vested in quarter sessions, is transferred by the Local Government Act,* 1888, *to the standing joint committee.*

Case stated under section 29 of the Local Government Act, 1888.

At the Michaelmas Quarter Sessions for the county of Leicester, on the 15th of October, 1849, it was resolved to divide the county into eight police districts, pursuant to the provisions of sections 3 and 4 of the Police Act, 1840. The resolution was

(a.) Reported by G. K. PALEY, Esq., Barrister-at-Law.

approved by the Secretary of State, and since that time the county has been divided into police districts, and general and local police rates have been assessed and levied as provided by the Act.

At a meeting of the county council held on the 23rd of October last, it was resolved that in the opinion of the council no distinction ought to be made in the assessment and levying of the rate for police purposes throughout the county, but that the entire expenditure in connection with the police should be defrayed in common by the entire county.

The question for the court was whether the powers formerly exercised by justices in quarter sessions of assessing and levying police rates, of altering the existing police districts, and of assessing and levying one equal police rate throughout the county, instead of assessing and levying a general police rate and local police rates as hitherto, were transferred to and exercisable by the county council or to and by the standing joint committee.

Buszard, Q.C., and *Macmorran*, for the county council.—All questions of rating are transferred to the county council by the Local Government Act, 1888. This is purely a question of rating, for the primary object of making police districts was to enable special rates to be made on those districts which required more police than the rest of the county. The county council, therefore, and not the joint committee, ought to deal with it.

R. S. Wright, for the standing joint committee.—The question is one as to management, not as to the power of making rates. It is only the power of making rates that is transferred to the county council. All matters connected with the management of police, to which class the alteration of existing police districts clearly belongs, are transferred to the joint-committee: *Ex parte The Somerset County Council, In re The Local Government Act*, 1888, 58 L. J. Q. B. 513, 38 W. R. Dig. 117.

Buszard, Q.C., in reply.—The case cited applies only to questions connected with the maintenance and repair of buildings, and does not affect the assessment or levying of rates.

HAWKINS, J.—This case raises an important question depending chiefly on section 27 of the Police Act, 1840, and on section 3 of the Local Government Act, 1888. Section 27 of the former Act vests the power of regulating police districts in the justices. In pursuance of this power police districts were, in 1849, constituted by resolution of the justices, approved of by the Secretary of State, and ever since that time the county had been divided into police districts, and general and local police rates had been assessed, and this arrangement had continued for forty years, and it may be fairly assumed that it has worked well. Then comes the Local Government Act, 1888, upon section 3 of which the present question mainly turns.

That section enacts that "there shall be transferred to the council of each county the administrative business transacted by the justices in sessions, comprised under various heads set forth, including "the assessing and levying of police rates," and the application of the expenditure thereof, &c. I cannot, however, suppose that it was intended to include the powers expressly given to the justices by the Police Act of 1840. If a transfer of these powers to the county council had been intended, there would surely have been some special reference to it in the Act. Moreover, we find that by section 9, sub-section (1), "all the powers, duties, and liabilities of the justices in quarter sessions, or out of sessions, as to the police shall vest in the standing joint committee of the justices and of the county council." I am of opinion, therefore, that these powers are vested in that committee, and that the question raised in the case must be decided in their favour.

STEPHEN, J., concurred.

Judgment accordingly.

Solicitors for both parties, *Kingsford, Dorman, & Co.*, for *Freer*, Leicester.

House of Lords.

From C. A. (England). June 19, 1890.

ENO *v.* DUNN. (*a.*)

Trade-mark—Registration—Words calculated to deceive —"Fruit salt"—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 73.

The respondent applied to register a trade-mark, of which the words "Dunn's Fruit Salt Baking Powder" formed a conspicuous part. The appellant had for many years used the words "Fruit Salt" as his trade-mark for a powder for an effervescing drink, and opposed the application.

Held (Lords Halsbury *and* Morris *dissenting*), *that the proposed words were calculated to deceive the public, that the registrar had a discretion whether to register or not under section* 73 *of the Patents, Designs, and Trade-Marks Act*, 1883, *and should refuse were it is not clear that the public would not be misled.*

Decision of the Court of Appeal *reversed.*

This was an appeal from an order of the Court of Appeal (Lindley and Fry, L.JJ., Cotton, L.J., dissenting), reported 41 Ch. D. 439.

The respondent applied to register as a trade-mark a label representing a woman holding up a dish of cakes with the words "Dunn's Fruit Salt Baking Powder," "The Cook's Best Friend," and was opposed by the appellant.

The respondent thereupon took out a summons that the application might be proceeded with, the appellant opposing on the ground that the use of the term "fruit salt," as proposed by the respondent, was calculated to deceive.

The evidence and proceedings generally are stated in the judgments. Kay, J., dismissed the respondent's application, but this decision was reversed by the Court of Appeal.

Sir R. Webster, A.G., and *Aston, Q.C.* (*John Cutler* with them), for the appellant.

In re Palmer's Trade-Mark, 32 W. R. 306, 24 Ch. D. 504; *Orr-Ewing* v. *Registrar of Trade-Marks*, 28 W. R. 17, 4 App. Cas. 479; *Johnston* v. *Orr-Ewing*, 30 W. R. 417, 7 App. Cas. 219; *Edwards* v. *Dennis*, 30 Ch. D. 454, 34 W. R. Dig. 197; *In re Australian Wine Importers*, 37 W. R. 578, 41 Ch. D. 278, were referred to.

Moulton, Q.C., and *Birrell*, for the respondents.

Sir R. Webster, A.G., replied.

The House took time for consideration.

June 19.—Lord HALSBURY, C.—I am unable to concur in the view entertained by the majority of your lordships that the judgment of the Court of Appeal was wrong. I think that court put the right

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

construction upon the 73rd section of the statute, the section upon which, I believe, we are all agreed the question must turn, and, indeed, I do not see that any difference of opinion exists among us as to that construction; but while I agree that no absolute right to the registration of a trade-mark is given to an applicant for registration, the meaning and intent of the statute itself is that, unless for some of the reasons contemplated by the statute there is an objection to the registration, the trade-mark ought to be registered. Unless we are of opinion that there is something in the proposed trade-mark which the statute renders an objection to its registration, we ought to grant the application.

I think I may dismiss all other considerations here except the objection that the proposed trade-mark comes within that part of the 73rd section which enacts that it shall not be lawful to register, as part of, or in combination with the trade-mark, any words the exclusive use of which would, by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a court of justice, or any scandalous design. Then, again, I may omit to consider the words "or otherwise," and the words "scandalous design," and confine myself to the consideration of the words "fruit salt." The trade-mark itself is free from all objection, unless these words make it objectionable. While the statute is wide enough to include within it any deceit, one must remember one is dealing with a trade-mark, and a deceit which is relevant to the subject-matter in debate is, as I understand, what is here insisted on. Could the comptroller refuse to register this trade-mark upon the ground that it so nearly resembled Mr. Eno's trade-mark, already on the register, as to be calculated to deceive a purchaser into believing that he was buying Mr. Eno's powder when he was buying Mr. Dunn's? It is only necessary to place them side by side to see the difference of them even as marks. A cook with a dish of baked confectionery, with Mr. Dunn's name very prominently exhibited as the maker of a baking powder, bears no resemblance, even the slightest, to Mr. Eno's Fruit Salt, or Fruit Saline, or Fruit Powder, surrounded by grape leaves and grapes. I must add, however, that no verbal description of the difference does entire justice to the dissimilarity of the two trade-marks. If Mr. Eno were to rely upon the section which I have quoted, he would be further met by the objection that the same goods, or description of goods, form essential words in the section, and a baking powder is not a powder for an effervescing drink, nor for a medicine. I accept the evidence as true that "fruit salt" is now only applied to Eno's Fruit Salt, since it is clear that, until Mr. Dunn sought to use the phrase, the words "fruit salt" only meant in shops where such articles were sold the "fruit salt, fruit saline, or fruit powder" which Mr. Eno sold; but it does not, therefore, follow that two ordinary words in the English language, though, I will assume, new in their combination, here become the property of Mr. Eno.

Apart from what Lindley, L.J., says upon this subject, though I do not disagree with him, so long as that combination of words was only applied to one thing, and that one thing was advertised as Mr. Eno's "fruit salt," the phrase would naturally mean Eno's Fruit Salt. But if it were applied to a baking powder, I cannot believe that anyone would either suppose he was buying an effervescing drink, or that Eno's Fruit Salt formed an ingredient in it. It is here, I believe, that the difference arises in the minds of some of your lordships. For my own part, I cannot conceive the possibility of an ordinary person supposing that the medicinal salt obtained from fruit by Mr. Eno was the same salt which Mr. Dunn used as a baking powder. It is the knowledge of the chemist, and not that of the ordinary person, which recognizes the bitartrate of potassa as the basis of both. At least three salts can be obtained from, and exist naturally in, fruit. Why, to the popular mind, should a baking powder obtained from fruit be the same salt as that which furnishes its medicinal qualities to Mr. Eno's effervescing drink? It is admitted that Mr. Eno has no right to the exclusive use of the words. It is admitted he has no patent right in the thing, and yet a trade-mark totally unlike Mr. Eno's must not be registered, because the exclusive use of the words in debate is calculated to deceive. I cannot think that is right. It may be true that the statute gives no right to the applicant to be registered, which is, in its nature, absolute. Indeed, where so much must be left to discretion and judgment, it could hardly do so; but I do not think that is of importance here, since it clearly means that if no such objections as it points at can be made to the registration, the comptroller ought to register, and we are now in the position of the comptroller, and ought to register, if these objections do not exist. I think they do not exist here, and, therefore, I think the judgment of the Court of Appeal ought to be affirmed.

Lord WATSON.—This appeal does not appear to me to raise any serious question in regard to the construction of the Patents, Designs, and Trade-Marks Act, 1883, but depends upon matters of fact, as to which opinions may differ. The statute nowhere confers an absolute right to register a trade-mark. The comptroller, by section 62, may, if he thinks fit, refuse to register, his refusal being subject to an appeal to the Board of Trade, who may either hear parties and decide whether, and subject to what conditions, if any, registration is to be permitted, or may refer the matter to the court for its determination.

Section 72 (2) prohibits the registration, with respect to the same goods or description of goods, of a trade-mark so nearly resembling a trade-mark already on the register, with respect to such goods or description of goods, as to be calculated to deceive. That provision is supplemented by the broader enactments of section 73, to the effect that "it shall not be lawful to register, as part of or in combination with a trade-mark, any words the exclusive use of which would, by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a court of justice, or any scandalous design." These prohibitory clauses cast upon the applicant the duty of satisfying the comptroller, or the court, that the trade-mark which he proposes to register does not come within their scope. In an inquiry like the present, he does not hold the same position which he would have occupied if he had been defending himself against an action for infringement. There the *onus* of showing that his trade-mark was calculated to mislead rests, not on him, but upon the party alleging infringement; here he is *in petitorio*, and must justify the registration of his trade-mark by showing affirmatively that it is not calculated to deceive. It appears to me to be a necessary consequence that, *in dubio*, his application ought to be disallowed. I think the present case must be dealt with under the provisions of the 73rd section. If the use of the words "fruit salt" in the trade-mark, which the respondent asserts his right to register, would be calculated to deceive the public, such use is expressly forbidden by that clause. Whether it would or would not have a misleading effect is, according to my apprehension, the only question arising for decision. I do not think it necessary to refer to the evidence in detail. It

appears to me to establish conclusively that, although the words "fruit" and "salt" are in common use wherever the English tongue is spoken, they have in combination no technical or scientific meaning, and, before the respondent entered the field, were never applied, in popular language, to any known substance other than the article manufactured and sold by the appellant under the name of Eno's Fruit Salt. That circumstance does not give the appellant a right of property in the words "fruit salt," or entitle him to use them, by themselves, in a registered trade-mark; but it is, nevertheless, a material circumstance in considering whether the use which the respondent proposes to make of them in his trade-mark would be calculated to mislead. I have come to the conclusion that the proposed use of the term "fruit salt" by the respondent might, and in many instances probably would, have the effect of deceiving the public.

It is no doubt said that the respondent's trade-mark is for a baking powder, to be used in the manufacture of bread, whereas the appellant's mark is for a powder to be used in producing an effervescing drink; and that there can be no risk of any member of the public confounding the two things. To a certain extent the criticism is well founded. I do not suppose that persons intending to bake would buy Eno's Fruit Salt, or that persons desiring to indulge in an aperient drink would invest in Dunn's Fruit Salt Baking Powder. But I do think that there would be a supposed connection between the two articles in the minds of many persons, who would naturally assume that the baking powder had been manufactured with the appellant's fruit salt, and purchase it in that belief; so that a batch of badly-made baking powder might seriously injure the credit of the effervescing powder. Having regard to the uncandid statements made by the respondent with respect to his selection of the words, I cannot avoid the conclusion that he adopted them, as they now stand in his trade-mark, with the deliberate purpose of obtaining pecuniary advantage from the wide reputation of the appellant's manufacture and the probability of purchasers connecting it with his own baking powder. I do not for a moment suggest that everybody would be misled. Skilled chemists and persons of intelligence who gave heed to the matter might incur no risk of error; but I cannot assume that these are the only classes who may be expected to purchase packets of baking powder and Eno's Fruit Salt.

It was argued that to give effect to these considerations would be equivalent to allowing the appellant to appropriate, as his own property, two words in common use. The argument appears to me to underrate the resources of the English language, which are, in my opinion, quite sufficient to enable anyone, honestly desirous of distinguishing his own goods, to use these words in a trade-mark in such a manner as to prevent any possibility of their being connected with the appellant's fruit salt. For these reasons I am of opinion that the judgment of the Court of Appeal ought to be reversed with costs and the order of Kay, J., restored, and I move accordingly.

Lord HERSCHELL.—This appeal arises out of an application made by the respondent on the 29th of June, 1887, to register a trade-mark, of which the words "fruit salt baking powder" formed a conspicuous element, although any right to the exclusive use of the words "fruit salt" was disclaimed. The appellant opposed the application on the ground that the proposed trade-mark was an infringement of a trade-mark registered by him, and also that it was calculated to deceive. On the 12th of April, 1888, the respondent took out a summons for an order directing the comptroller to proceed with his application. Kay, J., refused to make such an order, but the Court of Appeal reversed this decision, and ordered the comptroller to proceed. The judgment was that of the majority of the court, Cotton, L.J., dissenting.

It was not contended at the bar that the respondent's application to have the mark registered should be rejected on the ground that it was an infringement of the appellant's trade-mark. The only point insisted on was that it ought not to be registered because it was calculated to deceive. In order to appreciate the point it is necessary to bear in mind the facts which have been proved. I take it to be indisputable upon the evidence that prior to the appellant's use of the term "fruit salt" to describe the powder manufactured by him that expression had not been in use, either in scientific or popular nomenclature, as descriptive of any substance. The combination of words appears to have been adopted by him for the first time for the purpose of describing the powder he prepared and sold. Owing to his having extensively advertised it, "fruit salt" had, at the time the respondent applied for his trade-mark, come to be well known by the public, and was largely dealt in as an article of commerce. I can draw no other conclusion than that these two words if employed alone would then have been understood by the public and those engaged in trade as applying to the powder manufactured by the appellant. I am for the moment speaking only of the use of these words by themselves. I shall have to consider presently the effect of using them in combination with others. Fry, L.J., says that they are common English words, so collocated as to become descriptive, and that they convey to his mind an intelligible, if vague, notion similar to that derived from them by Mr. Clayton, the chemist—viz., that the preparation which Mr. Eno sold contained some ingredients derived from fruits. I have no doubt that this might well be so in the case of a person with some chemical knowledge; but I see no reason to think that the same idea would be conveyed to the minds of the public generally. I give credit to the evidence, which I see no reason to differ from, that the idea suggested by the words to those engaged in commerce, and to the public at large, would be Mr. Eno's powder, and that alone.

Assuming this to be so, the next question is, would the words, in the collocation in which they are found in the proposed trade-mark of the respondent—viz., Dunn's Fruit Salt Baking Powder—be calculated to deceive? I do not understand it to have been doubted that if this language would induce the public to believe that Eno's Fruit Salt Powder was an ingredient of the baking powder, or employed in its preparation, or that the appellant was connected with the manufacture of the baking powder, the proposed trade-mark would be open to objection. But it is said that there would be no danger of any such notion being acquired by the public; that an aperient medicine and a baking powder are such essentially different things that no one would imagine that the one could enter into the composition of the other. I think this is scarcely a fair statement of the case. Fruit salt is described in its registration under class 42, in which the respondent seeks to be registered, as "a dry preparation for making a non-intoxicating beverage," though it is true that it does possess slight aperient properties, and that the trade-mark is registered also in class 3, where the description of goods is "a proprietary medicine for human use." Nevertheless, the argument remains, and is, no doubt, deserving of serious attention. I may say at once that in my opinion the appellant has no exclusive property in the words "fruit salt," and if it were

proposed so to employ them that no reasonable person could suppose that they had reference to the appellant's preparation, such a use would be perfectly unobjectionable. For example, I cannot conceive anyone imagining that a "fruit salt umbrella" was in any way connected with the article manufactured by Mr. Eno. And numberless similar illustrations might be given.

But I am unable to arrive at the conclusion that fruit salt and baking powder are of so essentially different a character that the one could not be supposed to enter into the composition of the other. The evidence appears to me to be cogent the other way. Two persons at least did, before this litigation was even contemplated, use Eno's Fruit Salt with success as baking powder. It not only occurred to them that this fruit salt might be so used, but they actually so employed it. I do not think the importance of this evidence was fully appreciated in the court below. It was said, I have no doubt truly, that the appellant had never advertised or sold his preparation as a baking powder, and that his powder and the respondent's were not likely to be sold the one for the other. But this does not, to my mind, dispose of the evidence. Seeing that "fruit salt" would mean, in the eyes of the public, the appellant's powder, and that it had occurred to people to use it for the purpose of baking, does it not seem highly probable that the words "fruit salt baking powder" would convey widely the idea that the appellant's powder was one of its principal ingredients? I cannot avoid the conclusion that it would, and that the proposed use of the words "fruit salt" would be calculated to deceive. But I do not think it is necessary to go so far as this. I think it is enough to say that I am not satisfied that there would be no reasonable danger of the public being so deceived.

The case was argued on behalf of the respondent as if he had an absolute right to have any trade-mark registered which was not proved to fall within the terms of either the 72nd or 73rd section of the Act. I do not so read the statute. Those sections prohibit the registration of a trade-mark in certain specified cases, but there is no duty cast upon the comptroller of registering every other trade-mark that may be applied for. On the contrary, whilst he is in certain cases prohibited from registering, a discretion, whether to register or not, appears to me to be in all other cases plainly conferred. Of course this discretion must be reasonably, and not capriciously, exercised; but it is, in my opinion, a reasonable exercise of it to refuse registration when it is not clear that deception might not result from it. To prevent misapprehension, I desire to add that your lordships have not now to determine whether the appellant could in any, and, if so, in what, cases restrain the use of the words "fruit salt." I have already indicated my opinion that the appellant has no private property in them. The sole point for decision is, whether the comptroller ought to be directed to proceed with the registration of a particular trade-mark of which they form an element.

For the reasons I have given I think he ought not, and that the judgment appealed from ought to be reversed.

Lord MACNAGHTEN.—If it had not been for the difference of opinion to which this case has given rise I should have thought the question before your lordships tolerably free from difficulty. Ever since courts of equity have interfered to protect traders in the exclusive use of marks and words which they have lawfully appropriated for the purpose of distinguishing their goods, it has been an established principle that this protection is not to be extended "to persons whose case is not founded in truth." That is said to be a clear rule. Unfortunately, in the keen competition for business, a trader not unfrequently endeavours to attract custom by representing that the goods which he offers for sale are different in origin, composition, or character from what they really are. The public are constantly tempted to buy one thing when they think they are buying another. It is not, as has been observed, the province of the court to protect speculations of this kind. Between rival traders the application of the principle is necessarily a matter of extreme difficulty. But as between the innocent public and a trader seeking registration of a proposed trade-mark there is, I think, no room for hesitation or doubt. The statute allows any person to oppose an application for registration, whether he has or has not a personal interest in the result. It declares that it is not lawful to register as part of, or in combination with, a trade-mark any words the exclusive use of which would, by reason of their being calculated to deceive, be deemed disentitled to protection in a court of justice. It seems to me that in registering trade-marks the principle to which the enactment so plainly refers ought to be applied without any qualification whatever, and that the comptroller to whom in the first instance is committed the "discretionary power," as it is termed in the Act, of registering a trade-mark, ought to reject words which involve a misleading allusion or a suggestion of that which is not strictly true, as well as words which contain a gross and palpable falsehood. In the present case the evidence shows that the expression "fruit salt" has come to mean Mr. Eno's preparation, that at present it means nothing else, and that Mr. Eno's preparation is well known and very popular. Mr. Dunn adopts the expression "fruit salt," and gives it a prominent position among the words he seeks to register. I have no doubt that those words are calculated to deceive. They are calculated, and I think designed, to create confusion in the minds of those persons to whom Mr. Dunn's advertisements are addressed, and to lead the ordinary run of such persons to suppose that his baking powder is in some way or other connected with Mr. Eno's preparation. The object, I think, was, and if Mr. Dunn's application were successful the result I am convinced would be, in some cases at any rate, to induce people to buy under an impression not founded in truth, and not, perhaps, the less misleading because it is vague and indefinite, and it may be incapable of bearing the very slightest examination. Mr. Eno has not, and cannot have, any exclusive property in the expression "fruit salt." The words of which it is composed are common English words. Anybody may use them in any manner and in any connection he pleases, provided he takes care that the use to which they are applied is not calculated to deceive. The learned judges who were in favour of Mr. Dunn in the court below seem to have come to the conclusion that Mr. Dunn's object was to obtain the benefit of the celebrity which the name adopted by Mr. Eno has acquired, but that it was not his object to steal Mr. Eno's trade. So far I am disposed to agree; but I do not think that those propositions cover the real question. The question is one between Mr. Dunn and the public, not between Mr. Eno and Mr. Dunn.

It is immaterial whether the proposed registration is or is not likely to injure Mr. Eno in his trade. Equally immaterial, as it seems to me, is the fact that for a considerable time Mr. Eno had on the register as his trade-mark the words "fruit salt." Mr. Eno may have gained some advantage to which he was not properly entitled; but that is hardly a reason for permitting Mr. Dunn to practise a deception upon the

public. I am of opinion that the decree under appeal ought to be reversed, and that the decision of Kay, J., ought to be restored.

Lord MORRIS.—I concur with the conclusion arrived at by the Lord Chancellor in this case. The facts necessary to recapitulate are: The appellant had caused to be registered the words "fruit salt" as a trade-mark. The label printed in the appendix to the case represents it thus: "Eno's Fruit Salt, Fruit Saline, or Fruit Powder, a dry preparation for making a non-intoxicating beverage." The respondent applied for registration of a trade-mark consisting of a label having thereon, "Dunn's Fruit Salt Baking Powder." A representation of the respondent's label is also set out in the appendix. Except that the two labels use the words "fruit salt," they could scarcely be more dissimilar. The appellant opposed the respondent's application upon two grounds—first, that the trade-mark proposed to be registered was an infringement of the appellant's trade-mark in using the words "fruit salt"; second, that the use of the term "fruit salt" was calculated to deceive.

The respondent, on the other hand, contended that the appellant had never been entitled to be registered in respect of the words "fruit salt" as a trade-mark. This contention was yielded to by the appellant, and he submitted to an order to remove the words off the register. The case is consequently out of the 72nd section of the Act of 1883, and is narrowed to one point—Is the respondent's use of the words "fruit salt" calculated to deceive within section 73? The respondent stated in his affidavits that he adopted the words "fruit salt" from a copy of "Brande's Manual of Chemistry." No such phrase is in the book, and I discredit the statement. The respondent obviously adopted the phrase from the appellant's use of it. The words "fruit salt" in connection are not *per se* calculated to deceive; for the baking powder has a main constituent, bitartrate of potassa, a salt contained in fruit. But, as I understand it, the appellant contends that buyers of the respondent's baking powder would believe, from the use of the words "fruit salt," that it was an adaptation of the appellant's so-called invention. This contention is, in my judgment, untenable. It appears to be founded on the assumption that the words "fruit salt" is a fancy phrase invented by the appellant, who has given evidence that none of the ingredients of his fruit salt were salts found in fruit. I can arrive at no other conclusion than that the use of the two words "fruit salt," words of ordinary English, when used in that connection, imply that there was a salt extract from fruit in the preparation, and I must act on my own understanding of the words "fruit salt, fruit saline, or fruit powder," as, in their ordinary signification, meaning that some salt extract from fruit formed an ingredient of "Eno's Fruit Salt Powder."

The appellant's contention is founded on a supposed invention of an arbitrary term or fancy phrase, "fruit salt"; whereas it appears to me to be the description of an ingredient of his powder, whether truly or untruly stated to be so. In my judgment this case stands thus: Eno advertises that he has a powder for producing an aperient drink of which salt derived from fruit enters into the preparation, while Dunn advertises that he has a powder for baking bread of which salt derived from fruit enters into the preparation. Why is Dunn suggesting anything deceptive in truly stating that his baking powder contains fruit salt, because that Eno had previously used the same words to convey that his aperient drink contained it? The appellant, however, has given evidence to prove that his fruit salt powder does not contain any ingredient of salt extracted from fruit, and, as I understand, relies upon that evidence to establish that the words "fruit salt" must be taken to denote only a fancy description of his preparation, and not a description of any of the ingredients of which it was composed. But, in the view I entertain, that argument would lead to this result, that Eno, from having deceived the public into the belief that his powder for making a drink contained salt derived from fruit, can now prevent Dunn from truly stating his powder for making bread contained it, because, forsooth, the catchwords "fruit salt," used to describe the ingredient in both compositions, may deceive a purchaser of these most dissimilar and different articles of consumption and use. To avoid so untenable a position the appellant resorts to what appears to me an extraordinary contention—namely, that his powder might be used for baking as a baking powder also, and that consequently his trade for baking purposes might be interfered with, and that persons who wanted "Eno's fruit-salt powder" to bake, might be deceived into buying Dunn's ditto. This argument wants a foundation in fact. It is true an archdeacon of Pietermaritzburg, when unable to obtain baking powder, states he used Eno's fruit salt for baking in 1877 and 1880, and apprised Eno of the fact; and the appellant's accountant states his wife had used it for four years past as a baking powder, and two other witnesses deposed to the same, on experiments made, I collect, after this action had commenced, as no date is given, and the experiments are stated to have been lately made: the same evidence could be given of the possible use of a seidlitz powder. Can it be gravely asserted that such a use of the aperient drinking powder could ever be an ordinary one, or that it was ever contemplated by Eno, or that he could or would adopt such a trade of his powder? He has never advertised or purported to sell it to bake bread. In my opinion there is nothing in the use by Dunn of the words "fruit salt," to deceive purchasers; and in deciding in favour of the appellant we should practically give him the exclusive right to use the words "fruit salt," though admittedly incapable of being registered by him as a trade-mark, to the exclusive use of which words he is not entitled.

I am of opinion the judgment of the Court of Appeal should be affirmed.

Order appealed from reversed, and judgment of Kay, J., restored, with costs here and below; cause remitted to the Chancery Division.

Solicitors for the appellant, *Garrard, James, & Wolfe.*

Solicitors for the respondent, *Radford & Frankland.*

Court of Appeal.

From Q. B. Div. Dec. 4.

EDWARDS *v.* MARSTON. (*a.*)

Bill of sale—Form in schedule—Repayment of principal and interest—Instalments—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.

By a bill of sale, dated the 26th of September, 1887, *and given as security for an advance of £50 and interest thereon at the rate of five per cent. per month, the grantor agreed that he would pay to the grantee the principal*

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

sum, together with the interest then due, as follows:—The sum of £2 10s. on the 26th of October, 1887, and the like sum of £2 10s. on the 26th of each and every succeeding month until the 26th of September, 1889; then the balance and interest as aforesaid was to be paid.

Held, that, upon the true construction of the bill of sale, the monthly payments of £2 10s. were in respect of interest only, and not of principal, and that the principal sum of £50 was not repayable until the 26th of September, 1889; and that the bill of sale so drawn was in accordance with the statutory form.

Held, further, that, apart altogether from its construction, the bill of sale was in accordance with the form, and was therefore valid.

Goldstrom *v.* Tallerman, 35 *W. R.* 68, 18 *Q. B. D.* 1, *distinguished.*

Appeal from the judgment of Charles, J., at the trial of the action without a jury.

The action was by the plaintiff, as grantee of a bill of sale, to recover damages for the conversion of a carriage assigned to him by the grantor. Subsequently to the execution of the bill of sale the grantor sold and delivered the carriage to the defendant.

The bill of sale, which was dated the 26th of September, 1887, assigned the chattels described in the schedule (including the carriage in question) by way of security for the repayment of an advance of £50, and interest thereon at the rate of £5 per cent. per month; and the grantor agreed that he would duly pay to the grantee "the principal sum aforesaid, together with the interest then due as follows: the sum of £2 10s. on the 26th day of October, 1887, and the like sum of £2 10s. on the 26th day of each and every succeeding month thereafter until the 26th day of September, 1889, then the balance and interest as aforesaid is to be paid."

Charles, J., held that the bill of sale was valid, and gave judgment for the plaintiff.

J. A. Foote, for the defendant.—According to the language of Fry, L.J., in delivering the judgment of the court in *Goldstrom* v. *Tallerman*, 35 W. R. 68, 18 Q. B. D. 1, the instalments mentioned in the statutory form mean instalments of principal, and not of interest. But these twenty-four monthly instalments taken together amount to more than the £50 advanced. Therefore the instalments must include some interest, or else the sum repaid would be the £50 advanced, plus £10, together with interest at the rate of five per cent. per month. It is impossible to tell how much is for interest and how much for principal, and therefore it is impossible to tell what the final instalment will be. The monthly payments of £2 10s. cannot be in respect of interest only, as the words "the balance and interest as aforesaid" show that the whole principal cannot be repayable then. "Balance" assumes that part of the principal has been repaid. According to the form the equal instalments must be principal, and the interest is then calculated and payable in addition. This bill of sale is therefore void as not being in accordance with the form.

He referred to *Hazlewood* v. *Consolidated Credit Company*, *ante*, p. 54, 25 Q. B. D. 555; *Davis* v. *Burton*, 32 W. R. 423, 11 Q. B. D. 537.

Cock, Q.C., and *Crispe*, for the plaintiff, were not called upon.

Lord ESHER, M.R.—The question in this case is whether the bill of sale is void as not being in accordance with the form in the schedule to the Bills of Sale Act, 1882. The objection to the validity of the bill of sale is directed to the mode in which the payments are described to be made. The bill of sale is in printed form, with certain blanks left in it to be filled in in writing. The bill of sale, so far as the printed part is concerned, exactly follows the form in the schedule to the Act. Does it, then, depart from the form as regards the part in writing? The form states that "A. B. doth further agree and declare that he will duly pay to the said C. D. the principal sum aforesaid, together with the interest then due, by equal payments of £ on the day of [or whatever else may be the stipulated times or time of payment]." The part in brackets is an alternative mode of repayment. The form may therefore be read thus: The principal sum aforesaid, together with the interest then due, at the stipulated times or time of payment. The payment, therefore, in my opinion, need not be by equal instalments. The present bill of sale follows the form exactly until the mode of repayment is specified. The repayment is to be by £2 10s. on the 26th of each month—that is to say, the times of each payment are specified—until the 26th of September, 1889, when the balance and interest is to be paid. That seems to me to be in accordance with the very terms of the form. If that is so, the construction to be placed upon the words is immaterial to the present point. The bill of sale, therefore, being in accordance with the form, there is no use trying to pick holes in it. But if I do go into the construction of the bill of sale, I am prepared to say that the language used by Fry, L.J., in delivering the judgment of the court in *Goldstrom* v. *Tallerman*, as to an instalment covering principal only and not interest, was applicable to that particular case, and was not intended to be of general application. Charles, J., thought that £2 10s. included some part of the £50 principal. I cannot agree with him in that interpretation. It seems to me that the language of this bill of sale is perfectly clear. It means that the loan of £50 is not to be repaid until the end of the two years, and that the interest alone is to be paid in the interval. The payment of £2 10s. per month for two years does not make up the sum of £50, but it exactly covers the five per cent. per month on the £50. The true construction of the bill of sale, therefore, is that the loan of £50 is not to be repaid for two years, the interest at five per cent. per month on the £50, which is exactly £2 10s. a month, being in the meanwhile paid. Though that is not expressly stated in the bill of sale, it seems to me to be a necessary implication from it. The bill of sale, therefore, is exactly in accordance with the form, and is perfectly good.

LOPES, L.J.—I agree that this bill of sale is in accordance with the form. The true construction of it seems to me to be this: The grantee lends £50 to the grantor for two years, and the grantor agrees to pay to the grantee five per cent. per month for the loan. That seems to me to be aptly expressed in this bill of sale. The monthly payments of £2 10s. correspond with the interest at five per cent. per month on £50. The bill of sale exactly follows the form. *Goldstrom* v. *Tallerman* was a different case from this, as there the total of the monthly sums exactly made up the principal sum.

KAY, L.J.—I am of the same opinion. Every word of the clause in the bill of sale before us is in strict accordance with the form except the last words, "then the balance and interest as aforesaid is to be paid," and those words can only be said to be not in accordance with the form because the form does not contain them. The first inquiry is, what is the sum of £2 10s. which is payable monthly? Is it principal or interest, or both? Now it is the exact amount of interest on £50 at five per cent. per month. It seems to me that no one can doubt that

it was intended as a payment in the ordinary way between mortgagor and mortgagee in respect of interest. I entirely agree with the other members of the court as to the construction of the bill of sale. The interest, therefore, on the £50 is to be paid each month for two years. What, then, is the meaning of the words, "then the balance and interest as aforesaid is to be paid"? At that time—that is, at the twenty-fourth month—there would be the principal sum of £50 due and one month's interest, assuming that all the payments had been regularly kept up. Why should not this principal sum be called "the balance"? The bill of sale was given as security for principal and interest. If the interest has been duly paid, the principal is "the balance." No doubt the bill of sale does not say "the £50 and interest," but that may be for this reason. By agreement between the parties, part of this sum might have been paid back before the expiration of the two years. The balance might, therefore, not amount to the sum of £50, and that seems to me a good reason for using the word "balance." But even if no part of the £50 had been paid off in the interval, there seems to me no difficulty in describing this sum as the balance, the bill of sale being given as security for principal and interest. It is said, however, that by reason of the decision in *Goldstrom* v. *Tallerman* we are precluded from construing the bill of sale thus. It was urged that that case laid down a hard and fast rule that the instalments must include principal only. I cannot bring myself to see that that is the effect of the judgment in *Goldstrom* v. *Tallerman*. I should require very much more consideration before I came to the conclusion that that case decided any such thing. In my opinion this bill is in accordance with the form, and is, therefore, valid.

Appeal dismissed.

Solicitors for the plaintiff, *Hicks & Arnold.*

Solicitors for the defendant, *Prior & Co.*, for *Dickinson & Co.*, Poole.

From Q. B. Div. [and Q. B. Div.] Nov. 1, 24.

DARLINGTON WAGON AND ENGINEERING CO. (LIMITED) v. HARDING AND OTHERS. (a.)

Arbitration—Action—Order of reference by consent of "all matters in difference"—Setting aside award—Jurisdiction of court—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *ss.* 14, 15.

An action having been brought to recover certain instalments due in respect of work done under a contract, upon an application for judgment under order 14, *other instalments having become payable under the contract, an order was made by consent that "all matters in difference between the parties" should be referred to the award of an arbitrator.*

The arbitrator having made his award, the defendants moved to set it aside, contending that, under section 15 *of the Arbitration Act*, 1889, *the award was equivalent to the verdict of a jury.*

Held, by the Queen's Bench Division, *that section* 15 *did not affect the finality of an award, and that the application must be refused.*

Held, by the Court of Appeal, *that as the order of reference was of "all matters in difference between the parties," section* 15 *was not applicable; and the award could not be set aside in the same way as the verdict of a jury.*

Application by the defendants to set aside, vary, or remit an award made by an arbitrator.

An action was brought to recover £3,969, instalments due for work done under a contract for the construction of a pier. Upon an application for judgment under order 14, other instalments having become due since the date of the writ, an order was made by consent on the 10th of December, 1889, referring "all matters in difference between the parties" to the award of an arbitrator. The order of reference was made in a form somewhat similar to the form No. 33 in App. K. in the Annual Practice, 1890-91. The first meeting took place before the arbitrator on the 10th of January, 1890, and subsequently a supplemental agreement was made, including matters in difference arising under the contract since the order of reference. The arbitrator made his award in favour of the plaintiffs for £10,064, and the defendants moved to set it aside, contending that under section 15 of the Arbitration Act, 1889 (which came into operation on the 1st of January, 1890) the award was equivalent to the verdict of a jury, and could be set aside accordingly.

Nov. 1.—*Jelf, Q.C.*, and *W. S. Robson*, for the plaintiffs, took the preliminary objection that the award of the arbitrator was a final decision and could not be appealed from on the ground of its being wrong in law or in fact.

J. E. Bankes, for one of the defendants.—The award of an arbitrator is open to appeal, because by section 15, sub-section 2, it is "equivalent to the verdict of a jury." This was so decided in *Longman* v. *East*, 26 W. R. 183, 3 C. P. D. 142, in regard to a reference to an official referee under section 57 of the Judicature Act, 1873. Brett, L.J., says on p. 155—"I think the appeal is of the same nature as the appeal from the finding of a judge when he tries without a jury, or as the appeal from the finding of a jury; that is to say, the court must accept the finding of the referee unless they can set it aside, according to the ordinary rules which would be applicable to the finding of a jury or to the finding of a judge trying a cause without a jury." That is, for improper reception of evidence and misdirection, or a finding against the weight of evidence. The words in section 58 of the Judicature Act, 1873, are "the report of any referee upon any question of fact on any such trial shall (unless set aside by the court) be equivalent to the verdict of a jury." The words in sub-section 2 of section 15 of the Arbitration Act are: "The report or award of any official or special referee or arbitrator on any such reference shall (unless set aside by the court or a judge) be equivalent to the verdict of a jury." An award is put on the same footing as a report was under the earlier Act, and the right of appeal must be the same.

R. M. Bray, for the other defendants.

DAY, J.—When section 15 of the Arbitration Act was first called to my attention in this case I was disposed to attribute to it more importance than I now think it deserves. The words, "shall be equivalent to the verdict of a jury," do not in my opinion affect the finality of an award at all. The finality of an award has so long been established that if the Legislature meant to alter it it would have done so in plain terms. The words must mean equivalent to the verdict of a jury for other purposes, but I cannot believe that they were intended to make any

(a.) Reported by CECIL CHAPMAN and W. F. BARRY, Esqs., Barristers-at-Law.

change as to the finality of awards, which would destroy the great and undoubted boon of arbitrations. It would be intolerable, I think, if great trials of a technical character, which had been determined by an arbitrator specially selected for his competency to deal with the matters involved, could be reopened. I cannot, therefore, believe that that is the result. The case of *Longman* v. *East* is not important here, because that refers to the award of an official referee upon questions or issues referred to him in a cause, and such an award was never intended to be final. I do not think an arbitration when the whole cause has been referred to some person agreed upon by both parties is placed on the same footing. When the Master of the Rolls is speaking of a reference, he is speaking of a reference by order of a judge, that is a reference for the benefit of a judge, the award in which was not intended to be final. The words in sub-section 2 of section 15 were not intended to affect the question of finality, and I am of opinion that the preliminary objection is fatal, and that we are not at liberty to investigate whether the arbitrator was wrong in law or in fact.

LAWRANCE, J.—I entirely agree.

The defendants appealed.

Nov. 24.—*Finlay, Q.C.*, and *J. E. Bankes*, for one of the defendants.—By section 25 of the Arbitration Act, 1889, this reference comes within the provisions of the Act. The order of reference comes within section 14 of the Act. It is an order made in an action, and therefore comes within section 14 as an order made "in any cause or matter." Where the parties consent to refer the cause plus something else, it is still an order referring the cause or matter. Therefore section 14 is applicable, and by section 15 the award is equivalent to the verdict of a jury. Further, section 15 is larger than section 14. It deals with any reference "in" any cause or matter, not "of" any cause or matter. This order was headed in the action. It was, therefore, made in the cause.

They cited *Clark* v. *Sonnenschein*, 38 W. R. 743, 25 Q. B. D. 464.

R. M. Bray, for the other defendants.

Jelf, Q.C., and *W. S. Robson*, for the plaintiffs, were not called upon.

Lord ESHER, M.R.—The order of reference in this case was made before the Arbitration Act, 1889, came into operation, but I shall assume that the Act is applicable to this case. The question, then, is whether this order of reference comes within sections 14 or 15 of the Act of 1889. Section 14 provides that "in any cause or matter" the judge may order "the whole cause or matter, or any question or issue of fact arising therein," to be tried by a special referee or arbitrator. Could this order have been made under that section? There was a cause here, but the order does not merely refer the whole cause, or any question or issue of fact arising therein, but refers "all matters in difference between the parties." It is made by consent, and is much larger than could have been made under section 14. If this order of reference is to be considered as made under section 14, the judge would have exceeded his jurisdiction. It is, therefore, not such an order of reference as could have been made under section 14 of the Arbitration Act, 1889. Then could this order have been made under section 57 of the Judicature Act, 1873? That section provides for an order of reference in any cause or matter "of any question or issue of fact or any question of account arising therein." There again the reference must be of some question in the cause or matter, and this order is larger than a judge could have made under that section. The order, therefore, was not and could not have been made either under section 57 of the Judicature Act, 1873, or under section 14 of the Arbitration Act, 1889. It is clear that it was a good order of reference, but it was made under the general authority of the judge derived from the consent of the parties. The whole validity of the order was derived from the consent of the parties. It was said, however, that the order of reference came within section 15 of the Arbitration Act, 1889. That section deals with cases of reference "in any cause or matter," and provides, *inter alia*, that the award of the arbitrator "on any such reference shall, unless set aside by the court or a judge, be equivalent to the verdict of a jury." It is clear to my mind that section 15 is a mode provided for carrying out references under section 14. It does not apply to references not made under the Act at all. But further still. It is obvious on looking at the order that the parties intended to bring themselves within the general consent jurisdiction of the judge, inasmuch as they have given to the arbitrator all sorts of powers which otherwise would not have been necessary.

Upon these grounds I have come to the conclusion that this order of reference was not made under the Arbitration Act, 1889. The appeal must therefore be dismissed.

LOPES, LJ.—I am of the same opinion. This order refers "all matters in difference between the parties." Such an order could not have been made under section 57 of the Judicature Act, 1873, nor can it now be brought within sections 14 or 15 of the Arbitration Act, 1889. Sections 57 and 58 of the Judicature Act, 1873, have been repealed, but they have been re-enacted in substance by sections 14 and 15 of the Arbitration Act, 1889. There was always power to refer by consent any differences that the parties might desire. The present order was founded solely upon consent, and does not derive its efficacy from sections 14 or 15 of the Act of 1889.

KAY, L.J.—I agree. Both section 57 of the Judicature Act, 1873, and section 14 of the Arbitration Act, 1889, provide for two things—a reference by consent, and a reference without consent. But in each case the subject-matter to be referred is the same—namely, something arising in any cause or matter. Take, first, section 57 of the Judicature Act, 1873. It provides for the reference in any cause or matter of "any question or issue of fact or any question of account arising therein." So, too, section 14 of the Arbitration Act, 1889, provides for the reference in any cause or matter of "the whole cause or matter, or any question or issue of fact arising therein"; and section 15 also deals with such a case. It is clear to me that the judge could not have made this order under section 14, whether with or without the consent of the parties. Under that section he could only have made an order referring the whole action or some question or issue of fact arising therein. This order operates, no doubt, to stay the action, but it derives its whole validity and efficacy from the consent of the parties.

Appeal dismissed.

Solicitors for the plaintiffs, *Satchell & Chapple*, for *Davies & Balkwill*, Newcastle-on-Tyne.

Solicitors for the defendants, *Bird & Moore*.

High Court of Justice.

Chan. Div. North, J. } July 3, 8-10; Aug. 6, 1890.

ATTORNEY-GENERAL v. MORGAN. (a.)

Royal mine—Gold mine—Crown rights to—Gold mixed with other metals—Right to work—1 W. & M. c. 30, ss. 3, 4—5 W. & M. c. 6, ss. 2, 3—55 Geo. 3, c. 134.

All gold mines in the United Kingdom are royal mines, and cannot be worked without a licence from the Crown.

A mine substantially worked for gold, though the gold is mixed with other metals, is a gold mine.

Trial of action.

This was an action brought on behalf of the Crown by the Attorney-General to restrain the defendant, Mr. Pritchard Morgan, M.P., from raising, working, or getting, and from selling or removing from the Gwynfynydd Mine, near Dolgelly, Merionethshire, and from other lands in the same county, any gold or gold ore, or quartz, or other substances containing gold or silver, the produce of the said mine or lands, without the licence of the Commissioners of her Majesty's Woods, Forests, and Land Revenues, and for an account of such as had been already obtained, and payment of the value thereof.

The defendant in 1887 obtained a lease of Gwynfynydd Mine for thirty years from the 29th of September, 1887, from the freeholder, subject to the rights of the Crown.

Some gold had been obtained by a company from the land and royalties paid, but the working had been abandoned as unprofitable some time prior to the defendant obtaining possession.

The defendant for a short time after commencing mining operations obtained gold in considerable quantities.

In January, 1888, the Commissioners of Woods and Forests applied to the defendant for an account of the gold raised and payment of a royalty, and a correspondence ensued, resulting in the issue of the writ in this action on the 26th of April, 1888. In May, 1888, an interlocutory injunction was granted. In June, 1888, the defendant issued the prospectus of the Morgan Gold Mining Co. (Limited), which was incorporated for the purpose of taking over the Morgan Gold Mine, near Dolgelly, and stated, amongst other things, that a royalty not exceeding one-thirtieth of the gross yields would be payable to the Crown, and giving favourable reports as to the yield of gold.

The freeholder obtained a licence from the Crown and assigned it to the company, under which they had since worked. The defendant refused the offer of the commissioners to stay proceedings on his payment of costs, and insisted on contesting the Crown's right to royalties, alleging that the Crown had only a right of pre-emption. The action, therefore, came to trial.

Sir R. Webster, A.G., Napier Higgins, Q.C., and *Vaughan Hawkins*, for the plaintiff.—The right of the Crown to all gold mines is incontestable: *The Queen* v. *Earl of Northumberland*, 1 Plow. 310; and where it is mixed with other metal, prior to the Acts of William and Mary, the whole belonged to the Crown: see s.c., pp. 336, 336a. The Acts of William and Mary were passed to enable mines of iron, tin, copper, and lead, to be worked without being liable to be claimed as royal mines because some trifling amount of gold was found in them, and they enabled the Crown to retain the gold and buy the baser metal from the subject: 2 Stephen's Commentaries, 9th ed., 552. If the mine is really worked for gold it is a gold mine. The defendant's is such a mine.

Mr. Morgan in person.—The Acts of William and Mary deprive the Crown of ownership, and grant instead a mere right of pre-emption at a fixed price. It is not limited to mines of iron, tin, copper, and lead, but applies to ores which contain these metals: 55 Geo. 3, c. 134. The Crown has refused to purchase the ores, and has no right to a royalty.

Wilkinson held a watching brief for the company.

Napier Higgins, Q.C., in reply.

NORTH, J.—The only question which I have to decide is by whom the costs of this action are to be borne, as the defendant has disposed of his mine to a company, who have a licence from the Crown and pay a royalty. I must, however, in order to arrive at a conclusion, consider the points in dispute. The existence of royal mines in this country for a long period is undoubted, and the fact that there is gold in Merionethshire has long been known, and various adventurers have from time to time sought gold, but, apparently, without much financial success. Among such workings have been the Gwynfynydd Mine, and the defendant, in a letter in April, 1888, says that the mine has been worked for a long period. In the years 1864-5 various small sums were paid by the then proprietors for royalties to the Crown.

In October, 1887, the defendant appears to have taken a lease of the mine from the owner of the farm on which it is situate, subject to the rights of the Crown and to a rent; and he thereupon worked them, and provided the necessary plant at considerable cost.

The Commissioners of her Majesty's Woods and Forests appear to have written to him claiming the Crown royalty and asking for accounts in January, 1888, and a considerable correspondence ensued, during which a claim to a royalty of one-thirtieth was made, and a request for information as to whether the defendant was prepared to apply for a licence. In March, 1888, the defendant applied for a licence for a year, and he also paid some royalty that was due. In April the commissioners informed the defendant that he had no authority to remove the gold or silver from the mine, and that, unless he gave an undertaking not to remove it, steps would have to be taken to stop him; and after further correspondence the writ in this action was issued on the 26th of April, and an injunction granted by me on the 4th of May. Two agreements have been put in by which the mine was transferred to the company, which was formed in May, 1888, and also the prospectus. Now the defendant is responsible for the prospectus, and it is, therefore, evidence against him. I come to the conclusion, on the whole of the evidence, that this is undoubtedly a gold mine. There is no record of gold having been found absolutely pure, but the suggestion that this mine is worked for the baser metals is a fiction not borne out by the evidence. Now, as regards the law with respect to the Crown's rights in mines, no serious difficulty arises. Originally, it seems that the right to all mines was vested in the Crown, but that the right to get the baser metals was conceded to the subject except in certain portions of the kingdom. But the right to all gold found was originally and still is vested in the Crown. The defendant commented on the hardship to the subject,

(a.) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

but the well-established right of the Crown is not contestable.

In the great case of mines, *The Queen* v. *The Earl of Northumberland*, it was decided that all mines of gold and silver belong to the Crown, and, moreover, nine out of the twelve judges who gave their opinions held that the base metal mixed with the gold, as well as the gold, belonged to the Crown. It was accordingly held that copper extracted from a copper mine belonged to the Crown, because it contained some gold. Three of the judges thought that if it were proved that the value of the copper exceeded that of the gold, it might not have been a royal mine; but this view has not been adopted, and on the facts in this case is not material. Subsequently, questions arose as to what proportions the metals should bear to each other to make it a royal mine, and in 1640-1 an opinion was expressed by fifteen eminent counsel that, although the gold or silver contained in the base metal of a mine in the lands of a subject be of less value than the base metal, yet if the gold or silver countervail the charge of refining it, or be of more worth than the base metal spent in refining it, this is a mine royal, and as well the base metal as the gold and silver in it belong to the prerogative of the Crown (see Bainbridge on Mines, 4th ed., p. 129), and this view seems to have entensively prevailed. As, however, it seriously impeded mining enterprize, two statutes were passed in the reign of William and Mary modifying the Crown's rights.

By 1 W. & M. c. 30, passed in the year 1688, after reciting a statute of 5 Hen. 4 made against the multiplying of gold and silver, and making it a felony, the Act was repealed, and provided by section 3 that all gold and silver should be taken to the Mint and bought at its true value for money. This section was subsequently repealed in 1867. The defendant says that this provision is inconsistent with the Crown's claim to a royalty. But, if apart from this section a royalty is due, this section does not relieve the owner from paying it. The 4th section of the Act provides "that no mine of copper, tin, iron, or lead shall hereafter be adjudged, reputed, or taken to be a royal mine, although gold or silver may be extracted out of the same." This clearly does not assist the defendant, as his mine is neither copper, tin, iron, or lead.

By 5 W. & M. c. 6, s. 3, the Crown is authorized to purchase the ore raised from royal mines at a certain fixed price, according to the baser metal with which it is mixed. And by a later statute—55 Geo. 3, c. 134—the price of pre-emption is, in the case of lead, altered. The defendant bases his principal argument on the second section of the later Act, and contends that, as it speaks of the proprietor of any mine wherein any ore is found in which there is copper, tin, iron, or lead, and authorizes him to work such ore; he claims the right to work his mine under this statute. I do not think this is the true construction. The earlier Act deals only with mines of copper, tin, iron, or lead, and does not refer to gold or silver mines or other metal. And from the preamble of the later Act we see that the owners of the mines referred to were the persons prejudiced by the existing state of things, and which the Act was passed to remedy. It is also noticeable that the Act is expressly stated to be for the better explanation of the former statute. The Act only applies to cases where gold or silver exists in the mine worked, and then affords protection to the workers. And trivial quantities of the named metals found in such mines of other metals would not bring their proprietors among the class of persons intended to be benefited by the Acts. In my opinion both Acts of William and Mary are intended to benefit the owners or proprietors of copper, tin, iron, or lead mines, and no other. The object of these Acts is to secure to the subject the copper, tin, iron, and lead found in his land, or the full values thereof, and at the same time to secure to the Crown all the gold and silver, if it chooses to take it, paying the value of the copper, tin, iron, or lead which accompany any of it. The defendant seeks to use these Acts for the purpose of appropriating for himself and his company without payment the gold and silver in their land which belongs to the Crown.

The whole contest in this case has arisen from the persistent endeavour of the defendant to prevent the application of part of the public revenue of the country to its legitimate purposes, and direct it into the pocket of himself and his fellow-shareholders, and he says it is against public policy that this attempt should be opposed. The Attorney-General has in this action been wholly right throughout, and I hold that the defendant must pay the costs of this action.

Solicitors, *Solicitor to Woods and Forests; Davidson & Morris.*

Chan. Div. Kekewich, J. — July 19, 1890.

ASHWORTH v. ROBERTS. (a.)

In a patent action the plaintiff delivered interrogatories asking step by step whether the defendant had used, and to what extent, the process, or any part of it, described in the specification, and asking also the names of some of his customers. The defendant set up a plea of "secret process," objecting to answer the interrogatories, on the ground that the answer would disclose his secret.

Held, that the defendant could not, by pleading a secret process, claim to decline to refuse discovery as to how far, either alone or in combination with his own process, he had used the plaintiff's.

Semble, *also, that the names of customers must be disclosed.*

Motion.

This was a motion by George Ashworth and Elijah Ashworth as owners and patentees of a patent for "improvements in wire cards, and in the preparation and treatment of wire therefor, applicable wholly or in part in the treatment of wire for some other purposes." They had brought an action against the defendant, Godfrey Roberts & Son, a licensee, for an account of all card clothing manufactured, sold, supplied, or used by him under the licence, and payment of what might be found due.

The defendant denied user of the plaintiffs' invention. The plaintiffs thereupon delivered interrogatories asking whether he had manufactured or sold under their licence articles made under the plaintiffs' patent, and, if he denied such sale, asking him to describe the processes and apparatus used by him, and how they differed from the plaintiffs'. The defendant denied ever having manufactured or sold articles which had been subjected to the processes claimed, and moreover alleged that he had himself invented and used a different process, which was a secret, and that it would be unjust to force him to disclose it to a trade competitor such as the plaintiffs.

On the 22nd of May, 1890, the plaintiffs delivered a further set of interrogatories, going through their specification step by step, and asking (1) whether he used each particular process; (2) requiring the defendant to state whether, if he had ever used any of the

(a.) Reported by J. W. GREIG, Esq., Barrister-at-Law.

said processes, he had in using or employing the same adopted the same means with the same object, and by the use of an apparatus made or arranged as described in the plaintiffs' specification; (3) whether at any time since the 1st of October, 1886, he had used any of the processes referred to in the first interrogatory as part of the process employed by him as stated in the former answer to interrogatories; (4) whether he had not sold or supplied steel wire, and tempered according to his process or apparatus to a particular customer, and asking the names and addresses of some of them; (5) asking him to state if he had since the 1st of October, 1886, used any of the plaintiffs' processes referred to in interrogatory, what steps or stages or additional steps he took in hardening wire according to his own process; (6) whether he had used any apparatus constructed as described in the specification; (7) whether the apparatus in fact used by him did not contain parts of the apparatus shown in the plaintiffs' specification.

The defendant refused to answer so much of the 1st, 2nd, 3rd, 5th, 6th, and 7th interrogatories as had not been already answered by him, on the ground of his using a secret process, and further declined to give the names of any customers. This was a motion by the plaintiffs for a full and sufficient answer to these interrogatories.

Moulton, Q.C., and *Chadwyck Healey*, for the plaintiffs.—Setting up a secret process is no excuse to answering step by step the questions as to user of the plaintiffs' invention as described in his specification: *Renard* v. *Levinstein*, 10 L. T. N. S. 94, 12 W. R. Ch. Dig. 68, and *Badische Anilin und Soda Fabrik* v. *Levinstein*, 31 W. R. 913, 24 Ch. D. 156—169. The other information asked as to user is relevant as a point at issue.

Goodeve, for the defendant.—The process described in the plaintiffs' specification is an old one, the apparatus only is new. The defendant says he has invented another method which is secret, and he ought not to be compelled to divulge it, and before he can be called on to disclose the names of customers actual infringement must be proved. He has given all the information up to this stage which can properly be asked: *De la Rue* v. *Dickinson*, 3 K. & J. 388.

KEKEWICH, J.—Born and bred, so to say, in Chancery, I have a leaning towards the rule adopted by the Court of Chancery of requiring full discovery. But I have at the same time a great fear in this case lest a full discovery should cause disadvantage to the defendant, and I confess to being unwilling to direct answer after answer where I can avoid so doing.

In this case I am by no means satisfied that the plaintiffs are entitled to all the discovery asked; but, on the other hand, I think some discovery ought to be given, and none has been given. The present case seems to me to come within the old class of cases where a defendant, in answer to interrogatories, has given an insufficient answer, and has denied the bill to be true, "save as aforesaid," or, "except as appears by the other facts of the answer," and it has been held that the addition of the words "save as aforesaid," or "except as aforesaid," does not make the traverse sufficient: *Tipping* v. *Clarke*, 2 Hare, 388. I think that even on this ground the plaintiffs would succeed; but this, no doubt, is somewhat technical. The question raised by this case is not one of infringement by a tort feasor, but of account of a licensee, and I must decide on that footing. What is it that is material for a plaintiff to know to enable him to conduct his case properly at the trial? He is entitled to know under what circumstances and to what extent the defendant has used his process, and unless he has enough information to show whether it be or not worth while to proceed to trial, he has not got all the discovery which the rules say he is entitled to. It may be—I have no wish to settle the interrogatories or answer—but it may be that when the interrogatories come to be answered the defendant will be able to show some ground for refusing to give the full discovery asked. But still he must say to what extent he has used the plaintiffs' process. The plaintiffs, in the first instance, asked whether he used their process by reference to the claiming part of their specification. That user being denied, and the plea of secret process being set up, the plaintiffs go into more detail and refer to the text of their specification.

That is a document which may require much interpretation, and in respect of which difficulties of construction may arise. Nevertheless, the plaintiffs are entitled to deliver these interrogatories so long as they are not oppressive, and so long as they do not compel the defendant to disclose his secret process. I agree that the mere plea of secret process does not preclude an answer to interrogatories, but the interrogatories must not be used so as to put unfair pressure on the party interrogated. With reference to the discovery of customers' names, Mr. Goodeve relies on *De la Rue* v. *Dickinson*, a leading authority, which was decided in 1857. The marginal note is as follows:—"When plaintiff's right to relief at the hearing is clear, assuming the title stated by his bill, defendant, by his answer denying that title, is, in certain cases, protected from discovery immaterial to that question, and which, when that question is decided, would be given under the decree." That is a fair epitome of the decision; but does not apply immediately and fully to an action like this—it does not follow that in an action for account by a patentee against his licensee, a licensee denying user is entitled to refuse to give discovery as to user because the question of user is material whether the account is to be given at all.

An order must be made in the terms of the notice of motion, the plaintiffs to have the costs in any event.

Solicitors for the plaintiffs, *Shaw, Tremellen, & Kirkman*, agents for *A. M. Blan*, Manchester.

Solicitors for the defendant, *Elliott & Ash*, agents for *Rawnsley & Peacock*, Bradford.

Q. B. Div. (Stephen and Williams, JJ.) — Nov. 17, 20.

REG. *v.* COLONEL BYRDE AND OTHERS (JUSTICES) AND THE PONTYPOOL GAS CO. (*a.*)

Justices—Discretion—Declining jurisdiction—Dismissal of summons—Refusal to hear application for second summons—Mandamus.

Upon an application for a summons for penalties for which a company were liable under an Act of Parliament at a certain rate per week for every week during which a certain reservoir remained uncompleted, the justices refused to hear the application, on the ground that a summons for an offence of the same kind had previously been taken out by the present prosecutor and dismissed, as, in the opinion of the justices, the offence was not a continuing offence, and it had been completed more than six months before the date of the summons, and the claim

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

was therefore barred by section 11 *of* 11 *&* 12 *Vict. c.* 43 (*Jervis's Act*).

Held, that the justices were wrong in declining to hear the application, and that a mandamus *ought to go directing them to hear the application and determine whether, upon the facts, a summons ought or ought not to be granted.*

Rule for a *mandamus* to the justices of Monmouthshire, directing them to hear and determine the matter for the issuing of a summons.

The Pontypool Gas and Water Co. had obtained in the year 1873 an Act of Parliament called the Pontypool Gas and Water Act, 1873, and by section 47 of this Act the company were, within two years and six months after the passing of the Act (the 26th of May, 1873), to complete, to the satisfaction of the Board of Trade, a certain reservoir, and if the company should fail within that period to complete the reservoir, "then the company shall be liable to a penalty of £20 a week for every week after the expiration of the period so limited until the said reservoir is completed as aforesaid."

In the year 1880 the prosecutor had issued a summons for penalties under this section, the reservoir being still uncompleted; but on the hearing of this summons the justices were of opinion that the offence created by the section was not a continuing offence, and that the right to the penalties began to run from the date when the reservoir ought to have been constructed—that is, the 26th of November, 1875—and that as more than six months had elapsed since that date, the prosecutor's right to sue for such penalties was barred by the six months' limitation in section 11 of Jervis's Act (11 & 12 Vict. c. 43). They accordingly dismissed the summons on that ground, but they offered to state a case, which the plaintiff declined, and no appeal was brought against that decision of the justices.

The prosecutor subsequently, in the year 1882, brought an action to recover these penalties under the section, but this action was dismissed, and judgment in the action given against the prosecutor, on the ground that he had misconceived his remedy as—the claim being one for penalties—an action was not the appropriate remedy, and this decision against the prosecutor was upheld by the Court of Appeal and the House of Lords.

The prosecutor then, in May, 1890, the reservoir being at that date uncompleted, applied to the justices to issue another summons, but they refused to entertain the matter at all, on the ground that they had already, on the former occasion in 1880, disposed of the whole matter, and that they had no jurisdiction in the case, and they refused to hear the application for a summons, and refused to issue a summons.

The section of the Act was in force until July, 1890, when it was repealed by an Act of Parliament, but before that repeal the prosecutor obtained the present rule for a *mandamus* directing the justices to hear and determine the application for the issuing of a summons.

Ram, for the justices, showed cause.—The whole matter had been disposed of in the former summons in 1880, so that the justices had no jurisdiction to entertain the matter at all, and they were, therefore, right in refusing to hear the application or issue a summons. The prosecutor had a chance of appealing against the decision of the justices on the former occasion, as the justices offered to state a case, but the prosecutor declined to proceed with the appeal, and he cannot now apply for a fresh summons. The offence here was not a continuing offence, and the claim for these penalties was barred by the six months' limitation in Jervis's Act, as the time began to run from the 26th of November, 1875, when the reservoir ought to have been completed. Moreover, this reservoir was completed to the satisfaction of the surveyor to the Board of Trade.

A. T. Lawrence, for the company, also opposed the rule.

Ruegg, in support of the rule.—The justices here refused to hear the application on one ground and one ground only—namely, that they had already adjudicated upon the matter. The section in Jervis's Act only applies when the private Act is silent as to limitation. Here sections 145—151 of the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), are incorporated with the private Act, and by section 151 of that Act, which is the only section that applies, the words are, unless the complaint shall have been made "within six months next after the commission of such offence." These words mean after the end or completion of the offence; here the offence was a continuing offence, and the six months' limitation does not apply: *Mayer* v. *Harding*, 17 L. T. N. S. 140, 16 W. R. C. L. Dig. 90; *Reg.* v. *West Riding Justices*, 6 B. & S. 803. On the authority of these cases the justices were clearly wrong in holding that there was no continuing offence, and that the limitation applied; they were wrong in refusing to entertain or hear the application at all, and this rule ought to be made absolute.

Cur. adv. vult.

Nov. 20.—The judgment of the COURT was read by

WILLIAMS, J.—We are of opinion that this rule must be made absolute. The ground upon which the justices refused the summons was that a summons for an offence of the same nature had been taken out by the present prosecutor in 1880, and dismissed on the ground that the offence alleged had been completed more than six months before the date of the summons, and that, therefore, they had no jurisdiction to go into the matter again. It appears from the affidavit of the clerk to the justices that after the hearing of the complaint in 1880 the justices, at the instance of the prosecutor, consented to state a case for the opinion of the Queen's Bench Division of the High Court, raising the question whether the non-completion of the reservoir by the 26th of November, 1875, the time limited by the special Act, was an offence which was complete at that date—namely, a date more than six months before the date of the summons, or whether it was an offence continuing in each week that the non-completion continued. It further appeared by his affidavit that the prosecutor failed to take up that case, and thus acquiesced in the validity of the decision of the justices.

The question, then, we have now to decide is whether that previous decision was a sufficient ground for the refusal of the justices to issue the present summons. Now, generally speaking, if on application for a summons for an indictable offence they have heard and determined the application, and on the merits have declined to grant it, the court will not grant a *mandamus* to compel them to review their decision.

Secus, if they have refused to hear the application, or if, after hearing, have refused to grant it from a mistaken view of their duty, amounting to a declining of jurisdiction: *Reg.* v. *Fawcett*, 19 L. T. N. S. 396, 17 W. R. C. L. Dig. 71. The justices, however, must have declined jurisdiction. This court cannot review the discretion of the justices if the justices have really and *bonâ fide* exercised that discretion, although the judgment of the justices may be wrong in law or in fact as to whether a legal offence has been made out.

This seems to be the outcome of the decisions, and in particular of *Reg.* v. *Adamson*, 24 W. R. 250, 1 Q. B. D. 201, and *Ex parte Lewis*, 37 W. R. 13, 21 Q. B. D. 191. Blackburn, J., in his judgment in the former case, points out that the words in 11 & 12 Vict. c. 42, s. 9, "if they shall think fit," show that the justices have a discretion, and that the *mandamus* in that case was granted expressly upon the ground that the justices had not exercised a discretion. The justices may, however, it would seem, in the exercise of their discretion, refuse to issue a summons, even though there is evidence before them of an alleged indictable misdemeanour, if they consider that the issue of the summons would be vexatious or improper: see *Reg.* v. *Ingham*, 14 Q. B. 396—the only question for the court upon the application for a *mandamus* being, have, or have not, the justices exercised their discretion honestly in refusing to issue the summons. In the present case, however, it appears from the affidavit of the clerk to the justices that they had not exercised any discretion; they have simply declined jurisdiction. We think, further, that the justices were wrong in declining jurisdiction, and we think, therefore, that a *mandamus* must go directing them to consider the evidence and decide whether a summons ought or ought not to issue. We do not mean by this decision in any way to conclude the question as to whether a summons ought to issue, but merely to direct the justices, instead of declining jurisdiction, to hear and determine whether, upon the circumstances disclosed to them, a summons ought now to issue. In the case of *The Queen* v. *Mayor of Wisbeach*, 7 Times Rep., p. 21, the court refused a *mandamus* to direct justices to issue a summons, the justices in their discretion having refused a summons, on the ground, however, that one summons had already been issued and disposed of.

Under these circumstances the rule, as I have said, will be made absolute, but without costs.

Rule absolute.

Solicitor for the applicant, *R. Biale.*

Solicitors for the company, *Few & Co.*

Solicitors for the justices, *Harrison & Powell*, for *Edwards & Le Brasseur*, Pontypool.

Q. B. Div. (Grantham, Williams, and Lawrance, JJ.) } Nov. 7.

DIX (*Appellant*) *v.* KENT AND ANOTHER (*Respondents*). (*a.*)

Election law—Parliament—Registration of voters—Disqualifying alms—Alms-person—Reform Act, 1832 (2 & 3 *Will.* 4, *c.* 45), *s.* 36.

On an objection made to a voter that he had received disqualifying alms during the qualifying period, it was proved that the voter was, during the whole of the period, an alms-person of a certain hospital; that, as such alms-person, he received a weekly allowance of ten shillings and washing, and occupied a plot of ground assigned to him by the trustees of the charity; that the alms-persons were elected from poor persons of good character; that they could not be absent from the almshouse without the consent of the trustees; and that they were liable to be removed at the discretion of the trustees for certain causes.

Held, that such alms-persons had received disqualifying alms within the meaning of section 36 *of the Reform Act*, 1832, *and were not entitled to be registered as voters.*

Appeal from the revising barrister of the city of Gloucester.

The appellant was entered on the list of freemen entitled to vote in the election of a member to serve in Parliament. His place of abode was stated to be St. Bartholomew's Hospital. Notice of objection was served by the respondent upon the appellant, on the ground "that he had received disqualifying alms during the twelve months ending July 15 last."

The appellant was thirteen years ago elected, and has since continued, and still is, an alms-person of St. Bartholomew's Hospital, in the city of Glocester, and as an alms-person he has, during the whole of that time, occupied gratuitously and resided in a room in the hospital assigned to him by the trustees, and has received a weekly allowance of 10s. in addition to washing and half a ton of coals every Christmas He had also a separate plot of garden-ground behind the hospital assigned to him by the trustees.

By the scheme approved by the Charity Commissioners for the management of the hospital the alms-persons are to be elected from poor deserving men and women of good character who have not, during the period of three years next preceding their appointment, been in receipt of parochial relief. No alms-person was to be absent from the almshouse, which was the hospital, for a period exceeding twenty-four hours without consent in writing of the trustees, and any alms-person can be removed from the hospital by the trustees for certain specified causes.

No evidence was given that the appellant had any other means of subsistence than the allowance from the hospital, and it was taken that he had no other means of subsistence.

The revising barrister thought the case governed by the cases of *Baker* v. *Town Clerk of Monmouth*, 34 W. R. 64, and *Edwards* v. *Lloyd*, 20 Q. B. D. 302, 36 W. R. Dig. 75, and was distinguishable from *Smith* v. *Hall*, 12 W. R. 172, 15 C. B. N. S. 485, on which the appellant relied, and he decided that the appellant, as an alms-person of St. Bartholomew's Hospital, had been, and was, receiving alms such as to disqualify him from being registered as a voter.

Ashton Cross, for the appellant, cited the cases already mentioned and the case of *Harrison* v. *Carter*, 25 W. R. 182, 2 C. P. D. 26, and contended that in cases of exclusion from the franchise there was the disqualification that the persons were not able to maintain themselves by their own exertions, which was not shown to be so in the present case, and he contended that the case came within the principle of *Smith* v. *Hall*.

F. Stroud, for the respondents.

GRANTHAM, J.—In this case we are constrained to agree with the decision of the revising barrister. I connot get over the circumstance that these alms-persons depended on the goodwill of the trustees for their position in the hospital. We have to consider whether the present case falls within the principle of *Edwards* v. *Lloyd*, *Baker* v. *Town Clerk of Monmouth*, and *Harrison* v. *Carter*, which were cases of exclusion from the franchise. We think that it does fall within the principle of those cases. In the scheme of the Charity Commissioners one element taken into account was that persons qualified for election should not be able to maintain themselves by their own exertions; and not only so, but there are provisions of the scheme which seem to leave the alms-persons dependent on the will and discretion of the trustees.

Under those circumstances we think we are bound

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

to uphold the decision of the revising barrister, and exclude these persons from the franchise.

WILLIAMS and LAWRANCE, JJ., concurred.

Appeal dismissed.

Solicitor for the appellant, *C. T. Courtney Lewis*, for *W. L. Smith*, Gloucester.

Solicitor for the respondents, *Wyatt Digby*, for *Ryland & Waghorne*, Cheltenham.

Q. B. Div. (Day and Lawrance, JJ.) Nov. 4.

SHOWERS AND OTHERS *v.* ASSESSMENT COMMITTEE OF THE CHELMSFORD POOR LAW UNION. (*a.*)

Poor rate — Rateability — Residences of police—Police station.

Buildings and premises surrounded by one wall consisted of residences occupied by officers of the county police and of stores, stabling, and a parade ground used for police purposes. The whole was vested (under the provisions of the Local Government Act, 1888) *in a joint committee of county justices and county councillors.*

Held, that the premises were not a police station, and were liable to be rated for the relief of the poor.

Special case stated for the opinion of the court.

The material facts stated in the case were as follows:—

The appellants were Edward McLean Showers, chief constable of the county of Essex, the deputy chief constable, a superintendent, and a sergeant of police, all of whom resided in buildings called Springfield Court, in the parish of Springfield, and Union of Chelmsford, in the county of Essex.

On the 18th of October, 1889, a poor rate for the said union was made by the overseers of the poor of the parish of Springfield, in which the appellants were severally rated in respect of property, described as "House" or "House and Garden," "Springfield Court."

The appellants objected to these rates on the ground that the premises were not rateable, as they considered the buildings occupied as aforesaid were part of the county police station, and occupied solely for the purposes of the Crown. The appellants thereupon appealed against the rates to the assessment committee. The assessment committee, however, failed to give relief on appeal and confirmed the assessment.

The constabulary force for the county of Essex was appointed under the Act 2 & 3 Vict. c. 93, and the county was divided into police districts, and station houses and strong rooms were provided under the Act 3 & 4 Vict. c. 88. The parish of Springfield is situated within one of these police districts, and the property called Springfield Court is about a mile from the county town and borough of Chelmsford, being in fact the headquarters of the Essex constabulary. There are not now any police cells used for the reception and detention of prisoners at Springfield Court, but the county police make use of a portion of the ground floor of the Shire Hall in Chelmsford, which is county property, as a police office. This, however, is not provided with sleeping accommodation, being nothing more than a space partitioned off, and supplied with desks and office-fittings. The cells for the detention of prisoners whilst in the custody of the police are also in the Shire Hall. The office and cells are used both by day and night. There are no other premises in the Chelmsford Union used for police purposes than those before mentioned.

The whole of the premises called Springfield Court belonged formerly to the justices of the peace for the county of Essex, but are now, under the provisions of the Local Government Act, 1888 (51 & 52 Vict. c. 41), vested in a joint committee consisting of an equal number of county justices and county councillors. The whole of the premises are used exclusively for the purposes of the police, and consist of the chief constable's and deputy chief constable's houses and gardens, a superintendent's and a sergeant's quarters, and also of clerks' offices, store rooms for police clothing, &c., parade ground, stables, coach-house, and other outbuildings. The chief constable, deputy chief constable, and two other officers, and the wives and children of those who are married live and sleep at Springfield Court aforesaid.

The premises occupy three sides of a square, and open into one centre court and have gardens adjoining; the whole building is under one roof, the front doors from all the separate quarters opening into the court. The whole of the premises and grounds are enclosed by a large brick wall, so that they can only be entered by the main gate or through the back way to the stable-yard.

All the premises are used solely by the police force for the purposes of the county constabulary, the chief constable being bound to reside there as a condition of his appointment. Only the portions of the premises in which the chief constable and the other three officers before-mentioned reside are rated.

Each officer pays a rack rent for the premises occupied by him, such rent being deducted from his pay, such deduction being applied in aid of the police rate.

Channell, Q.C., and *Woollett*, for the appellants.—These buildings are occupied wholly by the police, and are in fact a police station, and, therefore, exempt from rating. This case comes within the principle laid down by Lord Coleridge, C.J., in *Martin* v. *West Derby Union*, 31 W. R. 489, 11 Q. B. D. 145; *Coomber* v. *The Justices of Berks*, 32 W. R. 525, 9 App. Cas. 61, is also in our favour. The whole premises belong to the county for public purposes, and the court will not inquire into the nature of the occupation of particular sets of rooms by the persons employed by the county for those public purposes. The fact that they pay a rent makes no difference: *Justices of Lancashire* v. *Stretford*, E. B. & E. 225, 7 W. R. C. L. Dig. 80. [LAWRANCE, J., referred to *Gambier* v. *Overseers of Lydford*, 2 W. R. 226, 3 E. & B. 346.] A place need not contain cells to be a police station; a police station is a place where police are, ready for duty.

W. J. Grubbe and *Duffield*, for the respondents, were not called upon to argue.

DAY, J.—This is a question of not precisely the same, but of similar, character to that which we have already decided to-day (*Durham County Council* v. *Chester-le-Street Poor Law Union*, 63 L. T. N. S. 461). In giving the decision which I am about to pronounce it must not be supposed that I in any way dissent from the principles laid down in the cases which have been cited in argument. Referring to the judgment of Lord Coleridge, C.J., in *Martin* v. *The Assessment Committee of West Derby*, I may say that I do not doubt that where portions of a building which in itself is not rateable are occupied for the benefit of the persons occupying them, those portions are not rateable. But is that the present case? Here we have a building occupied by persons who are members of the

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

police force of the county; and it is no doubt desirable that the police should live near to their sphere of duty, and that good accommodation should be provided for them.

Springfield Court consists of residences of the police, the rateability of which is the very question at issue; it is not a building which is notoriously non-rateable. Portions, no doubt, may be non-rateable—for instance, the police stables, the parade ground, or the stores for police clothing. But those places do not constitute a whole; they are a part only, and perhaps a small part, of the building, Springfield Court, the rateability of which is in question. Therefore, that passage in the judgment of the Lord Chief Justice, strongly as it commends itself to our respect and to our common sense, has no application here. These are residences for the police and their families for which they pay rent. I do not think that the fact that one wall surrounds their houses and the places where the horses and clothes of the police are kept makes any difference as to their rateability; and if they were outside the wall there is no doubt that they would be rateable.

I do not see that these buildings come under the exemption which police stations enjoy. A police station means a place where police are stationed for the purposes of their duty and nothing else; not the place where they live for their own convenience. In my opinion, these buildings ought to be rated, and the appeal fails.

LAWRANCE, J.—I am of the same opinion, and I think that this case falls within the principle of the decision in *Gambier* v. *Overseers of Lydford*.

Appeal dismissed.

Solicitors for the appellants, *Patterson, Snow, Bloxam, & Kinder*, for *H. & H. W. Gibson*, Ongar.

Solicitors for the respondents, *Duffield & Bruty*.

Prob. Div. & Adm. Div. Probate. } June 10, 1890.

In the Goods of SLINN. (*a*.)

Probate—Deed poll—Execution as a will—Extrinsic evidence—Administration.

The deceased, prior to her death, executed a deed poll, which was duly witnessed by two witnesses, who signed as witnesses in the presence of each other. The person who drew up the document regarded it as a will, and added the words, "And in presence of each other." The sole beneficiary was present, and under the deed understood that she was to receive nothing until after the death of the deceased, and after the execution of the document she promised to give, at the request of the deceased, £10 to E. C. after her death, as she had omitted to mention it in the paper.

Held, that the beneficiary was entitled to administration, with the paper annexed, as the last will and testament of the deceased. As the document was ambiguous, extrinsic evidence was admissible to show whether the deceased intended it to operate as a testamentary document.

Motion by Elizabeth Walker for grant to her of administration to the estate of Rhoda Slinn, deceased, with the following paper annexed as the last will and testament of the deceased:—

"To all people to whom these presents shall come, I, Rhoda Slinn, do send greeting. Know ye that the said Rhoda Slinn, of No. 3 house, 3 court, West John-street, in the parish of Sheffield, in the West Riding of the county of York, widow, for and in consideration of the love, goodwill, and affection which I have and do bear towards my loving friend Elizabeth Walker, wife of Joseph Walker, of No. 5, Garden-street, of the same parish and county, file cutter, have given and granted, and by these presents do freely give and grant, unto the said Elizabeth Walker, her heirs, exetors, or administrators, the moneys invested in my name in the Sheffield Savings Bank, Norfolk-street, in the parish of Sheffield aforesaid, to have and to hold as her and their own, without any manner of condition. In witness whereof I have hereunto put my hand and seal, this 12th day of October, 1889.

her
"RHODA × SLINN.
mark.

"Signed, sealed, and delivered in the presence of us, and in the presence of each other,

"GEORGE STUART,
"GEORGE MACKLEY."

It appeared that Rhoda Slinn died on November 3, 1889, and that about three weeks before her death she divided her furniture between the applicant, Mrs. Walker, who was her niece, and Mrs. Walker's son, and that she went to live with Mr. and Mrs. Walker, who nursed her and took care of her until her death. A few days before the date of the will Mrs. Walker called to see the deceased, who had on several previous occasions expressed a wish that she should have the money in the Sheffield Savings Bank. The deceased said she felt very ill, and would like to have a settlement of her affairs, as she did not think she would live long; she said that Mrs. Walker, or her husband, had better see to it. In reply to an inquiry whether she wanted to make a will, the deceased said she wanted to give Mrs. Walker the money in the savings bank in the cheapest way, and upon being informed that a will would cost one guinea she said that someone had told her that a deed of gift was the same as a will, and would not cost so much. A neighbour borrowed a book, and prepared a document with which the deceased expressed her entire approval, and she then put her mark to it in the presence of the witnesses, who, in her presence and in that of each other, then put their names to it. Mrs. Walker understood that no benefit was to accrue to her until after the death of Rhoda Slinn. After the document had been executed, the deceased said, "There is Edwin Carrington; I should like him to have something." Mrs. Walker asked whether she had fixed the amount. The deceased said she had not mentioned it in the paper, but she would leave it to Mrs. Walker and the two witnesses to see that he got £10 after her death. Mrs. Walker promised that the payment should be made. The deceased sealed up the document in an envelope, and gave it to Mrs. Walker to put in a certain tin box.

George Mackley, who drew the document from a form in a book which he borrowed for the purpose, added the words, "and in presence of each other," as he said he looked upon the document more in the light of a will, and he thought those words were usually inserted in wills.

Notice of the present application had been given to the Queen's Proctor, and advertisements were inserted in the newspapers calling upon any next of kin of the deceased to come in and accept or refuse administration. No next of kin appeared, and the Queen's Proctor intimated that he did not intend to take any steps in the matter. The deceased's property consisted of £200 in the savings bank and her wearing apparel.

(*a*.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Middleton, in support of the application, referred to *Cock* v. *Cooke*, 15 W. R. 89, L. R. 1 P. & D. 241; *Robertson* v. *Smith & Lawrance*, L. R. 2 P. & D. 43, 18 W. R. Dig. 15; *In the Goods of Coles*, 20 W. R. 214, L. R. 2 P. & D. 362.

HANNEN, P., was of opinion that the paper should be admitted to probate. It was clear that extrinsic evidence was admissible for the purpose of showing the intention with which an ambiguous paper had been executed. Besides the improbability that a person would denude herself of all her property during her life, there was in this case, as in some of the cases referred to, evidence of expressions wholly inconsistent with the idea of an out-and-out gift. The expression used by the deceased in *Robertson* v. *Smith & Lawrance* was very similar to that used in the present case in reference to Edwin Carrington. This document was, therefore, testamentary, and he granted administration to the applicant with the document annexed.

Motion granted.

Solicitors, *Geare, Son, & Pease.*

Prob. Div. & Adm. Div. } Nov 4.
Admiralty. }

"THE AVON" AND "THE THOMAS JOLLIFFE." (*a.*)

Damage—Form of decree where tug and tow both to blame for collision—No contribution amongst tort feasors.

Where, in an action of damage against two vessels and their owners, defendants intervening, the court absolves the plaintiff's vessel from blame, and finds both the vessels proceeded against to blame for the collision, the proper practice is for the court, except in the case where one or both of the vessels are exonerated from liability on the ground of compulsory pilotage or other defence of the like nature, to pronounce a decree in the action condemning the owners of each vessel and their bail in the damage proceeded for and in costs, and under this decree the plaintiffs are entitled to recover the whole of their damages and costs from the owners of either vessel or their bail, without regard to any question of contribution between the defendants.

This was an action of damage instituted on behalf of the owners of the steamship *Alaska* against the sailing ship *Avon* and the steam tug *Thomas Jolliffe* to recover for the damages sustained by *The Alaska* in a collision with *The Thomas Jolliffe* on the 25th of December, 1888, when *The Avon*, in tow of *The Thomas Jolliffe*, was proceeding to enter the Penarth Dock at the same time as *The Alaska*.

Appearances in the action were entered on behalf of the owners of *The Avon* and of the owners of *The Thomas Jolliffe*, and both these vessels were released on bail being put in.

The action was heard on the 6th of November, 1889, when the court came to the conclusion that no blame for the collision attached to *The Alaska*, but that the collision was solely caused by the negligence of *The Avon* and of *The Thomas Jolliffe*, and thereupon the following minute of the decree was entered in the registry:—"The judge . . . having heard counsel on all sides, pronounced the collision in question in this action to have been occasioned by the fault or default of the master and crew of the ship *Avon* and the fault or default of the master and crew of the steam tug *Thomas Jolliffe*, and for the plaintiff's claim for damages in consequence thereof, and he condemned the owners of the ship *Avon* and their bail and the owners of the steam tug *Thomas Jolliffe* and their bail in the said damages and costs, and referred the said damages to the registrar, assisted by merchants, to assess the amount thereof."

On the 1st of November in this year the solicitors for the defendants of the owners of *The Thomas Jolliffe* gave notice of motion that the judge in court would be moved on behalf of their clients to order "that the registrar be directed to amend the form of the above-mentioned decree dated the 6th of November, 1889, entered in this case by providing by the said decree that the owners of the ship *Avon* and of the steam tug *Thomas Jolliffe* and their respective bail be condemned severally each for one-half of the entire damage, and that any balance of such half which the plaintiffs shall not be able to enforce against either vessel shall be paid by the other vessel or her bail, or that such other amendment be made as in the circumstances is just."

Nov. 4.—*Kennedy, Q.C.*, and *Pyke*, on behalf of the owners of *The Thomas Jolliffe*, moved the judge in court in the terms of the above notice of motion.—The plaintiffs admit that the decree in the action is entered in the form usually adopted in similar cases without objection, but they contend that the practice of the court on the point has been erroneous, and that the principles laid down in *The Milan*, Lush. 603, ought to be applied in ascertaining the liability of the defendants to the plaintiffs, and the decree be altered as set forth in the notice of motion, which does no more than formulate what is now, and has been for some time, the rule of the Supreme Court of the United States in cases like the present.

They referred to *The Bernina*, 35 W. R. 314, 12 P. D. 58, *nomine Mills* v. *Armstrong*, 36 W. R. 870, 13 App. Cas. 1; *Chartered Mercantile Bank of India* v. *The Netherlands India Steam Navigation Co.*, 31 W. R. 445, 10 Q. B. D. 522, 545; The Black Book of the Admiralty, edited by Sir Travers Twiss (Rolls Series), vol. 1, p. 109, and the following American cases:—*The Sterling and The Equator*, 16 Otto, 647; *The Virginia Ehrman and The Agnese*, 7 Otto, 309; *The City of Hartford and The Unit*, 7 Otto, 323; *The Civilta and The Restless*, 13 Otto, 699.

Bucknill, Q.C., and *Mansfield*, for the owners of *The Avon*, were not called on to argue.

Raikes, for the plaintiffs.

BUTT, J.—This decree has been, to my mind, drawn up in the proper form. It may be that the law, as administered either in the United States generally, or in some of them, directing the recovery of damages in the way pointed out by Mr. Kennedy, is calculated to work out, in the end, more equal justice than results from the application of the law of England as it exists, but I have no power to deal with the matter in the way suggested by the American decisions referred to, if, in so dealing, I contravene the law of this country.

I am very clearly of opinion that I should be so contravening the law of England if I directed this decree to be amended in the way suggested. It is the law of England that everyone who has sustained damage by the joint act of two individuals, and also sues those two individuals in tort, gets a judgment for the amount of the damages he has sustained, and that judgment he has a right to enforce by execution against one or the other, or both, of those defendants. That I conceive to be the right of a plaintiff in ordinary cases. I do not understand why the law should be different in an admiralty action of damage. I do not agree at all that we have anything to do

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

in this case with what is known as the rule of the Admiralty as to division or apportionment of damages.

Both the plaintiffs and the defendants, the owners of *The Avon*, will have their costs of this application.

Solicitors for the plaintiffs, *Botterell & Roche.*

Solicitors for the owners of *The Avon*, *Toller & Sons.*

Solicitor for the owners of *The Thomas Jolliffe*, *A. H. P. Ewen.*

Privy Council.

July 12, 1890.

"THE CITY OF PEKING" *v.* COMPAGNIE DES MESSAGERIES MARITIMES AND OTHERS. (*a.*)

(*On appeal from the Vice-Admiralty Court at Hong Kong*).

Shipping—Collision—Consequential loss—Damages—Demurrage—Practice.

Where, as the result of a collision, a vessel was detained in port, while a substituted vessel, belonging to the same owners, was doing her work at the defendants' expense, claim for demurrage disallowed.

There must be actual loss, and reasonable proof thereof, to support a claim for indemnity for consequential loss.

The Black Prince, 1 *Lush.* 568, *distinguished.*

Where a reference was directed to ascertain the actual expenses incurred for the detained vessel, as distinguished from loss of profits,

Held, that it should, in the circumstances, be made to the Registrar of her Majesty in Ecclesiastical and Marine Appeals.

This was an appeal from an order of the Vice-Admiralty Court of Hong Kong, dated the 27th of March, 1888.

The facts are stated in their lordships' judgment, the main question at issue being the consequential damages of a collision, in respect to demurrage, while a substituted vessel belonging to the plaintiff company, was doing, at the defendants' expense, the work which should have been done by the injured vessel.

Sir W. Phillimore, and *Walton*, for the appellants.

Sir R. E. Webster, A.G., and *Raikes*, for the respondents.

The cases cited were *Jebson* v. *East and West India Dock Co.*, 23 W. R. 624, L. R. 10 C. P. 300; *The Black Prince*, 1 Lush. 568; *The Clarence*, 3 Wm. Rob. 283; *The Inflexible*, 5 W. R. 517, Swab. 200, 204; and *The Argentino*, 36 W. R. 814, 37 Ibid. 210, 13 P. D. 61, 200, 14 App. Cas. 519.

Dec. 14, 1889.—The judgment of their lordships (Lord HOBHOUSE, Lord MACNAGHTEN, Sir BARNES PEACOCK, and Sir RICHARD COUCH), was delivered by

Sir BARNES PEACOCK.—This is an appeal from a decree or order of the Vice-Admiralty Court at Hong Kong of the 27th of March, 1888.

The point determined was the amount of damages which the respondents, the Compagnie des Messageries Maritimes, were entitled to recover in a suit instituted by them against the appellant, the steamship *City of Peking*, in respect of a collision which took place on the 29th of November, 1886, in the harbour of Hong Kong between the said steamship *City of Peking* and the steamship *Saghalien*, of which the company were the owners.

In that suit *The City of Peking*, having been found to have been alone to blame, was condemned in damages and costs by a decree (subsequently affirmed by this board), by which it was referred to the registrar of the court to be assisted by merchants to ascertain the amount of damages and to report thereon.

The company brought in their claim containing many items. One of the items is as follows:—"No. 50, demurrage for the steamship *Saghalien* from the 29th of November, 1886, to the 25th of January, 1887, being fifty-six days, £5,352 4s."

The Saghalien was a vessel of about 3,823 tons gross, and M. de Champeaux, the agent of the company at Hong Kong, stated that he claimed demurrage at 6d. a ton a day on the gross tonnage.

The assistant-registrar, on the 6th of February, 1888, after hearing both parties, reported that he allowed the amount, £5,352 4s., claimed for demurrage, and all the other items of the plaintiff's claim with some comparatively slight deductions, which are not material to be considered with reference to the present appeal. The total so allowed being 1,491 francs, 95 centimes, £5,819 0s. 9d., and 66,068dols. and 79 cents., with interest at eight per cent. until paid.

No objection was made to this report by the plaintiffs, but the defendant appellant, on the 21st of February, 1888, objected to the item allowed for demurrage. The appellant also objected to several other items, the objection to which has since been abandoned, and is, therefore, not now material. The objections were heard by the learned judge who delivered judgment thereon, and by an order dated the 9th of March, 1888, referred back the report to the registrar and merchants, with a direction to ascertain the number of days *The Saghalien* was prevented by the collision from taking up her position on her own day from Marseilles, referring, as will hereafter appear, to the 30th of January, 1887, a day on which *The Saghalien*, as one of a line of steamers belonging to the company, was appointed to commence a fresh voyage from Marseilles to Shanghai.

The deputy-registrar, assisted by the same merchants, having, in pursuance of the last-mentioned order, heard both parties, together with fresh evidence, including an affidavit of M. de Champeaux, again reported to the court on the 21st of March, 1888, that fifty-six days' demurrage be allowed, and also specified his reasons for such report. To that report the defendant, on the 24th of March, 1888, objected, and contended that it should be varied, and that no demurrage ought to be allowed.

The learned judge, having again heard the case on the 27th of March, 1888, without assigning any further reasons, pronounced (*inter alia*) that the sum of £5,819 0s. 9d. was due to the plaintiffs in respect of their claim, together with interest and costs. And he condemned the defendants and their bail in the said sums, interest, and costs. The sum of £5,819 0s. 9d. so held to be due to the company includes the sum of £5,352 4s. claimed by them and allowed by the first report for demurrage.

From that order or decree the present appeal has been preferred by the defendant upon the ground that no demurrage ought to have been allowed, or, in the alternative, that the demurrage allowed was for too many days at too high a rate, and also upon the ground that the rate of interest allowed was unreasonable. Their lordships, in the course of the argument, intimated their opinion that, no objection having been made in the lower court in respect of

(*a.*) Reported by J. M. COLLYER, Esq., Barrister-at-Law.

the interest allowed, the appellant could not now support the appeal against such allowance.

The only question now to be decided is whether the defendant ought to be held liable for the £5,352 4s. allowed for demurrage, or any part of that amount.

It was objected on behalf of the respondents on the argument of the appeal in support of the third reason of their case, that the objection to the demurrage taken in the court below was not to the rate or number of days, but that no demurrage at all was due, and that the rate and number of days were not objected to in the court below and were, therefore, not subject to appeal to her Majesty in Council; but their lordships are of opinion that that objection cannot be supported. The objection to the first report was that the report be varied, the following items (of which No. 50, "Demurrage for *Saghalien* £5,352 4s., was one) being objected to." In the objection to the second report the language was, no doubt, altered, the objection being "that the report be varied, and that no demurrage be allowed." Their lordships are disposed to think that even if the latter objection stood alone the appellant would have been at liberty to contend that part of the sum allowed for demurrage ought to be disallowed, even though it might fail in showing that no demurrage ought to be allowed; but reading the second objection, coupled with the first, they have no doubt that the appellant is at liberty to show that the whole or some part of the item of £5,352 4s. ought to be disallowed. In dealing with the case their lordships consider that the plaintiffs must be held to their claim for demurrage, from the 29th of November, 1886, to the 25th of January, 1887, or, in other words, during the detention of *The Saghalien* at Hong Kong, and that they are not at liberty to claim as demurrage any detention of the vessel at Marseilles after her arrival there on the 25th of February, 1888, the 6d. a day claimed and allowed being limited to the period of her detention at Hong Kong between the dates mentioned in item No. 50 of the claim.

There is no doubt as to the rule of law according to which compensation is to be assessed in cases of this nature, where a partial loss is sustained by collision. The rule is *restitutio in integrum: The Black Prince*, 1 Lush., at p. 573. The party injured is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered. It does not follow as a matter of necessity that anything is due for detention of a vessel whilst under repair. In order to entitle a party to be indemnified for what is termed in the Admiralty Court a consequential loss resulting from the detention of his vessel, two things are absolutely necessary—actual loss, and reasonable proof of the amount: *The Clarence; The Argentino.*

There is no dispute as to the principal facts as stated by the learned judge: "*The Saghalien* is one of the steamers of the company which run regularly every fortnight from Marseilles to Shanghai. These teamers are subsidized by the French Government to carry mails from France to China and the ports on that course, and to take return mails to France. The China terminus is Shanghai, and it is from there that they commence their return voyage homewards after staying for a time at Shanghai, something between a fortnight and three weeks it would seem from the evidence before the registrar. They also stop for a short time apparently at Marseilles after the completion of the round trip and before commencing a fresh voyage to China. On the 29th of November, 1886, *The Saghalien* was lying in the harbour of Hong Kong, having arrived from Shanghai two days before. She was homeward bound next day at noon. *The City of Peking*, arriving with the American mails, in coming up to her anchorage collided with and damaged *The Saghalien* so that she could not proceed on her journey to France, but had to be taken into dry dock. On the same day the steamship *Melbourne*, another of the company's steamers, arrived in Hong Kong from Europe with passengers, mails, and cargo, and in the ordinary course would have proceeded to Shanghai on the following day. The agent of the company, M. de Champeaux, at once decided to send on *The Melbourne's* cargo, mails, and passengers by outside steamers to Shanghai, and send *The Melbourne* back to Europe instead of *The Saghalien*. This decision was very promptly executed, and *The Melbourne* having discharged her northern cargo, had transferred to her *The Saghalien's* cargo, passengers, &c."

The outward voyage of *The Saghalien* from Marseilles commenced on the 26th of September, 1886. If the collision had not taken place she ought, in ordinary course, to have left Hong Kong on her homeward voyage on the 30th of November, 1886, and to have reached Marseilles about the 3rd of January, 1887, and, according to the arrangements of the company, would have remained there unemployed until the 30th of January in that year, when she was timed to take her turn and to start upon a fresh outward voyage to Shanghai. In consequence, however, of the collision she was detained at Hong Kong until the 25th of January, 1887, fifty-six days after the collision. She left on that day, arrived at Marseilles on the 25th of February in that year, and remained there unemployed until the 27th of March, when she again sailed for Shanghai.

The Melbourne left Hong Kong on the 2nd of December, 1886, two days after *The Saghalien* ought to have started; she arrived at Marseilles in due course early in January, 1887, and remained there unemployed until the 30th of that month, on which day she took the turn which, but for the collision, would have been taken by *The Saghalien*, and sailed on a fresh outward voyage for Shanghai.

The Melbourne having been substituted for *The Saghalien* on the homeward voyage, was necessarily prevented from continuing her outward voyage to Shanghai and back, and other arrangements had to be made for carrying on to that port the mails, passengers, and cargo of *The Melbourne*, and for her return voyage to Marseilles. These arrangements were attended with very considerable expense, in addition to the loss sustained by the withdrawal of certain passengers and freight, booked by *The Melbourne* from Hong Kong to Shanghai, but the whole of these expenses and losses were included in the plaintiff's claim, and have been allowed both by the assistant-registrar and by the judge, in addition to the claim of £5,352 4s. for demurrage.

As to the homeward voyage from Shanghai, which would have been made by *The Melbourne* if she had not been substituted, M. de Champeaux, in his affidavit of the 18th of March, 1888, says:—"The company's steamship *Amazone*, instead of remaining at Shanghai, according to the time tables of the company, until the 6th day of January, 1887, was despatched from Shanghai on the 23rd day of December, 1886, to supply the place of the steamship *Melbourne*, and the plaintiff company's steamship *Yangtse*, instead of remaining in Shanghai until the 20th day of January, 1887, was despatched from Shanghai on the 6th day of January, 1887, in the place of the said steamship *Amazone*.

"The company's steamship *Volga* was taken off the Hong Kong and Japan line, and was despatched from Shanghai on the 20th day of January, 1887, in place of the said steamship *Yangtse*, and she carried the

mails, passengers, and cargo to Hong Kong, where they were transhipped into the said steamship *Saghalien* thus enabling that vessel to sail on the 25th of January, 1887, for Marseilles, otherwise the said steamship *Saghalien* would have had to proceed to Shanghai for the mails, passengers, and cargo, which would have caused her to leave Marseilles again two weeks later than the 27th day of March, 1887, the day she did leave.

"The company's steamers usually remain at Shanghai for about seventeen to twenty-one days, in order to thoroughly overhaul their engines and machinery, and in consequence of the earlier despatch of the said steamships, *Amazone* and *Yangtse*, as aforesaid, they were only at Shanghai about three or four days, and the usual overhaul of the engines and machinery could not be and was not effected.

"The company's steamers usually remain at Marseilles for about four weeks after their arrival before being again despatched to China."

M. de Champeaux, in his affidavit of the 9th of January, 1888, paragraph 15, also stated that, in consequence of the detention of the steamship *Saghalien*, she lost her turn in the line of mail steamers, and the company suffered great inconvenience, and incurred heavy loss, both pecuniarily and in reputation; but on cross-examination, at page 15, he says:—"I do not know if any loss has actually occurred. Loss might have occurred by the steamers not staying long enough at Shanghai to clean their engines. The service of the steamers was also made irregular. We were exposed to a claim from the French Government.

"If there had been no collision *The Melbourne* would have got to Shanghai about the 3rd of December, and would have stayed about fourteen days there, and ought to have left here, *i.e.*, Hong Kong, on the 28th of December. *The Yangtse* probably left on the 28th of December. The next steamer to the north after *The Melbourne* was *The Yangtse*. These steamers were turned round at Shanghai. So far as profits were concerned the Compagnie lost nothing. The crew and officers are engaged for the voyage, and some of the crew are discharged at Marseilles. Taking *The Volga* off did not interfere with the service from Yokohama to Hong Kong. I cannot say what extra expense was caused by taking *The Volga* off her proper voyage. I do not know if any actual gains were lost to the company by the change of steamers, nor can I say what actual expenses were incurred."

There appears to be a slight mistake in the statement that *The Yangtse* was the next steamer north after *The Melbourne*, for it appears from a later affidavit, as already stated, that *The Amazone* was the next, and *The Yangtse* the next after *The Amazone*, and that *The Amazone* was the steamer which supplied the place of *The Melbourne* on the 23rd of December, but the mistake does not in the least degree alter the case.

M. de Champeaux again says:—"*The Saghalien* is three times as large as *The Volga*. If I had sent *The Saghalien* up to Shanghai instead of using *The Volga* the expense would have been more, as a fortnight would have been lost. If I had sent *The Saghalien The Volga* would not have come down to Hong Kong. Whilst in dock other steamers were earning the profits of *The Saghalien*. I did not hear of any cargo being shut out at Shanghai."

It seems clear that no damage was sustained by the company in consequence of *The Melbourne's* not having completed her outward voyage, and been at Shanghai for her return voyage. The profits of her homeward voyage, though earned by other steamers, were earned by other steamers of the company and for the company.

As to the sending of *The Volga* to Shanghai to carry the mails, passengers, and cargo from thence to Hong Kong to be reshipped on board *The Saghalien*, and carried by her to Marseilles on her voyage which commenced on the 25th of January, it seems clear that no damage has been sustained by the company, as all the expenses of *The Volga* were claimed by the company and have been allowed by the judge, the sums allowed being £433 4s. 4d. and 624 dols. and 77 cents. The learned judge, on allowing these amounts remarked: "The allowance for *The Volga* in connecting the Shanghai end of the line with Hong Kong is most moderate, and seems to me to have been the cheapest service that could have been rendered for *The City of Peking*."

The learned judge was mistaken in treating the case of *The Black Prince* as analogous to the present. The two cases are very different. In *The Black Prince* the vessels belonged to different sets of owners, so that the profits earned by one ship belonged to one set of owners, and the profits earned by a different ship to another set of owners, whereas in the present case the profits earned, whether by one ship or another, all belonged to the company.

Again, in the case of *The Black Prince*, the arrangement as to the turns fixed for the voyages to be made by several ships was made by the several owners, each set of owners having a distinct interest in having the arrangement adhered to so that their ship might be employed in its proper turn; no set of owners had the power to alter the turns allotted without the consent of all the others. In the present case the order in which the ships were appointed to leave Marseilles was one made for the company's own convenience and to preserve regularity in the departure of their own vessels. It could be changed or varied at any moment at the will of the company in the case of emergency, or if the interests of the company appeared to them to require it, and, in fact, it was very properly changed by M. de Champeaux in consequence of the inability of *The Saghalien* to proceed on her voyage.

It appears to their lordships that all the damages sustained by the company in consequence of the substitution of *The Melbourne* were included in the claim brought in before the registrar, allowed by him, and finally sanctioned by the court. *The Melbourne* and her crew having been substituted for *The Saghalien* and her crew on her homeward voyage, at what may now be termed the expense of the defendant, was very properly, and perhaps necessarily, allowed to take the turn of *The Saghalien* on the next outward voyage from Marseilles on the 30th of January, 1887.

The company lost nothing, so far as the use of the ships was concerned, by substituting *The Melbourne*, for if she had not been engaged on the homeward voyage she and her crew would have been occupied during the whole time in completing the voyage on which she was engaged at the time of the substitution.

It would be very unjust to charge the defendant £95 a day or anything for the loss of the use of *The Saghalien* during her detention at Hong Kong for the time during which *The Melbourne* and her crew were doing at the defendant's expense the work which *The Saghalien* and her crew ought to have done. This includes the period from the 2nd of December, 1886, to the day in January 1887, on which *The Melbourne* arrived at Marseilles. No loss was sustained by the company by the detention of *The Melbourne* from the day of her arrival at Marseilles and the day of her departure therefrom, for it was in consequence of the arrangements of the company that she remained unemployed during that period; so also no loss was sustained by the company in consequence of *The Saghalien's* not having been in

Marseilles from the 3rd to the 30th of January, 1887, as but for the accident she ought to have been, for if she had been there she would have been lying unemployed and earning nothing in accordance with the company's own arrangements.

The learned judge was clearly in error in referring back the report by his first judgment to the registrar and merchants with a direction to ascertain the number of days *The Saghalien* was prevented by the collision from taking up her position on her own day, and to amend their report on the principles indicated, without directing them to ascertain whether the company sustained any loss in consequence. In giving that direction he was acting entirely upon the case of *The Black Prince*, without adverting to the difference between that case and the present. He said:—"It may turn out that there were fifty-six days' delay, but although *The Araxes* (referring to the injured ship in the case of *The Black Prince*) was thirty-eight days in dock she was only allowed twenty-eight days' demurrage, such being the number of days she was prevented from taking her place on the line—in other words, that she was not earning money for her owners."

The case went before the deputy registrar, Mr. Sangster, a different officer, and the same merchants, who reported that fifty-six days' demurrage be allowed. The report is not very clear; but reading the whole report together it seems to their lordships that the deputy registrar attributed the demurrage to the fifty-six days during which *The Saghalien* was in dock at Hong Kong, and not to any portion of the time during which she was unemployed at Marseilles.

Be this as it may, the learned judge, acting upon the report, without giving any further reasons than those in his first judgment, and apparently under the erroneous impression that this case was governed by the ruling in the case of *The Black Prince*, allowed the sum of £5,352 4s. claimed for demurrage, being at the rate of 6d. per ton upon the gross tonnage of *The Saghalien*, or about £95 a day for each of the said fifty-six days, and this without proof that any loss had been sustained by the company in consequence of that demurrage.

It has been shown that the company has claimed and been allowed all the damage sustained in consequence of the inability of *The Saghalien* to proceed on her homeward voyage on the 30th of November, 1886, so far as the loss by the company of the use of the vessel was concerned.

Mr. Champeaux very properly, and, as it appears to their lordships, correctly stated, "that, so far as profits were concerned, the company lost nothing," and also "that whilst in dock the other steamers were earning the profits of *The Saghalien*." The learned judge, however, remarked that that statement required some explanation, and added, "Should they have nothing for those services? I have stated why I think they ought to have," without adverting to the fact that he was allowing in other items of the claim all the expenses which had been incurred in consequence of the substitution of *The Melbourne*.

Their lordships are of opinion that the decree or order appealed against ought to be reversed so far as it allows the sum of £5,352 4s. claimed for demurrage, with interest thereon and costs. Mr. Champeaux stated in his affidavit of the 9th of January, 1888, that the portage bill of the steamship *Saghalien*, whilst lying at Hong Kong during the time she was being repaired, amounted to from £95 to £100 a day, and that it could not have been reduced. There seems, however, to be some mistake in that statement, unless the portage bill, the items of which are not before their lordships, included the 53,000dols. claimed and allowed for the repairs of the vessel. Their lordships are of opinion that the amount claimed and allowed for demurrage, so far as it includes any damage on account of the loss of the use of *The Saghalien*, ought to be disallowed. They cannot, however, say that the company may not have incurred some expenses in respect of *The Saghalien*, such, for instance, as the lodging, maintenance, and wages of the crew, and it may be other expenses incurred during the period of her detention which would not have been incurred if she had not been detained. These may have been included in No. 50, the item claimed for demurrage, and, if so, their lordships think that the plaintiffs are entitled to recover them under that item. (See *The Inflexible*.)

It would be very inconvenient and would be attended with considerable expense to the parties to send this case back to the registrar at Hong Kong. The head officer of the company is in France, and they will doubtless be able to supply the necessary information and affidavits as to the items of the portage bill, and as to the nature and extent of the necessary and reasonable expenses, if any, incurred at Hong Kong with reference to *The Saghalien* during her detention there.

Their lordships are not prepared to make any report to her Majesty before it shall have been ascertained whether any and what expenses of the nature above indicated were incurred by the company. They, therefore, refer it to the Registrar of her Majesty in Ecclesiastical and Maritime Appeals to ascertain and report whether, having regard to the above remarks, any and what expenses were properly incurred by the company with reference to the steamship *Saghalien* during her detention at Hong Kong between the 29th day of November, 1886, and the 25th of January, 1887, in addition to the several items included in the claim made by the company at Hong Kong exclusive of that for demurrage in No. 50, and if the registrar find that any such expenses were necessarily and properly incurred, then to report the amount and the several items thereof.

All further questions, including the question of costs, are reserved.

The plaintiffs must bring in their claims in writing before the Registrar of her Majesty in Ecclesiastical Maritime Appeals within the space of one month from the 14th day of December, 1889, or within such further time as the said registrar may allow.

July 12, 1890.—The final judgment of their lordships (Lord WATSON, Lord MACNAGHTEN, Sir BARNES PEACOCK, and Sir RICHARD COUCH) was delivered by

Sir BARNES PEACOCK.—Upon the hearing of this appeal their lordships declared their opinion that the decree or order appealed against ought to be reversed, so far as it allowed the sum of £5,352 4s. claimed for demurrage, with interest thereon and costs, but they added that they could not say that the company might not have incurred some expense in respect of *The Saghalien*, such, for instance, as lodging, maintenance, and wages of the crew, and it might be, other expenses incurred during the period of her detention, which would not have been incurred if she had not been detained, and their lordships referred it to the Registrar of her Majesty in Ecclesiastical and Maritime Appeals to ascertain and report to this board in respect of those matters.

Their lordships having considered the report of the registrar, and the evidence adduced before him, are of opinion that the whole of the sum claimed for demurrage ought to be disallowed, and that the respondents have not shown that they are entitled to any sum in substitution thereof.

Under these circumstances, their lordships will humbly advise her Majesty that the decree or order appealed against ought to be reversed, so far as it allows the sum of £5,352 4s. claimed for demurrage, with interest thereon and costs, and that in other respects it ought to be affirmed. The respondents must pay the costs of this appeal, including the costs of the reference to the registrar, and of the motion to this board consequent upon his report.

Solicitors for the appellants, *Trinders & Co.*

Solicitors for the respondents, *Gellatly & Warton.*

Court of Appeal.

App. Bankruptcy. Dec. 12.

Ex parte ARGENTINE GOLD FIELDS.
In re LOW. (*a.*)

Bankruptcy—Bankruptcy notice—Power to include more than one judgment debt—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g)—*Bankruptcy Rules,* 1886, *rr.* 136, 137; *Appendix, Part I., Forms* 5, 6.

A bankruptcy notice cannot be issued in respect of more than one judgment debt.

Appeal from the refusal of Mr. Registrar Linklater to issue a bankruptcy notice.

The Argentine Gold Fields Co. obtained two judgments against the debtor, each for £30. The company being desirous of serving the debtor with a bankruptcy notice, applied to the registrar, asking that one bankruptcy notice might be issued in respect of the two judgments.

The registrar held that there was no power to issue a bankruptcy notice in respect of more than one judgment.

The company appealed.

Whinney, for the company.—The registrar thought that as sub-section 1 (*g*) of section 4, and the forms in the appendix to the rules (Forms 5, 6), speak all through of "judgment" in the singular, it was impossible to comprise two judgments in one notice. But this is a case in which the singular ought to be held to include the plural, in accordance with the general rule of construction of statutes. And rules 136 and 137, which prescribe Forms 5 and 6, each say, "with such variations as circumstances may require." *In re Andrew,* 24 W. R. 197, 1 Ch. D. 358, is an authority on the somewhat analogous procedure under the old practice. One notice in respect of one judgment, or two separate notices, will not serve our purpose, as each judgment is for less than £50, though both together amount to more than £50. If we were to serve the debtor with two notices, he might comply with one by payment, and then, though his non-compliance with the other would be an act of bankruptcy, the debt itself, being for less than £50, would not be sufficient to support a petition.

Lord ESHER, M.R.—I am of opinion that we must read section 4, sub-section 1 (*g*), as it is written. As it is written, it applies, in every part of it, to one judgment, and one judgment only. I think we shall be construing the section according to its true meaning if we say that it does not contemplate the issuing of a bankruptcy notice in respect of more than one judgment. If we compare it with section 6, which deals with the question whether two creditors may join in the same petition, we find that where the Legislature mean that two may so join, they say so. I think the registrar was right in saying that he could not allow two judgment debts to be joined in the same notice. Another reason which leads me to the same conclusion is this: it was pointed out that if the bankruptcy notice is limited to one judgment, the debtor may pay it, and then the other judgment, though another notice might be issued in respect of it, would not be sufficient to support a petition, and so the appellants would not be able to make the debtor a bankrupt. As to that, I do not think it would be right to extend the meaning of the words so as to deprive the debtor of the opportunity of taking a course which is otherwise left open to him, and which may prevent bankruptcy proceedings being taken against him.

LOPES and KAY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the company, *Lyne & Holman.*

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

From Q. B. Div. Dec. 11.

In re LANGLOIS & BIDEN. (*a.*)

Costs—Solicitor—County court—Amount claimed over £10—*Amount recovered under* £10—*County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *ss.* 118, 119—*County Court Rules,* 1889, *Appendix.*

Where, in an action in a county court, the amount claimed is over £10, *but less than* £10 *is recovered, there is a discretion to allow the taxation of costs, as between solicitor and client, on the higher scale.*

Decision of the Queen's Bench Division (ante, *p.* 110) *reversed.*

Appeal by Messrs. Langlois & Biden, solicitors, from the decision of a divisional court (reported *ante,* p. 110).

Messrs. Langlois & Biden were instructed by a person named Wood to bring an action for him in the county court on a promissory note for £15 of which he was indorsee. At the trial Wood admitted in cross-examination that he had only given £5 for the note, and judgment was given for him for that sum with costs. The costs as between party and party were taxed at £2 13s. 6d. and paid by the defendant. Messrs. Langlois & Biden then sent in their bill of costs to Wood, which amounted to £9 14s. 6d., of which £5 2s. 6d. were actual expenses out of pocket. This sum was made up of counsel's fee, £2 4s. 6d., court fees, £2 8s., and witnesses, 10s.

Wood obtained an order for the taxation of this bill, and Master Wilberforce, before whom it came, while expressing his regret at the hardship inflicted on the solicitors, considered himself bound by the rules to tax the costs on the lower scale at £2 13s. 6d. On appeal Huddleston, B., at chambers, reversed this decision, but the Divisional Court restored the master's order.

The solicitors appealed.

By section 118 of the County Courts Act, 1888, "all costs and charges between solicitor and client shall, on the application either of the solicitor or

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

client, but not otherwise, be taxed by the registrar of the court in which such costs and charges were incurred, but his taxation may be reviewed by the judge on the application of either party, and no costs or charges shall be allowed on such taxation which are not sanctioned by the scale then in force."

The scale in force at the time of the taxation is given in the Appendix to the County Court Rules, 1889, and in it the lower scale is headed: "Costs to be paid to solicitors in actions and matters, as well between party and party as between solicitor and client, where the amount recovered exceeds £2 and does not exceed £10." At the end of the scale is the following note: "N.B.—No other costs are to be allowed than the above where the amount claimed does not exceed £10, unless the judge certifies under section 119 of the County Courts Act, 1888."

The higher scale is headed: "Costs to be paid to solicitors in actions and matters, as well as between party and party as between solicitor and client, where the subject-matter or the sum recovered exceeds £10."

Channell, Q.C., and *R. M. Bray*, for the appellants.

Crump, Q.C., and *W. H. C. Payne*, for the respondent.

The arguments used were the same as in the Divisional Court.

Lord ESHER, M.R.—In this case I do not think it necessary now to decide whether the taxation of this bill of costs was exclusively a matter for the county court. Certainly, such bills of costs ought not to be brought before masters of the High Court, except under exceptional circumstances. If it were to become a practice that bills of costs incurred in proceedings before county courts should be brought for taxation before masters of the High Court, the judges would have to amend the rules in order to prevent such a thing from occurring. But assuming that the bill of costs was properly brought before the master, the question is, whether he has any power when the amount claimed exceeds £10, and the amount recovered is less than that limit, to direct in a taxation between solicitor and client that the solicitor shall receive any costs other than those given by the lower scale. The question really turns on the construction of section 118 of the County Courts Act, 1888, and of the rules made under that Act. Those rules were made by a committee of county court judges, and they are to have the same force and validity as an Act of Parliament. We must, therefore, look at the rules and the Act together, and construe them as if they were all one enactment. The lower scale is headed: "Costs to be paid to solicitors . . . as well between party and party as solicitor and client, where the amount recovered exceeds £2 and does not exceed £10." Then follows the scale of costs, and then comes this note: "N.B.—No other costs to be allowed than the above where the amount claimed does not exceed £10, unless the judge certifies under section 119." Therefore, even where the amount claimed and the amount recovered are under £10, the judge may, under section 119, certify under certain circumstances, which are specified in the section, for costs on the higher scale. But where, as in the present case, the amount claimed is over, and the amount recovered is under, the limit, the negative part of the note does not apply. It is, therefore, a question whether the note does not by necessary implication give a power in such a case to give more costs than are allowed by the lower scale. No doubt, as between party and party, the taxation must in such a case be on the lower scale. In my opinion, the effect of the note is to give the master in such cases a discretion to allow, as between solicitor and client, costs on the higher scale. Of course, he cannot give more costs than are allowed by the higher scale, but I think that he has a discretion where the amount claimed exceeds £10, and the amount recovered is less than £10, to give costs either on the higher or the lower scale.

I can see nothing in section 118 inconsistent with this view. Section 119, in my opinion, does not apply at all to disputes between solicitor and client. It has reference only to taxation as between party and party, and therefore I think it does not in any way limit section 118 on this point.

The note to the scale is equally a part of the enactment. We are bound to give a meaning, if possible, to every part of the enactment, and this, in my opinion, is the only meaning which this note is capable of bearing. The master, therefore, has a discretion which he must exercise on the circumstances of each case. He will have to consider whether he will, under the circumstances, allow costs on the lower or the higher scale. If a solicitor knew, or ought to have known by taking ordinary care and making ordinary inquiries, that his client, who alleged that he claimed a larger sum, would not possibly recover more than £10, then he ought not to allow him to claim more, and if, knowing this, he nevertheless claimed more, then, after judgment had been given for less than £10, when the bill of costs came for taxation, I should think that the master would exercise his discretion against the solicitor, and would bind him down to the lower scale. On the other hand, if the client, through reticence or wilfulness, misinformed the solicitor and misled him into believing that he had a fair chance of recovering a larger sum than £10, then if the solicitor refused to bring the action for that larger sum, he would be equally wrong; for a solicitor has no right to shut out his client from recovering the amount he believes to be due to him. In such a case it would be a great hardship on the solicitor if he were unable to recover against the client even the costs which, on the faith of the client's statement, he had paid out of his own pocket in furtherance of the action. In such a case I think that the master would exercise his discretion in the solicitor's favour, and would give him costs on the higher scale. Therefore, in the present case I think that the master had a discretion which he has not exercised, and that the matter must consequently be remitted to him with this expression of our opinion. It follows that we think that the Divisional Court was wrong, and that this appeal must be allowed. I wish to repeat that this decision is given on the assumption that the master had jurisdiction to tax the bill, as to which I say nothing.

KAY, L.J.—I agree. I confess that at first I was in some difficulty to reconcile the heading and the note to the lower scale of costs, but I think the suggestion of the Master of the Rolls completely solves the difficulty. No doubt, according to section 118, the costs in this case must be taxed on the lower scale, but that lower scale, by its note, allows the master a discretion in such a case as this to give more costs. That discretion is, I think, perfectly consistent with the section, and it alone makes the heading and the note reconcileable. On this point, therefore, we differ from the Divisional Court, and the master will have to exercise his discretion and say whether any and what part of the bill should be taxed on the higher scale. I am most anxious not to fetter that discretion, and I will only suggest, in addition to the illustrations given by the Master of the Rolls, that in my opinion the master might, if he thought fit, say that counsel's fee or some other outgoings ought not to be allowed on the higher scale, and might leave

them on the lower scale while allowing other of the costs on the higher scale.

Appeal allowed.

Solicitors for the appellants, *Langlois & Biden.*

Solicitor for the respondent, *Morris N. Fuller.*

From Q. B. Div. Nov. 28.

ABRAHAMS v. DEAKIN. (a.)

Master and servant—False imprisonment—Arrest by a servant—Liability of master.

The plaintiff, with a friend, went into a public-house, in which N., a servant of the defendant's, was barman and acted as manager of the bar. The plaintiff's friend gave to N., in payment of liquor supplied to him and the plaintiff, a German ten-mark piece in lieu of a half-sovereign. N. went for change, but, on discovering that the coin was a foreign one, brought it back and got an English half-sovereign in return. On the plaintiff and his friend leaving the public-house, N. followed them out and gave them both into custody for attempting to pass false coin. The charge was dismissed. Upon an action by the plaintiff against the defendant, as master of N., for false imprisonment, the only evidence of any authority in N. to give suspected persons into custody was the fact that he was manager of the bar.

Held, that there was no evidence of any liability in the defendant for the action of his servant.

Owston v. Bank of New South Wales (*decided by the Privy Council*), 4 *App. Cas.* 270, 27 *W. R. Dig.* 156, *approved and adopted.*

This was an action for false imprisonment, in which, at a trial before Wills, J., and a jury, a verdict and judgment had been entered for the plaintiff for £50.

The material facts were that the plaintiff had gone into a public-house of the defendant's, with a friend, who offered to the barman a ten-mark German piece in lieu of half-a-sovereign.

The barman, one Nunney, took the coin to get it changed, but, finding it to be a foreign coin, returned it to the plaintiff's friend, who thereupon gave the barman a half-sovereign in its place. Subsequently, when the plaintiff and his friend had left the public-house, the barman, Nunney, followed them into the treet, and gave them into custody for attempting to pass bad money.

At the police-station the inspector declined to take the charge.

The plaintiff brought the present action, and his friend had brought another, against the defendant as the proprietor of the public-house, and so responsible for its servants. The defendant did not reside upon the premises, but came round to inspect this amongst other houses, for which he held a licence. Nunney, the barman, acted as manager of the business at the bar. There was no other evidence, beyond this fact, that Nunney had any authority to give people into custody. Wills, J., allowed the case to go to the jury, on the ground that, there being evidence that Nunney was manager, it was for the jury to say whether a person acting as manager in that particular class of business would not be impliedly authorized to give suspected persons into custody.

The defendant now appealed, on the ground that there was no evidence to go to the jury of Nunney having any authority to take any such action.

(a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

Cock, Q.C., and *R. Wallace*, for the appellant.—There was no evidence of any implied authority in Nunney to take anyone into custody: *Allen* v. *London and South-Western Railway Co.*, 19 W. R. 127, L. R. 6 Q. B. 65; *Owston* v. *Bank of New South Wales*, 4 App. Cas. 270, 27 W. R. Dig. 156; and *Poulton* v. *London and South-Western Railway Co.*, 16 W. R. 309, L. R. 2 Q. B. 534. There was no evidence of any immediate necessity to arrest the respondent. The property of the master was not in danger. The common law right to arrest anyone suspected of being about to commit a felony does not apply here.

French, Q.C., and *J. W. Gordon*, for the respondent.—It was for a jury to say whether, upon the facts of this case, there could be authority, express or implied, in the manager of a public-house bar to take such steps as Nunney did. This is a question of fact which the jury have found in the respondent's favour: *Ward* v. *General Omnibus Co.*, 21 W. R. 358; *Goff* v. *Great Northern Railway Co.*, 3 El. & El. 672; and *Seymour* v. *Greenwood*, 6 H. & N. 359.

[It was mentioned that in the other action of *Metcalfe* v. *Deakin*, upon the same facts, Denman, J., had ruled that there was no evidence of authority by Deakin to go to the jury.]

Lord ESHER, M.R.—The whole of this case turns upon the action of Nunney, who clearly was a barman, whatever else people chose to call him. The only evidence of his authority is the fact that he acted as what is called manager in this public-house. He was not a general manager of the business; he did not act as manager in any other place than the bar and bar-room. That being his position, the only question is, Does that office give him the right and the implied authority to act as he did? That is, to follow two persons out into the street and to give them into custody for an alleged attempt, which in any case had failed, to commit a crime. In the absence of any express authority by his employer to take persons into custody on suspicion, it was for the plaintiff to show some general custom in the trade to give managers such authority. None was produced. The judge appears to have made some remarks on the dangers to which a publican is more particularly exposed from stray customers. I do not agree with that opinion, but, even if I did, that was no evidence as coming from the judge. It was merely an expression of opinion. Was there any evidence of authority being in Nunney upon which a jury could be entitled to act either as an inference or as implying authority? I am clearly of opinion that there was not. The case comes within the principles of *Allen* v. *London and South-Western Railway Co.* and *Owston* v. *Bank of New South Wales.* If an act is done by a servant on his own behalf or out of spite, the master is not liable for its consequences, even though the authority given be a general authority. The latter case was decided by the Privy Council, and though not binding upon us here, is of the greatest possible weight, and I adopt its judgment unhesitatingly.

LOPES, L.J.—I agree. The only question upon the evidence given is, What was the implied authority in a servant in charge of the management of a bar? There is no other evidence of authority here except the fact that Nunney was manager of the bar-room. Blackburn, J., in *Allen* v. *London and South-Western Railway Co.*, lays down the right principle: "The principle which governs the present case has been laid down in the cases cited; there is an implied authority to do all those things that are necessary for the pro-

tection of the property intrusted to a person or for fulfilling the duty which a person has to perform." There is no implied authority in a servant to punish a customer for a supposed infringement of the law. How can an authority be presumed to exist empowering him, at a time when his master's property was admittedly safely secured, to go after and arrest a customer? Such a supposition is aimed at in Blackburn, J.'s words: "There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or recovering it back, and an act done for the purpose of punishing the offender for what has already been done." There can be no such authority of any sort or kind implied, nor could it be presumed from any evidence before the court in this case.

KAY, L J.—The question is, whether there was evidence to go to a jury on which they could reasonably find that there was an implied authority in the manager of a public-house bar to punish anyone for attempting to commit a crime? No evidence of custom in the trade was ever given. The sole evidence was the fact of the servant being the manager of the bar. There was no question of property having to be protected or as to the prevention of a felony. Can there be said to be, upon such evidence, any power in the servant to do such an illegal act as was admittedly done here in order to prevent other people from trying to commit the offence originally alleged to have been attempted? Suppose the case of a wrongful assault by a manager upon a customer at the bar, under the plea of keeping order, or of libellous letters inserted by him for some reason against a customer in a newspaper, could his master be held liable for such conduct? It would be as absurd to hold so as it would in this case.

Appeal allowed.

Solicitors for the appellant, *Peckham, Maitland, & Peckham.*

Solicitors for the respondent, *Kime & Hammond.*

High Court of Justice.

Chan. Div. }
North, J. } July 30, 1890.

In re BIGNOLD.
BIGNOLD *v.* BIGNOLD. (*a.*)

Will—Legacy—Interest on legacy—Date at which interest begins to run.

A testator directed his trustees to set apart and invest a certain sum (part of the proceeds of sale of his real and personal estate), and to permit his wife to receive the income during her widowhood, the provision to be accepted by her in lieu of dower and freebench. The widow elected to take the legacy.

Held, that she was entitled to interest on the legacy from the expiration of a year after the date of the testator's death, but not from the date of his death.

Further consideration.

William Atkins Bignold, by his will, after bequeathing to his wife his household furniture and provisions, and also a legacy of £1,000 to be paid within three months after his death, gave his freehold estates and residuary personal estate to trustees upon trust for sale and conversion, and devised his copyhold estates to such uses as his trustees should appoint for the purpose of completing any sale of them. And the testator directed his trustees to set aside out of the proceeds of sale of his real and residuary personal estate the sum of £2,000 upon trust to invest the same, and to permit his wife to receive the income thereof so long as she should continue his widow. And the will proceeded: "I declare that the provision hereinbefore made for my said wife shall be accepted by her in lieu of her claim to dower or freebench out of my said estates."

The testator died in 1884. His personal estate proved insufficient for the payment of his funeral and testamentary expenses and debts and the legacy of £1,000, so that the whole of the sum of £2,000 was payable out of the proceeds of the sale of his freehold and copyhold estates.

The widow elected to take the provision made for her in the will in lieu of dower and freebench.

This was the further consideration of an action for the administration of the testator's estate, and the question for decision was whether interest on the sum of £2,000 ran from the date of the testator's death or from the end of a year after that date.

Cozens-Hardy, Q.C. and *Lyttleton Chubb*, for the plaintiff.—The interest on the £2,000 runs from the expiration of a year from the death of the testator. [They were stopped by the court.]

Everett, Q.C., and *A. J. Chitty*, for the widow.—The widow is entitled to interest on the £2,000 from the date of the testator's death, as her interest in the £2,000 is in satisfaction of dower and freebench, and a legacy in satisfaction of a debt carries interest from the death of the testator: *Clark* v. *Sewell*, 3 Atk. 96; Theobald on Wills, 3rd ed., 133. [*Cozens-Hardy, Q.C.*, referred to *Elton* v. *Montague*, 1 L. J. Ch. (O. S.) 212.] That case differs from the present, as there the legacy was directed to be paid within three months from the testator's death. The fact that the legacy must be paid out of the proceeds of real estate does not affect the question: *Turner* v. *Buck*, 22 W. R. 748, L. R. 18 Eq. 301.

Hadley, Whinney, and *Stokes*, for other parties.

NORTH, J.—It is clear that the interest on the £2,000 runs from the end of the year after the testator's death. There is no personal estate of the testator to satisfy the £2,000, which must come entirely out of the proceeds of sale of his real estate. In an ordinary case a certain rule has to be adopted in the distribution of personalty—viz., legacies must be paid within a year from the date of the testator's death, from which time an unpaid legacy will carry interest. I think that the same rule ought to apply in this case, and that the interest ought to commence to run after the expiration of that year. This seems in accordance with the decision in *Elton* v. *Montague*, where a legacy of £5,000 was given to the testator's widow, to be paid her within three months after his death in lieu of jointure, and it was held that the widow, having elected to take the legacy, was not entitled to interest between the testator's death and the three months within which the legacy was directed to be paid. The Vice-Chancellor says: "The court intends that a testator means his widow to be provided for from the moment of his death, and therefore a legacy to her carries interest from that time. This, however, is a case, not of a simple legacy, but of election. The widow is provided for by her jointure; she is to make her election; and, in that election, the circumstance that the legacy is not payable till three months after the testator's death, is one of the ingredients to be taken into the account." That

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

decision seems in point, and I must follow it. It may be remarked that the Vice-Chancellor took the view that in the case of an ordinary legacy the widow would have been entitled to interest from the testator's death—which has since been held to be wrong. The fact that he took that view makes the decision stronger.

Solicitors, *Thorneycroft & Willis*; *Eldred & Bignold*; *Blake & Haseltine*; *F. A. & A. C. Doyle.*

Chan. Div.
Stirling, J. } Nov. 14, 21.

In re POWERS.
MANISTY *v.* ARCHDALE. (a.)

Vendor and purchaser—Sale under order of court—Conditions as to possession—Conditions of tenancy—Non-payment of rent by outgoing tenant—Distress by receiver—Statute of 8 *Anne, c.* 18, *s.* 7.

P. was yearly tenant of a farm under a written agreement, which provided (inter alia) *that, in the last year of his tenancy, he should consume on the farm all the hay, &c., produced thereon; that he should stack in the barns and rick yards all the corn, grain, and hay produced, and the hay, straw, &c., were to be consumed by cattle, and the dung, &c., to be left on the premises, for which purpose he was to have the use of the barns and yards necessary until the 25th of March next after the end of the tenancy; that the landlord or the incoming tenant should be at liberty to enter upon the lands and prepare them for seeds, &c.; that the tenant should also leave for the landlord or incoming tenant "all the hay, straw, and roots remaining unconsumed, being paid or allowed for the same"; and that, at the end of the tenancy, the landlord or the incoming tenant should allow to him for the manure and other things done, and "for the unconsumed hay, straw, and roots."*

The farm was sold under the order of the court to A., subject to "such tenant right as the occupier might be entitled to on quitting"; and by one of the conditions the purchaser was to pay the balance of his purchase-money on or before the 29th of September, 1890; *and upon payment he was to be entitled to possession of the farm as from the 29th of September, from which day he was to pay all outgoings.*

P.'s tenancy expired at Michaelmas, 1890. *A. paid his purchase-money into court on the 13th of October,* 1890, *and he was let into possession, but only on the terms of the above contract of tenancy, and no conveyance had been executed. The rent payable by P. at Michaelmas,* 1890, *had not been paid; and on the 24th of October a distress was put in by H., the receiver appointed in the action, and under it certain stacks of hay and straw produced during the last year of the tenancy were seized.*

A. moved for an injunction to restrain the receiver from remaining in possession of, or from removing or selling any of, the distrained goods.

Held, that the legal reversioners were entitled to distrain on the goods of the tenant, but were in equity trustees for the purchaser, and could not exercise their rights so as to prevent his enjoying every benefit of his ownership.

Held, also, that the statute of 8 *Anne, c.* 18, *did not apply to such a case.*

Motion.

All the necessary facts are stated in the judgment.

(a.) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

Warrington, for the defendant.—The plaintiffs' distress could only be justified under 8 Anne, c. 18, s. 7, and they had not brought themselves within it.

He cited *Nuttall* v. *Staunton*, 4 B. & C. 51.

Graham Hastings, Q.C., and *Methold*, for the plaintiffs.—The defendant has no legal title, and cannot interfere in this matter at all. The tenant's possession continues, if the term is extended for certain purposes.

They cited *Knight* v. *Benett*, 3 Bing. 364. [STIRLING, J.—That case shows that the Statute of 8 Anne has no application].

Leverson, for other parties.

Warrington, in reply.—The defendant is entitled to protection as a purchaser under the sale by the court.

Cur. adv. vult.

November 21.—STIRLING, J.—This is a motion on behalf of the defendant, Frederick Archdale, that Edward Hart, the receiver appointed in the action, and the bailiffs or agents employed by him, may be restrained from remaining in possession of the goods distrained by the said Edward Hart as receiver on the 24th of October, 1890, or from removing or selling any of the said goods. The applicant is a defendant, but he is also purchaser upon a sale by the court under conditions stating the property to be "in the occupation of Mr. Herbert Powers, whose tenancy expires at Michaelmas," 1890; and to be sold subject to "such tenant right as the occupier might be entitled to on quitting." By condition 14 the purchase-money was to be paid on or before the 29th of September last; and it is provided that the purchaser of each lot was, upon payment of his purchase-money, to be entitled to possession as from the 29th of September, from which day all outgoings were to be paid by the purchasers, and such rents, profits, and outgoings should, if necessary, be apportioned by the judge at chambers. The purchase-money was paid on the 13th of October, 1890; the purchaser was let into possession; and there is nothing to show that he was let in otherwise than under the terms of the contract. No conveyance has yet been executed, and the legal estate is vested in the plaintiffs.

Herbert Powers held under an agreement dated the 20th of December, 1884, by which it was first provided that the tenancy was to be from year to year, commencing on the 29th of September, 1884, determinable at the end of any year by a year's notice to quit by either party, at the yearly rent of £625, payable half-yearly on the 25th of March and the 29th of September in every year, the first payment to be made on the 25th of March, 1885.

The 9th condition of tenancy was that the tenant should in the last year of the tenancy spend and consume on the farm and lands all hay, straw, grain, crops, and fodder, dung, and manure, produced and made there, the dung and manure to be spread over the lands in a husband-like manner; except that he should be at liberty to remove hay and straw, if, for every ton of hay and straw so removed, he brought and consumed on the farm at last three tons of good rotten dung or other manure of equal goodness.

Condition 10 was that the tenant should stock in the barns and rick yards, in the last year of the tenancy, all the corn, grain, and hay produced on the premises, the corn and grain to be there threshed out, and all the hay, straw, chaff, stubble, and fodder to be there consumed by cattle, and the dung, manure, compost, or soil thereon arising to be left on

of the debt. So far as it conveys the estate, the assignment is absolute and complete the moment it is made according to the forms of law. Undoubtedly it is not necessary to give notice to the mortgagor that the mortgage has been assigned in order to make it valid and effectual. The estate being absolute at law, the debtor has no means of redeeming it but by paying the money. Therefore, he who has the estate has, in effect, the debt, as the estate can never be taken from him except by payment of the debt. With regard to the mere bond or covenant, which perhaps may accompany the mortgage, it is said that all the ceremonies declared to be necessary as to debts in general ought to be observed. But it is difficult to say the mortgage passes and is well assigned to one person and yet the debt remains in another. It is impossible that it can be so divided. Therefore, by the assignment of the mortgage, the debt necessarily passes as incident to it, and it is clear that, to constitute a valid assignment, notice to the mortgagor is not necessary. In *Walvyn* v. *The Assignees of Shepherd*, 4 Ves. 119, the bankrupt had deposited a mortgage and bond; and Lord Alvanley decreed that the assignees should execute a valid assignment, yet the mortgagor had no notice whatever of the deposit. It would be strange to say a mere deposit should be effectual against the assignees, and a valid and complete assignment should not. These mortgage debts, therefore, passed by the assignment of the mortgages, and the plaintiffs are not entitled to any account of them." That was a clear decision that the title of the particular assignee prevailed as against the assignees in bankruptcy. That was followed in *Ex parte Mackay, In re Wright*, 1 Mont. D. & D. 550, and *Ex parte Barnett*, 1 De G. 194. Those were all bankruptcy cases, but the same principle was recognized by Lord Hatherley in *In re Hughes' Trusts*, 12 W. R. 1025, 2 H. & M. 89, where he takes notice of the difference between that case and the case of an equitable mortgage. He says, at the end of his judgment: "The case of an equitable mortgagee is quite different. Suppose it is one mortgage, it is quite plain that it is different, because one mortgagee, if he has an equitable estate in the land of which he is the *cestui que trust*, may at any time require his trustees to convey that equitable estate to him. If it should happen that there are several mortgagees, if a single mortgagee could require to have the estate conveyed to him, it follows that if all the mortgagees concur they are tenants in common of the mortgage, and, all of them concurring, could have it either conveyed to themselves, in order to secure their several mortgage debts, or conveyed to trustees for them, they joining as one individual in making that request. They have a distinct estate in equity in the land itself, which is a case entirely different from the position of persons merely having an interest in the money which is to be produced by sale or mortgage, as they had in *Lee* v. *Howlett*, 4 W. R. 406, 2 K. & J. 531, and as they had in *Foster* v. *Cockerell*, 3 Cl. & F. 456." So that from the time of Sir W. Grant down to that of Lord Hatherley the rule has prevailed that, as between the particular assignee and the assignee in bankruptcy, the title of the particular assignee prevails.

That being the state of the authorities, I hold in this case that the bank are not entitled to priority by reason of having given notice before the executors, and their claim, therefore, fails.

Solicitors, *Warren, Gardner, & Murton*, for *Watson & Wadsworth*, Nottingham; *Wilson, Bristows, & Carpmael*; *Taylor, Hoare, & Box*; *Pontifex, Hewitt, & Pitt*, for *Wells & Hind*, Nottingham.

Q. B. Div. (Day and Lawrance, JJ.) — Nov. 4.

DURHAM COUNTY COUNCIL v. ASSESSMENT COMMITTEE OF THE CHESTER-LE-STREET POOR LAW UNION. (a.)

Poor rate — Rateability — Industrial schools — Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *s.* 3 (*vii.*).

An industrial school had been established (under the Industrial Schools Acts, 1866 *and* 1872) *by the justices of a county, and had been transferred, under section* 3 (*vii.*) *of the Local Government Act*, 1888, *to the county council.*

*Held, that it was not occupied on behalf of the Crown, and was liable to be rated for the relief of the poor.**

Special case stated for the opinion of the court.

The material facts stated in the case were as follows:—

In the year 1881 the Court of Quarter Sessions of the County of Durham, professing to act as the prison authority for the county, resolved to establish a county industrial school under the Industrial Schools Acts, 1866 and 1872, and submitted to the Home Secretary the plans of a farm, partly freehold and partly copyhold of inheritance, at Earl's House, near the city of Durham (being the farm mentioned in the assessment), which they proposed to purchase for the purpose. The Home Secretary signified his approval of the intended purchase on the 17th of August, 1881, and by an indenture and surrender, both dated the 6th of July, 1883, the farm was conveyed to the Clerk of the Peace of the County of Durham, and his successors in office, upon trust for the purposes of the Industrial Schools Acts, 1866 and 1872. The indenture recited the purchase of the farm by quarter sessions as the prison authority, and the approval of the Home Secretary, as before stated.

The purchase-money of the farm, and the costs of the building and furniture, were paid out of moneys borrowed by the county justices under the Prisons Authorities Act, 1874, on security of the county rate.

On the 29th of June, 1885, the Home Secretary certified that the new school was fit for the reception of children under section 7 of the Industrial Schools Act, 1866. The school was opened on the 2nd of July, 1885, and has since subsisted as a certified industrial school within the meaning of the Acts above mentioned.

In addition to the officers' apartments, the school comprises accommodation for 150 boys, including a cottage-hospital and workshops, in which they are taught trades, such as shoemaking and carpentering, by schoolmasters who form part of the regular staff. There is also a hind-house, in which a farm bailiff resides, under whose direction the boys are employed in tilling the farm. The farm and the building above mentioned are of reasonable size, having regard to the purposes for which they are required, and afford no accommodation further than such as is essential for the proper employment and education of the boys. The revenue of the school consists—firstly, of the grants in aid paid by the Government under the Industrial Schools Acts; secondly, of payments made in respect of boys committed to the school, but not at the cost of the county; and, thirdly, of the proceeds of the boys' work, and of the sale of the surplus produce of the farm, the bulk of which produce, however, is consumed in the school. These

* See and compare the case of *Showers* v. *Assessment Committee of Chelmsford Poor Law Union*, reported *ante*, p. 174.

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

sums together have not been in any year sufficient to defray the expenses of the school, and a considerable sum has been raised annually out of the county rates to meet the deficiency.

Until the 1st of April, 1889, the school was under the management of quarter sessions, but on that day the Local Government Act, 1888, came into operation, by section 3 (vii.) of which all business done by quarter sessions, or any of its committees, in respect of the establishment and maintenance of, and the contribution to, industrial schools," was transferred to the county council. Since the last-mentioned day it has been assumed, as between the quarter sessions and the county council, that the effect of the Act is to transfer the management also of the school to the county council, and the school has in fact been managed by the county council, but there has been no fresh appointment of superintendent, although some changes have been made among the minor officers. The usual deficiency was made up last year (as before) out of the county rate. The valuation list of the said union was duly made and approved by the assessment committee of the said union, and the county council gave notice of objection against the same, but failed to obtain relief. The rate now appealed against was made in conformity with such valuation list.

Walton, Q.C. (*Simey* with him), for the appellants (the County Council).—Prisons are not rateable: *Gambier* v. *Overseers of Lydford*, 2 W. R. 226, 3 E. & B. 346; and industrial schools ought to follow the same rule. These industrial schools are incapable of being rated, for there is no beneficial occupation of them: *Mersey Docks* v. *Cameron*, 13 W. R. 1069, 11 H. L. Cas. 443; *Coomber* v. *The Justices of Berks*, 32 W. R. 525, 9 App. Cas. 61. Moreover, these schools never could be beneficially occupied, they are property "struck with sterility," and therefore if rated, their value should be returned as nil—*West Bromwich School Board* v. *Overseers of West Bromwich*, 32 W. R. 866, 13 Q. B. D. 929. Two recent cases as to the rateability of reformatory schools bear out the case for the appellants: *Reg.* v. *West Derby*, L. R. 10 Q. B. 283, 23 W. R. Dig. 153, and *Tunnicliffe* v. *Overseers of Birkdale*, 36 W. R. 360, 20 Q. B. D. 450. Those were both cases of schools established by private persons and maintained by private funds, and the decisions that they were rateable turned upon the fact that they were private institutions. See per Lord Esher, M.R., in the latter case. In the present case the schools are public institutions, and do not fall within those decisions.

R. S. Wright (*R. Cunningham Glen* with him), for the respondents (the Union).—These schools are not incapable of beneficial occupation. The county council could at any time cease to carry on the school and let these premises at a rent. The case is similar to the case of a board school, which was considered capable of beneficial occupation in *London School Board* v. *St. Leonard's, Shoreditch*, 34 W. R. 583, 17 Q. B. D. 738, followed in *Burton* v. *Burton Union*, 38 W. R. 181, 24 Q. B. D. 197. This school is, therefore, not exempt as being "struck with sterility." Neither is it exempt as being Crown property, and to be classed as a prison. Neither in the hands of the justices nor when transferred to the county council can it be said to have been used for Crown purposes.

They also referred to *The Justices of Lancashire* v. *Cheetham*, 16 W. R. 124, L. R. 3 Q. B. 14, and *Martin* v. *West Derby Union*, 31 W. R. 489, 11 Q. B. D. 145.

Walton, Q.C., replied.

DAY, J.—The question arising upon this special case is whether a particular industrial school is or is not rateable. The history of the school is shortly this. It was established by the county justices and sanctioned by the Home Secretary. It was carried on and managed under the control of the justices until the Local Government Act, 1888, was passed; since then, together with other buildings formerly under the control of the justices, it was transferred to the county council. We have to say whether it is rateable.

Now *primâ facie* all property is rateable to the relief of the poor, but there are certain exceptions. Crown property is, of course, exempt; under that head fall post offices and other offices which are under the direct control of servants of the Crown. Another head of exemption comprises buildings which are occupied *quasi* for the Crown, such as assize courts, county courts, prisons, and other similar buildings; these also are exempt from rating. It was contended that industrial schools come under this head. But an industrial school is not a prison; it is true that persons who are sent there are obliged to remain there, but that does not constitute a prison. It was said that they exist solely for the benefit of the public; but that remark would apply to many classes of property, and it does not affect the question of rating. Neither does the fact of the school having been built with public money. Probably that is the case with all industrial schools in the first instance. It has been decided that industrial schools supported by private money are rateable, and I do not think that the fact of the school being controlled and managed by public officials affects its rateability. It is said that certain passages of the judgments relating to private schools show that had they been public the cases would have been differently decided. I do not agree with that argument Judges decide a particular case upon reasons which are satisfactory to them as to that case, and their reasoning cannot be applied to other states of fact.

It seems to me that this building was rateable when it was in the hands of the justices. It is now in the hands of the county council, and, whatever may be said about the justices, it certainly cannot be contended that the county council are servants of the Crown. Even when in the hands of the justices this building was not used by them as a court for them to sit in (in which case it would not have been rateable). It was rateable in the hands of the justices, and *à fortiori* it is rateable in the hands of the county council.

The other argument in favour of the appellants was that this school could not be beneficially occupied, that it was, in fact, "struck with sterility." But that is not so. The county council may give the school up at any moment; they might sell or let it. I can conceive of a tenant of these buildings. The existence of the school as an industrial school depends on the licence of the Home Secretary, and on its withdrawal the school would come to an end; so that its present condition is clearly not necessarily permanent. I think, therefore, that the argument addressed to us on behalf of the appellants fail, and that the appeal must be dismissed.

LAWRANCE, J.—I am precisely of the same opinion. I think that this school is entirely in the same position as a reformatory school. The justices were not, as managers of the school, acting as servants of the Crown. They could have parted with the school at any moment.

Appeal dismissed.

Solicitors for the appellants, *H. C. Cook & Ball*, for *Ralph Simey*, Durham.

Solicitors for the respondents, *Indermaur & Brown*, for *F. J. Radford*, Newcastle-upon-Tyne.

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) Nov. 5.

Ex parte RAPHAEL.
In re COSTER & TACK. (*a*.)

Solicitor—Costs—Bankruptcy—Petition by debtor—Refusal of trustee to pay costs—Previous payments made by debtor to solicitor—Alleged fraudulent preference—Bankruptcy Rules, 1886, *r*. 125.

A trustee in bankruptcy cannot refuse to pay out of the estate the taxed costs of the solicitor appearing for the debtor on the filing of his own petition, by reason of the fact that certain payments have been made by the debtor to such solicitor shortly before the bankruptcy, which the trustee is of opinion amount to a fraudulent preference; but in such case the trustee must pay the taxed costs of the solicitor, and move the court to set aside the previous payments in the ordinary way.

Application by the solicitor acting for the debtor on the presentation of his own petition for an order directing the trustee in the bankruptcy to pay out of the estate the petitioning debtor's costs, which had been duly certified by the taxing master.

In June, 1890, the applicant was instructed to appear for the debtor on the filing of his petition, in respect of which he subsequently carried in his bill of costs for taxation. On July 31, 1890, these costs were duly certified by the taxing master at £44 16s., but application for payment of this sum out of the estate was refused by the trustee.

The reasons stated by the trustee for this refusal were that he had discovered that shortly before the filing of the petition two sums of £60 and £40 respectively had been received by the solicitor from the debtor, which the trustee alleged to amount to a fraudulent preference, and he claimed the right to set off the costs due against these sums.

Application was now made to the court to enforce payment.

Muir Mackenzie, for the solicitor.—The contention of the trustee is wholly inadmissible. The previous payments were made in respect of services rendered before the petition, and the solicitor has a perfect right to retain them. But if the trustee is of opinion that those payments constitute a fraudulent preference, his proper course is to proceed by motion in the ordinary way. He cannot claim a right of set-off in this way. The costs are payable under rule 125 of the Bankruptcy Rules, 1886.

Mellor (*Herbert Reed* with him), for the trustee.—The debtor's petition was filed by the solicitor on June 15, 1890. The trustee has found that on May 13 and May 27, 1890, the sums of £40 and £60 respectively were paid by the debtor to the solicitor. The trustee claims the right of set-off, as he says these payments were a fraudulent preference.

CAVE, J.—This contention of the trustee cannot be entertained. His proper course is not to take the step he has taken, but to move to set the payments aside as a fraudulent preference. The trustee must pay this amount, and if he thinks fit he can make his motion. The plan he has adopted is a most inconvenient one, and the application must be allowed, with costs.

Application allowed.

Solicitor for the applicant, *R. Raphael.*

Solicitor for the trustee, *A. N. Phillips.*

(*a*.) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. Divorce. } June 10, 24, 1890.

NUNNELEY *v.* NUNNELEY AND MARRIAN. (*a*.)

Divorce—Decree absolute—Variation of Scottish settlement—22 & 23 Vict. c. 61, s. 5.

The court has power, under 22 & 23 Vict. c. 61, s. 52, after a dissolution of marriage, to vary a settlement made according to the Scottish law, in contemplation of the marriage of a Scottish woman to a domiciled Englishman.

Motion to confirm the registrar's report on a petition by the husband for variation of settlements after a decree absolute dissolving the marriage on the ground of the wife's adultery.

The petitioner was a domiciled Englishman, and the respondent's domicile of origin was Scotch. Two settlements were executed in contemplation of marriage, the first, relating to the petitioner's property, was in the English form, the second, dealing with the respondent's property, real estate in Scotland, and personalty invested in securities, was in the Scottish form. It was agreed before the registrar that the wife's interest under the first settlement should be extinguished as though she were dead; but the trustees of the second settlement objected to an arrangement agreed on between the parties on the ground that it was for the court in Scotland, before which the matter was pending, to decide what should be done, especially having regard to the interests of the children, inasmuch as the Scottish law would regard the wife as dead by reason of her having been proved guilty of adultery.

June 10.—*Middleton*, for the petitioner, asked for the confirmation of the report under the powers contained in section 5 of 22 & 23 Vict. c. 61.

Barnard, for the respondent, consented.

Deane, for the trustees, asked this court not to make an order until the Court of Session in Scotland had made their order, otherwise the trustees would be liable to have two orders made against them, one in Scotland, to pay half to the children, and one here, to pay one-third. The law of Scotland treats the wife as physically dead, and the property included in the Scottish settlement must be bound by that law: *Harvey* v. *Farquhar*, L. R. 2 H. L. Sc. 192.

Middleton, in reply.

Cur. adv. vult.

June 24.—HANNEN, P.—The question in this case is a simple one. It is the case of a Scottish lady married in Scotland, and whose property was included in a Scottish settlement. Her husband was a domiciled Englishman, and his property was included in an English settlement. The simple question is whether I have power to deal with the property included in the Scottish settlement. The language of the Act 22 & 23 Vict. c. 61 is very large. Section 5 provides that "the court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit." I am clearly of opinion that that power extends to a settlement.

(*a*.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

though made in another country according to the law of that country. It is clear that the wife here, by marrying an Englishman, acquired his domicile, and became subject to the law of England. I therefore see no reason to doubt that I have the power to make the order asked for to vary the settlement, and as it seems greatly to the advantage of the children. The petitioner's and trustee's costs to be paid out of the fund.

Solicitors for the petitioner, *Fallows & Rider*.

Solicitors for the respondent, *Robins, Billings, & Co.*

Solicitors for the trustee, *Fallows & Rider*.

Prob. Div. and Adm. Div. Admiralty. } Aug. 5, 1890.

"THE CARRON PARK." (a.)

Shipping — Charter-party — Exemption — "Neglect or default" of crew during the voyage—Effect on claims for general average contribution of clause exempting shipowner from negligence.

The owners of a ship entered into a charter-party whereby they agreed that the ship should proceed to a specified loading port and there load a cargo, and, being so loaded, should therewith proceed to her port of discharge and there deliver the same, the act of God or any act, neglect, or default whatsoever of the pilot, master, crew, or other servants of the shipowners during the said voyage always excepted. The ship duly arrived in a seaworthy condition at her loading port and commenced taking her cargo on board, but, before the loading was completed, a portion of it already shipped was, whilst the ship was lying at her mooring berth, damaged by water which accumulated in her hold, in consequence of one of her engineers having negligently left open a valve in her engine room. To recover for the damage so occasioned, the cargo owners brought an action for breach of contract against the shipowners, and the shipowners counter-claimed therein for expenses incurred by them in respect of discharging and warehousing the damaged cargo belonging to the plaintiffs and pumping the water out of the ship.

Held, that the damage proceeded for had arisen from the neglect or default of one of the crew during the said voyage within the meaning of the exemption contained in the charter-party, and that, consequently, the plaintiffs' claim must be dismissed.

Held, also, that the defendants were entitled to recover the amounts claimed by them in their counter-claim as general average on the cargo.

This was an action for breach of contract instituted on behalf of J. V. Drake & Co. against the Cathcart Steamship Co. (Limited), the owners of the steamship *Carron Park*, to recover the damages the plaintiffs had sustained by reason of a portion of a cargo of sugar belonging to them, and laden on board *The Carron Park*, having been damaged by water which had accumulated in *The Carron Park* owing to one of her engineers having negligently left open a valve in her engine room when she was lying moored at a loading berth, to which she had proceeded under the terms of a charter-party exempting the shipowners from liability for the act of God or any neglect or default whatsoever of the pilot, master, crew, or other servants of the shipowners "during the said voyage."

The defendants appeared, and denied liability, and claimed, by way of counter-claim, to recover certain expenses, incurred by them in saving, discharging, and warehousing the portion of cargo damaged as above mentioned, and in the common safety and preservation of ship and cargo, which were in danger by reason of *The Carron Park* making water on the occasion when such portion of cargo was so damaged.

March 25, 26.—On these days the action was heard before the President.

L. Batten, for the plaintiffs.—The exemption from liability for the negligence of the crew in this case only came into operation on the ship sailing from her loading port: *Steel* v. *The State Line Steamship Co.*, 3 App. Cas. 72, 26 W. R. Dig. 216; *Tattersall* v. *The National Steamship Co.*, 32 W. R. 567, 12 Q. B. D. 297; and, therefore, cannot exonerate the defendants from the consequence of their ship having been unseaworthy before leaving that port and at a time when "the voyage" referred to by the charter-party cannot be deemed to have commenced: *Crow* v. *Falk*, 8 Q. B. 467. The defendants are not entitled to the expenses claimed by them by way of counter-claim. Such expenses would not have been incurred but for the negligence of the crew of *The Carron Park*, and are, therefore, under the decision in *Schloss* v. *Heriot*, 11 W. R. 596, 14 C. B. N. S. 59, expenses to which the cargo owners are not required to contribute: *Fawcus* v. *Sarsfield*, 6 E. & B. 192, 4 W. R. C. L. Dig. 177. To hold otherwise would be to make the exemptions from negligenc, econtained in the charter-party, and intended only to modify the liability of the shipowner under his contract of carriage, alter the law of general average, the principles of which do not depend on contract: *Burton* v. *English*, 32 W. R. 655, 12 Q. B. D. 218; *Crooks* v. *Allan*, 28 W. R. 304, 5 Q. B. D. 38; *Schmidt* v. *The Royal Mail Steamship Co.*, 45 L. J. Q. B. 646, 24 W. R. Dig. 263; *Pirie* v. *The Middle Dock Co.*, 4 Asp. Mar. Law Cas. N. S. 217n, 388.

He also referred to the following authorities:—*Kopitoff* v. *Wilson*, 24 W. R. 706, 1 Q. B. D. 377; *Cohn* v. *Davidson*, 25 W. R. 369, 22 Q. B. D. 455; *The Glenfruin*, 33 W. R. 826, 10 P. D. 103; *The Undaunted*, 34 W. R. 686, 11 P. D. 46; *Anderson* v. *Morice*, 23 W. R. 180, L. R. 10 C. P. 58; *Worms* v. *Storey*, 4 W. R. 115, 11 Ex. 427; Carver's Carriage by Sea, s. 388; *The Ettrick*, 6 P. D. 127; *Johnson* v. *Chapman*, 14 W. R. 264; Lowndes on General Average, p. 47; *Mousir's case*, 12 Co. 63.

Barnes, Q.C., and *J. Walton*, for the defendants, relied on *Barker* v. *McAndrew*, 13 W. R. 779, 18 C. B. N. S. 757; *Bruce* v. *Nicopulo*, 3 W. R. 483, 11 Ex. 129; *Strang, Steel, & Co.* v. *Scott & Co.*, 38 W. R. 452, 14 App. Cas. 601; and *The Cargo ex Laertes*, 36 W. R. 111, 12 P. D. 187, as showing that the damage complained of by the plaintiffs had occurred "during the voyage" within the meaning of the charter-party, and that the exemptions in the charter-party must be taken into consideration in determining whether general average csntribution was due from the defendants.

Batten, in reply.

Cur. adv. vult.

HANNEN, P. — The plaintiffs, Messrs. Drake & Co., sued the defendants, the owners of *The Carron Park*, for breach of charter-party, entered into on the 9th of October, 1889, by which it was agreed that *The Carron Park*, therein described as "now on passage Fraserburgh to Libau," being "now tight, staunch, and strong, and every way fitted for the voyage," should proceed to New Fairwater and should

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(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

there load a full and complete cargo of sugar in bags, and being so loaded should therewith proceed to Greenock and there deliver the same," the act of God, or any act, neglect, or default whatsoever of the pilot, master, crew, or other servants of the shipowners during the said voyage always excepted." *The Carron Park* arrived in New Fairwater in ballast on the 13th of October, being at the time tight, staunch, and strong, and in every way fitted to receive and carry a cargo in accordance with the charter-party. On the 14th of October the loading of the cargo was commenced, and continued until the evening of the 15th of October, but it was not then completed. On the morning of the 16th of October it was discovered that three feet of water had found its way into the vessel through a valve in the engine room, which had been negligently left open by one of the engineers of the vessel during the night of the 15th. In all other respects the vessel was in good condition. In consequence of the water thus getting in the plaintiffs' cargo was damaged, and the plaintiffs have incurred expenses. Other expenses were incurred by the defendants in discharging and warehousing the cargo, and pumping the water out of the vessel. The plaintiffs claim damages for the injury sustained by their cargo in the above circumstances. The defendants deny their liability, alleging that the injury was caused by the neglect or default of the engineers of the said vessel during the said voyage, and that, therefore, it is within the excepted perils enumerated in the charter-party. The defendants also counter-claim for general average contribution for expenses incurred by them in saving, discharging, and warehousing the plaintiffs' goods, and otherwise for the common safety of the ship and cargo.

There can be no doubt that the defendants would, unless exempted by the last clause of the charter-party, be liable for the damage caused to the plaintiffs' cargo by the admission of water to the hold of the vessel. It arose from the direct negligence of the defendants' servants and was a breach of the obligation of the shipowner that his servants should not be negligent in and about the carrying of the goods. The question then arises, whether the shipowners have freed themselves from liability for this negligence by the terms of the charter-party, which stipulates that they shall not be responsible for any act, neglect, or default whatsoever of their servants "during the said voyage." It was contended for the plaintiffs that this only related to the voyage from New Fairwater to Greenock, and did not include the period of time during which the vessel was being loaded. For this contention the case of *Crow* v. *Falk* was cited. There the Court of Queen's Bench held, that "during the voyage" could only apply to the time after the voyage commenced, and that the voyage could not begin before the ship's loading had been completed. Willes, J., who was counsel for the successful party in *Crow* v. *Falk*, stated in his judgment in the case of *Baker* v. *McAndrew* that he did not concur in the judgment in *Crow* v. *Falk*. In *Baker* v. *McAndrew* it was decided that where a ship was described as then at N., being tight and staunch, and was to proceed to the usual place of loading at N., and there load and proceed to A. with the usual exceptions "during the voyage," that the voyage commenced from her starting from her then berth, and that the exception applied to the preliminary transit to the port of loading. In *Bruce* v. *Nicopulo* Pollock, B., stated that he could not subscribe to the case of *Crow* v. *Falk*, and held, with the other members of the court, that a preliminary voyage was to be considered part of the voyage contemplated by the contract.

These cases appear to me to be conclusive in the present case, and to lead to a result consistent with the intention of the parties, for I cannot doubt that the exemption was intended to apply, not only to the time after the vessel left the port of loading, but also to the whole time during which this vessel was engaged in performing the contract contained in the charter. It was further argued that the leaving open of the valve rendered the ship unseaworthy, and that thus the defendants were liable for breach of warranty. It is admitted that the vessel was, when the loading commenced, fit to receive and carry the cargo, and that it was during an interval in the loading that the water was by the negligence of the engineer allowed to enter the ship and damage the cargo already there. Holding, as I do, that the exemption extends to a period anterior to the vessel leaving New Fairwater, the negligent letting of the water into the vessel would be within the exemption. It did not render the vessel unseaworthy for the reception of this cargo, which had already been loaded on board the vessel when in good condition. It is, for the purposes now under consideration, as though during the passage from New Fairwater the valve had been negligently opened: that is, as Lord Blackburn said in the case of *Steel* v. *The State Line Steamship Co.*, like leaving a port hole open at sea, negligence on the part of the crew, and not unseaworthiness of the ship.

With regard to the counter-claim for general average, I think the defendants are entitled to recover. The claim for contribution as general average cannot be maintained where it arises out of any negligence for which the shipowner is responsible; but negligence for which he is not responsible is as foreign to him as to the person who has suffered by it. The loss would not have fallen on the shipowner, and the expenditure or sacrifice made by him is not to avert loss from himself alone, but from the cargo owner.

This question was considered in the case of *Strang, Steel, & Co.* v. *Scott & Co.* That was a case of jettisoned cargo. Lord Watson, in delivering judgment, says: "The fault of the master being matter of admission, it seems clear upon authority that no contribution can be recovered by the owners of the ship unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them and the shippers." Here it appears to me that the relation of the goods' owner to the shipowner has been altered by the contract that the shipowner shall not be responsible for the negligence of his servants in the events which have happened. I therefore give judgment for the defendants on the claim and counter-claim, with costs.

Solicitors for the plaintiffs, *Walters, Johnson, & Bubb.*

Solicitors for the defendants, *William A. Crump & Son.*

Court of Appeal.

(1905) KB 370.

Original motion. Jan. 13.

GOWER v. TOBITT. (a.)

Practice—Trial—Motion for new trial—Action tried before official referee—Court in which to move—Judicature Act, 1890 (53 & 54 *Vict.* c. 44), *s.* 1.

Where there has been a trial before an official referee, a motion for a new trial must be made in the Queen's Bench Division, and not in the Court of Appeal.

Application on behalf of the plaintiff that a motion for a new trial should be taken out of the new trial paper in the Court of Appeal and transferred for hearing to the Queen's Bench Division. The whole cause had been ordered to be tried before an official referee, and the referee having found in favour of the plaintiff, the defendant gave notice of motion for a new trial.

H. Newson, for the plaintiff.—The Judicature Act, 1890, only applies to actions tried with a jury. The present case was tried before an official referee, and so the motion must be set down for hearing in the Divisional Court.

R. A. Germaine, for the defendant.

Lord ESHER, M.R.—In this case we think that, looking at the Judicature Act, 1890, the only applications which under that Act can be made for new trials to this court are in cases where there has been a trial with a jury. In this case there has not been a trial with a jury; the trial has been before an official referee. Therefore in our opinion the case does not come within the terms of the Act, and the application for a new trial should not be made to this court, but to the Divisional Court. I have communicated with Pollock, B., who is now presiding in the Divisional Court, and the motion for a new trial will be transferred to that court.

BOWEN and FRY, L.JJ., concurred.

Order accordingly.

Solicitors for the plaintiff, *Beckford & Hall.*

Solicitors for the defendant, *Savery & Stevens.*

From Lancaster Palatine Court of Chancery. } Oct. 30; Dec. 17.

In re SANDBACH AND EDMONDSON'S CONTRACT. (b.)

Vendor and purchaser—Defective title—Misleading condition of sale—Condition requiring purchaser to assume facts believed to be true—Non-disclosure of dependence of title on facts to be assumed.

The title of persons, claiming under a trustee of real property, to the beneficial ownership (under the doctrine of Burgess *v.* Wheate, 1 *Eden.* 177) *of the same property (the trusts affecting it having become exhausted in* 1876) *depended on the death intestate without heirs before* 1870 *of the original settlor, who was believed (though legal proof was wanting) to have so died in* 1851; *and no claim had in fact ever been made by anyone as his heir. The property was sold in* 1890 *under conditions of sale one of which required the purchaser to assume that the settlor did in fact die before* 1870 *intestate and without an heir; but the condition contained nothing to show that the title depended entirely on the facts which the purchaser was required to assume, or to explain how or why it so depended. A vendor and purchaser summons having been taken out, the vendor and his solicitor deposed to their belief that the facts were as the purchaser was required to assume.*

Held (affirming the decision of Bristowe, V.C.), *that, under the circumstances, the condition was not a misleading one, but was aptly and properly framed to prevent the purchaser from insisting on proof of what was then, and was still, believed to be the fact (though the vendor was not in a position to furnish legal proof of it), and that the condition was accordingly binding on the purchaser.*

Appeal from Bristowe, V.C. (Lancaster Palatine Court of Chancery).

Four cottages in Bridge-street, Manchester, were put up for sale in February, 1890, by Joseph Sandbach, and purchased by one Booth, as agent for James Edmondson. The conditions of sale under which the cottages were sold incorporated the general conditions of sale of the Manchester Law Society, and also included the following special conditions (amongst others):—" 3. The title shall commence with an indenture of settlement dated the 10th day of June, 1848, and made between John Bouchier of the first part, Frederick Calvert and Michael Pease Calvert of the second part, Robert Broome of the third part, and Mary Whittaker of the fourth part. 4. The purchaser shall assume that the said John Bouchier died intestate and without an heir before the year 1870."

Robert Broome the elder, who was the person referred to in special condition 3, claimed to be absolutely entitled to the property, on the principle of *Burgess* v. *Wheate*, 1 Eden. 177, as a trustee of trust property the trusts of which were exhausted, and the settlor whereof had died intestate and without heirs prior to the coming into operation of the Intestates' Estates Act of 1884. It appeared that by an indenture of settlement of the 10th of June, 1848, which recited that John Bouchier was entitled in fee simple to the property about to be assigned, subject to the original rent therein mentioned, but that the legal estate was outstanding in the said F. Calvert and M. P. Calvert, the property was conveyed by Bouchier and the Calverts to Robert Broome (the elder), his heirs and assigns, upon trust to pay the rents and profits to Mary Whittaker (afterwards Mary Broome) for life for her separate use, and after her decease upon trust for the settlor, his heirs and assigns, and upon and for no other trusts, intent, or purpose whatsoever. It was supposed that John Bouchier, the settlor, had died in 1851 intestate and without an heir, and evidence as to their belief in this behalf was given by the vendor, Mr. Sandbach, and his solicitor, but there was no legal proof of the fact. Robert Broome the elder died in November, 1870, having by his will devised all his real estate to trustees upon trust for his nephew Robert Broome the younger and his assigns for his life without impeachment of waste. The testator had been in possession of the settled property and the title deeds down to the time of his death, but had paid over the income of the property (according to the trusts of the settlement) to Mary Broome, and after his death his trustees continued in possession, and paid over the income to Mary Broome until her death in 1876. After her death the trustees remained in possession until 1886, retaining the rents as part of their testator's estate. No claim had ever been made to the property by anyone claiming as the heir of John Bouchier.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

(b.) Reported by R. H. DEANE, Esq., Barrister-at-Law.

In the year 1886 Robert Broome the younger took possession of the rents and profits under an order of the court as devisee for life under the will of Robert Broome the elder, and he subsequently sold the property to the vendor under the powers of the Settled Land Act, 1882. From the death of Mary Broome, therefore, until that sale there had been uninterrupted possession of the property and the rents and profits thereof, successively, first, by the trustees of R. Broome the elder, and then by R. Broome the younger. On the sale to Mr. Edmondson, the present purchaser, the abstract of title was sent in due course, and in March, 1890, the purchaser sent in his objections and requisitions on title. The first objection was that it did not appear from the conditions what estate John Bouchier took, and that condition four did not sufficiently disclose the importance of the fact which the purchaser was required to assume, and that he was, therefore, not bound by it; and the purchaser accordingly demanded evidence of the death of John Bouchier intestate and without an heir. The vendor replied to this by stating his belief in the truth of the facts required to be assumed, and offered to search for proof at the purchaser's expense. Some correspondence having taken place, the vendor took out a summons in the Palatine Court under the Vendor and Purchaser Act, 1874, asking for a declaration that the requisition had been sufficiently answered, that the purchaser was precluded by the conditions of sale from making such a requisition, and that a good title had been shown in accordance with the particulars and conditions of sale.

Bristowe, V.C., held that the conditions of sale contained no *suggestio falsi*, no *suppressio veri*, no misrepresentation, and no ambiguity, and he made a declaration in the terms of the summons.

The purchaser, Mr. Edmondson, appealed.

Haldane, Q.C., and *Ernest Radford*, for the appellant.—The purchaser cannot get a marketable title. No mortgagee would lend money on the title the purchaser is asked to accept. [BOWEN, L.J.—Can you raise the point on a vendor and purchaser summons?] This is a small purchase, and the other side do not object to have the question decided in the cheapest way. It was allowed in *In re Marsh and Earl Granville*, 31 W. R. 239, 845, 24 Ch. D. 11. [Lord HALSBURY, L.C.—Why are you not bound by the fourth condition?] That condition was dishonest and misleading. The purchaser knew nothing of the real facts, but the vendor knew not only that he could not prove what the purchaser was required to assume, but also that a previous purchaser had thrown up his bargain on account of the defect. A vendor is bound to give a purchaser an opportunity of seeing what the defect is so as to enable him to decide whether he will buy with less than a marketable title. Here the entire title depends on this assumption. The use of a date so far back as 1870 is calculated to make a purchaser suppose he is getting a possessory title, and thus throw him off his guard. If a vendor is going to cut down the statutory title, he is bound to make a full disclosure of the real facts. It is dishonest to conceal a material fact which is within the knowledge of the vendor, and which, if disclosed, would deter the purchaser from purchasing. The vendor ought to have disclosed the fact that the title depended entirely on the facts required to be assumed. No one could have gathered from these conditions what the point was. Where a condition does not point directly to the defect, the purchaser is not precluded from objecting to it: *Cruse* v. *Nowell*, 4 W. R. 619, 2 Jur. N. S. 536; *Seaton* v. *Mapp*, 2 Coll. 562; *Rhodes* v. *Ibbetson*, 4 De G. M. & G. 787, at p. 792, 2 W. R. Ch. Dig. 99. "All the material facts must be known to both parties": *Ellard* v. *Lord Llandaff*, 1 Ball. & B. 241, at p. 251. [*Cozens-Hardy, Q.C.*, and *Rutherford*, for the vendor, took the objection that the question could not be tried upon a vendor and purchaser summons if the purchaser was going to take the ground of fraud or dishonesty in the conditions.] It is too late to raise that objection. [Lord HALSBURY, L.C., pointed out that by section 9 of the Vendor and Purchaser Act, 1874, the questions raiseable on these summonses were limited by the words "not being a question affecting the existence or validity of the contract," and that the whole scheme of the Act seemed inconsistent with trying such a question as that now raised on these summonses.] The Vice-Chancellor decided the case on the ground of construction, but there is jurisdiction to decide more than a mere question of construction: *Marsh* v. *Earl Granville*. A former purchaser who threw up his contract on account of this very defect in the title was asked by the vendor not to attend this sale. [Lord HALSBURY, L.C.—You cannot go into that on this summons. It is a question affecting the validity of the contract. *Cozens-Hardy, Q.C.*—There was no evidence on this point before the Vice-Chancellor.] At any rate, the order of the Vice-Chancellor goes too far in affirming the validity of the contract. The condition does not sufficiently disclose the importance of the assumption required. There is nothing to show the existence of the relationship of trustee and *cestui que trust* between Broome and Bouchier. The purchaser is entitled to the beneficial title, and not merely to the legal title, as the vendor appears to suppose. The purchaser, if he accepted this title, might be involved in a breach of trust. If such a condition were binding trustees could sell to themselves. The court will not encourage conditions which do not clearly disclose the blot: *Heywood* v. *Mallalieu*, 32 W. R. 538, 25 Ch. D. 357. A condition in general terms will not preclude a purchaser from taking a specific objection which is known to the vendor: *Nottingham Patent Brick and Tile Co.* v. *Butler*, 34 W. R. 405, 15 Q. B. D. 261, 16 Q. B. D. 778, at pp. 786, 789.

Cozens-Hardy, Q.C., and *Rutherford*, for the vendor.—[Lord HALSBURY, L.C.—We should like to hear you, Mr. Hardy, as to the point that the relation of trustee and *cestui que trust* subsisting between Broome and Bouchier was not, but ought to have been, disclosed. BOWEN, L.J.—If a vendor, knowing of a blot on his title, frames the conditions so that the blot may escape detection, will a court of equity enforce the contract?] Yes, in such a case as this, where the condition is made merely to preclude proof being required when no proof is available. There was quite enough in the condition to put the purchaser on his guard and enable him to infer the state of the title and the object of the condition. The condition is a perfectly proper and usual one, and cannot be fairly described as misleading. The purchaser was only required to assume that which the vendor believed, and still believes, to be true, though he was not in a position to prove it. It is not necessary for a vendor in such a case to point out the exact defect. It would be different if the purchaser were required to assume what the vendor knew to be untrue, or did not believe to be true. There is no case which requires a vendor to point out the defect in his title where the purchaser is merely required to make an assumption which the vendor believes to be true. If it were necessary to do so half the land in the country would be rendered unsaleable, for there is much as to which, though there may be no positive flaw, there is deficiency of evidence.

Haldane, Q.C., replied. *Cur. adv. vult.*

Dec. 17.—Lord HALSBURY, C.—I am of opinion that the judgment of the court below must be affirmed. There can be no doubt that in terms Mr. Edmondson is precluded by the fourth of the special conditions of sale from making or raising the requisition and objection upon which the question now arises, if that special condition can be insisted upon by the vendor. It is argued that it cannot be insisted upon, inasmuch as it comes within the general principle that a condition is bad if it be misleading. It is not suggested here that the vendor knew that the assumption required to be made was false. Indeed, it is not suggested even now that the facts required to be assumed are not true. I should quite agree that if there were any actual misstatement in the conditions or such an imperfect statement of the facts as in the result makes what is stated untrue, the conditions would be so tainted by falsehood that they could not be insisted on as against the purchaser misled by such taint of falsehood. But now that the facts are all known the condition appears to have been aptly and properly framed to prevent the purchaser from insisting on proof of what was then and is now believed to be the fact, although the vendor is not in a position to establish it by legal proof. It seems to me that, although the exact defect in the proof of the title is not specifically pointed out, it required very little foresight to conjecture that the death of John Bouchier intestate and without an heir was really material by reason of some such objection as that which is now in question. It seems to me that an opposite view would establish the principle that, apart from intentional misleading, and apart from any knowledge by the vendor that the facts required to be assumed were not true, a condition requiring assumptions as to the title could only be supported where the specific objection to the title was pointed out. For that proposition I can find no authority, and it certainly would make every title in which there was not only defect as a matter of fact, but absence of proof of soundness, absolutely unsaleable—a formidable proposition with reference to the known condition of titles to real property in this country. Possibly there could not be a better illustration of the effect of such a proposition than the present case. The vendor would have been compelled to state the exact objection, with the result that no one could deal with that estate in the future.

BOWEN, and FRY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the vendor, *Field, Roscoe, & Co.*, for *John Hugh Lewis*, Liverpool.

Solicitors for the purchaser, *Rowcliffes, Rawle, & Co.*, for *A. & G. W. Fox*, Manchester.

From Q. B. Div. Nov. 10, 25.

REG. v. BARNARDO.
JONES'S CASE. (a.)

*Practice—Appeal—*Habeas corpus*—Custody of infant—Right of mother of illegitimate child — Appointment of guardian.*

An appeal lies to the Court of Appeal from an order directing a writ of habeas corpus *to issue where the liberty of the subject is not involved, and where the Court of Appeal has power to enforce its decision.*

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

Bell-Cox *v.* Hakes, ante, *p.* 145, 15 *App. Cas.* 506, *explained.*

The mother of an illegitimate child is entitled to its custody as a matter of right, unless she be proved to be unfit to have the control of it. By committing the child to the care of another person for the purpose of education, she does not lose her rights over the child, and the court will assist her to regain its custody. She has also the right to nominate a guardian for the child, whom the court will appoint if he be a fit and proper person.

Appeal from the judgment of a Divisional Court (Lord Coleridge, C.J., and Mathew, J.).

The mother of an illegitimate child—a boy aged eleven years—being in very poor circumstances, had in 1888 voluntarily placed the boy in Dr. Barnardo's home, and the child had remained there with her consent for eighteen months. The mother, who was now a Roman Catholic, subsequently became desirous to remove the child from Dr. Barnardo's custody, in order to place it in a Roman Catholic home, and with that view had nominated a Mr. Walsh, a Roman Catholic gentleman of unexceptional character and position, as guardian of the child.

Dr. Barnardo had refused to deliver up the child for reasons which are fully stated in the judgment of Lindley, L.J.

The Divisional Court, on the application of the mother, made two orders—one, directing a writ of *habeas corpus* to issue to Dr. Barnardo to produce the child to the court; and the other, appointing Mr. Walsh the guardian of the child.

From this judgment Dr. Barnardo appealed.

Murphy, Q.C., Joseph Walton, and *Forbes Lankester*, for the respondent, took the preliminary objection that no appeal lay in such a matter.

They cited *Bell-Cox* v. *Hakes*, *ante*, p. 145.

The COURT decided to hear the appeal on the merits.

The appellant in person.

Murphy, Q.C., Joseph Walton, and *Forbes Lankester*, for the respondent.

Cur. adv. vult.

Nov. 25.—Lord ESHER, M.R.—The first question in this case is whether any appeal lies to this court from the decision of the Divisional Court on such a question as this. It has been argued that there is no appeal, and that that has been decided by the House of Lords in a recent case. This is a writ of *habeas corpus* to bring an infant child before the court in order that the court may determine whether the child should remain in the custody in which it now is, or whether it should be handed over to its mother or to persons whom she nominates. Is any appeal given to this court in such a case? The writ of *habeas corpus* is a writ of procedure for the purpose of the court making an order with regard to the person brought before it. It generally and originally had reference to persons whose liberty was affected, but the writ has always been used in the case of infant children to determine whether the person having charge of them as children is the right person to take charge of them. The question in such cases is one not of liberty, but of nurture and education. The House of Lords has determined that, with regard to one set of cases in which the writ of *habeas corpus* is in use, there is no appeal. It is said that they have gone further, and have said that for whatever purpose the writ is used there is no appeal. After carefully reading the judgments of the House of Lords in the case cited I have come to the conclusion that the decision of the House of Lords does not go so far. The House of Lords said that the words of the Judicature Act were

sufficiently large to give an appeal in cases of *habeas corpus*, but that when a subject of the Queen has been deprived of his liberty there are great constitutional reasons why there should not be any appeal from a writ discharging him from custody. But those reasons do not apply in the present case, and, therefore, I think that the House of Lords did not take away the right of appeal in such a case as the present.

That brings me to deal with the case before us. I cannot deal with it on the merits without first of all reducing it to what, in my judgment, is the value and truth of the matter. It is said that this is the case of a sensitive mother anxious to have her child under her own care, and wounded by Dr. Barnardo's refusal to let her see it as often as she wished. I do not believe a word of this. Here is a perfectly well-known institution with distinct objects. Its primary object is to rescue, take care of, and educate neglected children taken from the streets, but there is a fundamental point which animates Dr. Barnardo and those who assist and support him—namely, that these children should be educated as Protestants. On the other side, we have a body of equally sincere and honest people who desire to bring up children as Roman Catholics. It is a dispute between two sets of earnest benevolent enthusiasts. The real dispute is whether this child is to be educated as a Protestant or a Roman Catholic. This was the child of a poor woman, and was practically on the streets. It was as poor as it could be. Its mother could not keep it properly clothed or properly fed, but it would be wrong to say that she starved it. Nevertheless, it is true that the child was not clothed, fed, or educated as one could wish. Under these circumstances the mother takes the child to Dr. Barnardo, in order that it may be properly fed, clothed, and looked after, and she does so of her own free will. It is absurd to say that she had, at that time, any religious earnestness; she had nothing of the kind. The mother deliberately gave the child to Dr. Barnardo, and left it there for eighteen months.

In Dr. Barnardo's institution children are fed, clothed, and brought under proper discipline, and they are educated religiously. Dr. Barnardo assures us that he does not educate them in the controversial points of difference between Roman Catholics and Protestants. I hope, indeed, in the case of such young children, that he does not. The child is perfectly happy where he is. Nobody suggests that any harm can come to it from remaining in Dr. Barnardo's care. The mother, however, has Roman Catholic relations. Her own religious views are about as indifferent as they well can be, but under persuasion —having apparently changed her views several times—she decides to be a Roman Catholic, and her relations persuade her that the child's soul is in danger if it is left to be brought up as a Protestant, and she, therefore, is persuaded that she wishes that it should be removed from this institution. If I thought that she was not persuaded at all, and that she was a mere catspaw and perfectly indifferent to the child's interests—if I found that she had received money for her consent to this application I should say that it was not *bonâ fide*. But, as it is, I think she really is persuaded that she wishes to remove the child. It is not to be handed over to its mother, but it is to be given up to the Roman Catholic institution.

Now, the child is an illegitimate child. No doubt that makes a difference as to the position of the mother, but it makes none in respect of her right and wish to have the custody of her own child. Her wishes as to that will be considered by the court. There is no difference whatever in this respect between the mother of an illegitimate child and the father of a legitimate child. It is an undoubted right by the law of England, recognizing the law of nature, that the mother of an illegitimate child shall have the company, the care, and the control of her own child unless for any reason the law of England is obliged to interfere with the law of nature. She has therefore the same right as the father of a legitimate child has to nominate someone to take care of the child for her. She may say to what school it is to be sent, and may choose its tutors and governesses.

Now, suppose the child is actually in the custody of a particular person by her consent, as in this case it is in the charge of Dr. Barnardo. She has bound herself by agreement not to take it away. The law is perfectly plain. A parent cannot bind himself by any such agreement. He cannot by agreement—as Dr. Barnardo has often been told—give up his natural right to the control of the child. This is exactly the same in the case of the mother of an illegitimate child. She cannot by agreement absolve herself from her duties and rights to her child. The agreement, therefore, that she made with Dr. Barnardo is absolutely null. Then comes the question as to which of the two persons it is to be given to. Unless there is some reason to the contrary, the court is bound to give effect to the wish of the mother. Is there in this case any reason to the contrary? The child is given up to Dr. Barnardo by its mother. She had no means of taking proper care of it. She did the right thing in giving it to him, in my opinion. Then, after Dr. Barnardo has had all the trouble and expense of keeping the child, she insists on having it back again, not that she may enjoy its society herself, but that it may be handed over to be brought up in a Roman Catholic institution. The court can take no notice of any preference of one religion over another. It was not unnatural that under the circumstances Dr. Barnardo should look closely into the application. His mind was at once filled with suspicion, and he therefore, not unnaturally, has this woman closely watched. I do not blame him for doing so, but I think he did not appreciate the danger of employing agents to watch her who knew perfectly well that he wanted to find out that she was disreputable. Accordingly they made reports which, if they are true, would show that she is now a disreputable woman. The reports, however, have been carefully investigated in the Divisional Court, and the judges have come to the conclusion that Dr. Barnardo's agents were either deceived or have exaggerated matters. Therefore, we must take it that she is not now a disreputable woman. The law, as Dr. Barnardo has been told before, puts him into this position—that, although he takes a child in at its parent's request, and by agreement with him, and expends care and money upon it, nevertheless, whenever the parent chooses to ask for the child, he has no course but to acquiesce, unless he can show some good reason to the contrary. There is in this case nothing to entitle the court to interfere with the mother's rights, and, therefore, Dr. Barnardo is bound to hand over the child as directed by the Divisional Court. I will only add that I do not agree with the strictures passed on Dr. Barnardo's conduct in the court below.

The following judgment was read by LINDLEY, L.J.—Two questions are raised by this appeal—(1) Does an appeal lie? (2) If it does, ought the orders appealed from to be confirmed or reversed? The orders appealed from are two—(1) an order that a writ of *habeas corpus* do issue directing Dr. Barnardo to bring up an infant named Jones or Roddy; (2) an order appointing a Mr. Walsh guardian of the infant. There is not yet any order for the delivery of the

infant to him, but if this appeal fails such an order will forthwith be made as a matter of course. That an appeal lies against the second of these orders is too clear for serious controversy. Such orders were always made in Chancery before the passing of the Judicature Acts, and they were always appealable. The appeal section of the Judicature Act, 1873—viz., section 19—plainly includes orders of this description. Whether in form the appeal should be brought by Dr. Barnardo, as it in fact is, or whether it should be brought by the infant by a next friend, who might be Dr. Barnardo, is a matter of no real importance. The latter form is, I think, the more correct; but as the order has been served on Dr. Barnardo, and is a preliminary step towards removing the child from his custody, and as, moreover, the order directs him to pay the costs of the application, I am not prepared to say that his appeal is technically wrong in point of form. Even if it were the court would not hesitate to allow it to be amended, and I pass from this subject without further comment. But then it is said that no appeal lies from the order directing a writ of *habeas corpus* to issue, and reliance was placed on the recent decision of the House of Lords in *Bell-Cox's case*. That decision, however, appears to me to have no application to such a case as this. The question whether a person in prison ought to be set at liberty or not is entirely different from the question which of several persons ought to have the custody of a child. It is true that proceedings by *habeas corpus* may be had recourse to for the purpose of settling both questions; but the proper custody of an infant is by no means finally settled by *habeas corpus*.

The Court of Chancery has asserted its powers to restrain a father from applying for a *habeas corpus* in order to recover possession of a child from a properly appointed guardian (McPherson on Infants, 149); and in *Andrews* v. *Salt*, 21 W. R. 616, L. R. 8 Ch. 622, the court restrained a testamentary guardian who had applied for a *habeas corpus* to obtain possession of an infant, in the custody of her mother, from interfering with the custody or education of the infant. The jurisdiction of the Court of Chancery to control legal rights of custody enforceable at law by *habeas corpus* was never disputed, so far as I am aware. On the other hand, the court had no jurisdiction to restrain a person from seeking to obtain his freedom by that well-known writ. The Judicature Acts have put an end to injunctions to restrain legal proceedings, and as regards infants it is expressly enacted by section 25 (10) of the Judicature Act, 1873, that "in questions relating to the custody and education of infants the rules of equity shall prevail." It certainly would be a strange state of things if, since the Judicature Acts, there should be an appeal from an order as to the custody of an infant if made on summons, and no appeal from a similar order if made on *habeas corpus*, even although the two orders were wholly inconsistent with each other. It is true that there was no appeal from an order on *habeas corpus* before the Judicature Acts, but section 19 of the Act of 1873 gives such an appeal, so far as words are concerned, and I can discover no reason for cutting them down in a case of this sort. These reasons, as well as a careful study of the judgments of the House of Lords in *Bell-Cox's case*, lead me to the conclusion that it is competent for this court to entertain the appeal from the order on *habeas corpus* as well as from the order on the summons, which is the more important of the two.

I pass now to the merits of the case. The child is illegitimate. The consequence is that he has no guardian: *In re Ullee*, 53 L. T. N. S. 711. In other words, there is no person who has all the rights of a guardian over either him or his property. But, although this is true, it is now settled, after some fluctuation of opinion, that the mother of an illegitimate child has a *primâ facie* right to the custody of the child up to the age of fourteen in preference either to the reputed father or to any other person: *Reg.* v. *Nash*, 31 W. R. 420, 10 Q. B. D. 454. This right is based on the relationship which exists between a mother and her child, and on the absence of all superior right on the part of the reputed father or of anyone else. This right of the mother is, no doubt, subject to control by the High Court, and if in any case it be proved that a mother is unfit to have the custody of her own illegitimate child, the court clearly has jurisdiction to remove the child from her control.

The power of the Court of Chancery to deprive a father of the custody of his own legitimate child in a proper case is undoubted; and the power of the High Court over the mother of an illegitimate child is certainly no less extensive. The power of the court to control the mother is, in truth, indisputable and not disputed. But the court will not interfere with her arbitrarily, and will support her and give effect to her views and wishes unless it becomes the duty of the court towards the child to refuse so to do. Taking this view of the mother's rights and of the duty of the court, I see no reason why a mother should not from time to time change her mind as to where, how, or by whom her child shall be brought up, nor why the court should interfere with her or refuse to support her, unless circumstances be proved which satisfy the court that its duty to the infant requires it to act contrary to her wishes. The circumstances relied upon by the appellant to show that the mother's wishes ought not to prevail are as follows:—(1) The mother's immoral and dissolute character. The worst charges against her were, however, disproved in the opinion of the Divisional Court, and must be taken as not established. The fact that she lived with a man without being married to him is not of itself sufficient to deprive her of her rights. (2) The want of *bona fides* on the part of the mother, who is alleged to be a mere instrument in the hands of others. There can be no doubt that she is supported in this controversy by Roman Catholic priests, but the evidence is strong that she went to them for help, and that they did not first go to her; and, although it would be ridiculous to suppose that she is not under priestly influence, I cannot come to the conclusion that she does not really desire to have her child removed from his present custodians. (3) The abandonment by her of her right to the child. That even the father of a legitimate child may abandon his right to educate his child as he thinks proper is established by *Andrews* v. *Salt*, but it is extremely difficult to define the conduct which amounts to such an abandonment. A mere agreement with a stranger that he shall have the child for a definite time will not, although acted upon, necessarily amount to such an abandonment. But if it can be shown that it would be an injury to the child not to abide by such an agreement, this additional circumstance may turn the scale. It is necessary to consider this point—viz. (4) the injury which would accrue to this child if it were removed to a Roman Catholic school. Dr. Barnardo has educated the child as a Protestant. But, considering the age of the child and the short time he has had any religious instruction, I cannot think that he has yet arrived at that stage in his religious education at which a change of education will be injurious to him. So far as I can judge, no injury will be done to him whether he remains where he is or whether he is removed to some Roman Catholic institution. He will be as well cared for in the one place as in the

other, and his wishes are not strongly one way or the other. Nor is it the duty of the court to insist that he shall be brought up in the Protestant rather than in the Roman Catholic religion against the wishes of the mother.

I have now passed in review the various grounds relied upon by the appellant for leaving the child with him, and I have given my reasons for holding them to be insufficient. Being insufficient, I am of opinion that the law requires that the mother's wishes must prevail. I will only add that I am not surprised that Dr. Barnardo should feel annoyed at finding his efforts thwarted, as they occasionally are, by persons who do not awake to their own duties to their children until he has rescued them from degradation and ruin. But the duty of this court is to ascertain and maintain rights and to administer the law with absolute indifference to every other consideration; and whilst I regret that such a contest as this should ever have arisen, yet, having arisen, it is my duty to say that the law is on the side of the mother, and that the appeal must be dismissed, with costs.

LOPES, L.J., read the following judgment:—It was contended that no appeal would lie in this case, and reliance was placed upon the case of *Bell-Cox* v. *Hakes*, in the House of Lords. That case establishes that there is no appeal under section 19 of the Judicature Act, 1873, from an order of the High Court discharging a prisoner from custody under a writ of *habeas corpus*. It is said that the decision is not confined to discharges from custody, but is applicable to all illegal detentions, and includes a case like the present, where no question of the personal freedom of the infant arises, but a change of custody is sought from one who has the custody to another who claims to be entitled to it. To determine this it is necessary carefully to consider the judgments in the *Bell-Cox case*, and the reasoning upon which those judgments are founded. I feel that it is somewhat anomalous to hold that one order made under a writ of *habeas corpus* is an order within the meaning of the word "order" used in section 19 of the Judicature Act, 1873, and that another order is not. The words of the statute are:—"The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order of her Majesty's High Court of Justice, or any judges or judge thereof." Lord Bramwell says that he has a misgiving whether, in awarding or disposing of a writ of *habeas corpus*, a judge of the High Court, in the High Court itself, is acting as a court or a judge of a court of judicature. The ground, however, of the judgments in the *Bell-Cox case* is that, there being no power to re-capture or re-arrest, an appeal after an order of discharge from custody would be useless; consequently that the right way of dealing with the word "order" in section 19 is to limit its meaning to cases where the Court of Appeal, or the court appealed from, can execute the order or judgment of the court if required. The passages I am about to read from Lord Bramwell's and Lord Herschell's judgments make this clear. Lord Bramwell says:—"If an order of discharge is a judgment or order of judicature, and so within the very words of section 19, a limitation must be put upon them, excluding such appeals as would be futile." Lord Herschell says:—"I am driven then to the conclusion that where a prisoner has been discharged by the High Court under a writ of *habeas corpus*, the Court of Appeal has no power effectually to interfere with the action of the court below. The judgment of the higher court cannot in any way affect the discharge or restore to custody the person liberated. It is incompetent to give effect to its judgment, and cannot undo what it holds to have been wrongly done by the order appealed from. I think it is impossible to read the section to be construed without seeing that the power to hear and determine an appeal, and the power to enforce the judgment of the Court of Appeal in case it should differ from the court below, were intended to be co-extensive."

It is clear, therefore, that what the House of Lords decided was that in the case of a discharge from custody under a writ of *habeas corpus* there is no appeal, because the court cannot give effect to its order. This reasoning is inapplicable to the case now under consideration. There has been no discharge of the infant. The infant is within the control of the court, and the court can make what order it thinks fit with regard to his custody, and can give full effect to its order or judgment. I come to the conclusion, therefore, that there is an appeal in this case, and that this case is not governed by the *Bell-Cox case*. Indeed, it seems to me that the appeal is sanctioned by the reasoning in that case.

With regard to the merits of the case, I cannot help saying that I doubt much if the mother of the child would have wished to remove him if she had not been influenced by others. I believe the desire to remove the child emanates from others, and not from herself. She placed the child in Dr. Barnardo's institution in the first instance of her own free will. She entered voluntarily into an agreement, by which the child was to be left there for several years, and she, in fact, left the child there without any interference for more than a year. The child, it is to be observed, was happy and desirous to be left with Dr. Barnardo. The child's reputed father had the same desire. I doubt if the contemplated change into a different atmosphere, with new and different surroundings, will be for the welfare of the child. It is, however, a matter of discretion. The court below has seen and examined the witnesses and carefully considered the case. In such circumstances the exercise of the discretion is not lightly to be set aside, and for this reason, and this reason only, I do not dissent from the judgment delivered. On Dr. Barnardo severe strictures have been passed in the court below. I do not entirely agree with what has been said. Doubtless he is over-zealous, often misguided, and too prone to resist the law; but, at any rate, I believe his motives are benevolent and philanthropic.

Appeal dismissed.

Solicitors for the appellant, *H. C. Nisbet & Daw.*

Solicitors for the respondent, *Leathley & Phipson.*

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7. Smith (1893, 2 Ch. 5

High Court of Justice.

Chan. Div. }
Chitty, J. } Jan. 13.

In re EDYE. (*a.*)

Attachment—Solicitor—Non-compliance with order to pay a sum of money in his character of an officer of the court—Bankruptcy of solicitor—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4 (4)—*Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 9.

The court has jurisdiction to attach a solicitor for default in payment of a sum of money which he has been

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

ordered to pay in his character of an officer of the court, although he has subsequently become a bankrupt.

In re Wray, 36 *W. R.* 67, *followed.*

In re Simes, 38 *W. R.* 570, *not followed.*

Motion.

This was a motion for leave to issue a writ of attachment against a solicitor for default in the payment of a sum of money under an order made on the 27th of October, 1890, against him in his character of an officer of the court.

The motion was founded on the 4th exception to section 4 of the Debtors Act, 1869. The notice of motion was given in and for November last, but by arrangement the hearing had been postponed from time to time with a view to negotiations for a settlement.

On the 11th of December, 1890, the defendant was adjudicated a bankrupt on his own petition.

Leonard Field, for the motion.—The bankruptcy is no bar to this application, which is of a punitive character: *Marris* v. *Ingram*, 28 W. R. 434, 13 Ch. D. 338; *In re Wray*, 36 W. R. 67, 36 Ch. D. 138; *In re Gent*, 37 W. R. 151, 40 Ch. D. 190; *In re Dudley*, 32 W. R. 264, 12 Q. B. D. 44; *Mitchell* v. *Simpson*, 37 W. R. 798, 23 Q. B. D. 373, at p. 379.

Johnston Watson, for the respondent.—The application is barred by the Bankruptcy Act, 1883, s. 9, and the court has no jurisdiction: *In re Simes*, 38 W. R. 570.

CHITTY, J., stated the facts, and proceeded:—Now this bankruptcy is set up by the solicitor as a complete answer to the motion, and reliance is placed on section 9 of the Bankruptcy Act, 1883, and it is said that the bankrupt is *ipso facto* exempted from all liability under the Debtors Act, 1869.

The point came before North, J., in *In re Wray*, in which case the learned judge held that such a defence could not be maintained, and in an elaborate judgment he founded himself mainly on the reason that the proceeding was not merely civil, but was of a punitive or disciplinary nature, and, therefore, the provisions of the Bankruptcy Act had not taken away the jurisdiction. The grounds upon which the Legislature proceeded in framing the Debtors Acts are stated in *Marris* v. *Ingram*. In the case of *In re Wray* the learned judge, for reasons appearing to his mind sufficient, declined in his discretion to allow the writ to issue. On appeal the Lords Justices did not interfere with the learned judge's discretion, leaving untouched that part of his judgment which referred to the question of jurisdiction.

In re Wray was cited to the Divisional Court in *Mitchell* v. *Simpson*, and Charles, J., after referring to the decision of North, J., expressed his approval of it. A case, however, relating to a trustee, but involving the same question of jurisdiction, subsequently came before Kekewich, J., in which he decided that he had no jurisdiction. This was the case of *In re Simes*, on which the respondent relies. In that case, however, neither *In re Wray* nor *Mitchell* v. *Simpson* were cited, and I cannot but think that had the learned judge been aware of these decisions he would have followed them.

On the question of jurisdiction I must follow the judgment of North, J., which I think well founded.

I have, therefore, jurisdiction to make the order.

His lordship then reviewed the facts, and in the exercise of his discretion made the order, directing it to lie in the office for a fortnight.

Order made.

Solicitors for the applicant, *Field, Roscoe, & Co.*

Solicitors for the respondent, *Leslie, Antill, & Arnold*, for *F. P. Dighton*, Cheltenham.

Chan. Div. North, J. } Aug. 1, 1890.

CURTIS *v.* KESTEVEN COUNTY COUNCIL. (*a.*)

Local government — Main road — Roadside wastes — County council—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *s.* 11, *sub-sections* 1, 6.

Strips of waste land adjoining a main road are "roadside wastes" within the meaning of sub-section 1 *of section* 11 *of the Local Government Act*, 1888, *and are not, like the main road, vested in the county council by sub-section* 6 *of that section; and, consequently, the county council have no right to the herbage of such strips of waste land.*

Motion.

The question for determination was whether strips of waste land lying on the side of the metalled portion of a main road are, by virtue of section 11 of the Local Government Act, 1888, vested in the county council in which the main road is vested.

Under the will of Thomas Curtis, to whom the strips of waste land adjoining that part, which was in the parish of Sinderby, of the main road from Newark to Lincoln, were conveyed in the year 1876, C. C. Curtis was entitled for his life to those strips of waste land, and let to inhabitants of the parish the right of grazing cattle thereon.

The width of the metalled part of the main road from Newark to Lincoln was 22 feet, but the total width of the road from hedge to hedge varied from 65 feet to 95 feet, and the area of the strips of waste land was about 13 acres.

By virtue of section 11, sub-section 6, of the Local Government Act, 1888, the part which was in the parish of Sinderby of the main road from Newark to Lincoln was vested in the Kesteven County Council, who purported to sell the herbage growing on the strips of waste land adjoining that part of the main road to a purchaser for a year.

The action was brought by C. C. Curtis and two inhabitants, to whom he had let the herbage of the strips of waste land, against the Kesteven County Council and the purchaser from them of the herbage of the strips, claiming a declaration that the plaintiff Curtis was entitled to the strips of waste land and an injunction to restrain the defendants from wrongfully cutting or removing the trees and herbage growing thereon.

This was a motion by the plaintiffs for an interlocutory injunction to restrain the defendants from wrongfully cutting or removing the herbage. By consent of the parties it was treated as the trial of the action.

Cozens-Hardy, Q.C., and *Ingle Joyce*, for the motion.—The strips of waste land adjoining the main road are "roadside wastes" within the meaning of sub-section 1 of section 11 of the Local Government Act, 1888, which gives the county council the same powers as a highway authority over roadside wastes; and this is inconsistent with a construction of sub-section 6 which would vest roadside wastes in the county council in the same way as a main road is vested in them by that sub-section. The words "a main road" in sub-section 6 do not include everything from hedge to hedge, for otherwise there would have been no necessity for mentioning the materials and drains belonging thereto. Only so much of the soil of the road as is necessary for the purposes of the county council as a road authority is vested in the county council: *Coverdale* v. *Charlton*, 27 W. R. 258, 4

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

Q. B. D. 104. But the public have a right of way over the roadside wastes as well as over the main road.

R. S. Wright and *Vernon R. Smith*, for the county council.—Sub-section 6 of section 11 vests in the county council the whole width of the road from hedge to hedge over which the public have a right of way: *Elwood* v. *Bullock*, 6 Q. B. 383; *Reg.* v. *United Kingdom Electric Telegraph Co.*, 10 W. R. 538; *In re Warminster Local Board*, 38 W. R. 670, 25 Q. B. D. 450. The county council have a right to the herbage of the strips of waste land adjoining the main road: *Coverdale* v. *Charlton*; *Wandsworth Board of Works* v. *United Telephone Co.*, 32 W. R. 776, 13 Q. B. D. 904; *Rolls* v. *Vestry of St. George the Martyr, Southwark*, 28 W. R. 867, 14 Ch. D. 785, and they can remove trees which obstruct the public right of way over the strips of waste land, although they have not a right of ownership in the trees: *Turner* v. *Ringwood Highway Board*, 18 W. R. 424, L. R. 9 Eq. 418. [NORTH, J.—What do you say is the meaning of the words "roadside wastes" in sub-section 1 of section 11?] They may apply to village greens and other waste land over which the public have rights, but which are not part of a highway.

NORTH, J.—This case turns on the construction of the Local Government Act, 1888. The question is whether an area of ground, about thirteen acres in extent, is vested by this Act in the county council, and whether a person, who admittedly was the owner of the land until it was vested, if so vested, is to be deprived of it without compensation. I do not think this comes within section 11 of the Act, which section provides, by sub-section 1, "Every road in a county which is for the time being a main road within the meaning of the Highways and Locomotives (Amendment) Act, 1878, inclusive of every bridge carrying such road, if repairable by the highway authority, shall, after the appointed day, be wholly maintained and repaired by the council of the county in which the road is situate," and certain powers are given for the purpose. Then it provides: "The county council shall have the same powers as a highway board for preventing and removing obstructions and for asserting the right of the public to the use and enjoyment of the roadside wastes." The other material clause of that section is sub-section 6, which deals with the vesting, and says: "A main road and the materials thereof, and all drains belonging thereto, shall, except where the urban authority retain the powers and duties of maintaining and repairing such road, vest in the county council, and where any sewer or other drain is used for any purpose in connection with the drainage of any main road the county council shall continue to have the right of using such sewer or drain for such purpose."

These two sub-sections seem to me to draw a clear distinction between what the Act calls a "road" and what the Act calls "roadside wastes." It is suggested that "roadside wastes" have some meaning which the counsel for the county council confesses he does not know, and suggests that it may apply to village greens. I think that "roadside wastes" is an intelligible phrase, and what the county council have given to them by the Act is a power of asserting the right of the public to the use and enjoyment of these "roadside wastes." That in itself seems inconsistent with the idea that the roadside wastes were the property of the board; because, to say that the absolute owners are to have power to assert the right of the public to the use and enjoyment of their property seems to require an explanation that has not been given. I do not think the roadside wastes are vested by this Act in the county council. *In re Warminster Local Board* is a decision upon this very section, and if I thought it governed this case I should follow it. But I do not think it governs the case at all, because the question there was who was to keep up the footways, and it was held, as I should have held, if it had been a new case, that the footways were part of the road—*i.e.*, that the part of the road most convenient for foot passengers was as much part of the road as the other part which can be used by horses and carriages. I should have thought it clear that the footways were part of the road. But it does not go any further, excepting that there is an observation by Charles, J., where he says that, "under the Local Government Act the whole of the expenses of the maintenance of main roads—that is to say, main roads from hedge to hedge, including the footways—is thrown on the county council." The sole question before the court was as to a footway forming part of a street within the control of an urban authority, and although, no doubt, Charles, J., uses that phrase "road from hedge to hedge," he could not have had in his mind what I have to deal with now—a large area of ground outside the footpath.

Under these circumstances I come to the conclusion that these roadside wastes—as I hold them to be—are not vested in the county council, and that the plaintiffs are entitled to the relief they ask for.

An injunction was granted restraining the county council from cutting and removing grass, timber, and other growths by the side of the main road, "without prejudice to the rights of the county council under the Local Government Act."

Solicitors, *C. D. Woolley; Peacock & Goddard.*

Chan. Div. } Dec. 3.
Kekewich, J. }

In re JOSHUA STUBBS & CO. (LIMITED).
BARNEY AND THE BIRMINGHAM DISTRICT BANKING CO. (LIMITED) *v.* J. STUBBS & CO. AND WILLIAM ABBOTT. (*a.*)

Company — Winding up — Debenture — Liquidator — Receiver.

Where debenture-holders have, in an action to realize their security, obtained the appointment of a receiver, that receiver will not be displaced by the official liquidator of the company if the debentures include practically the whole of the company's property; but the debenture-holders will be allowed to continue their action and to control the realization of the assets.

Where a receiver of the company's property has been appointed in a debenture-holder's action, the plaintiffs ought, on a subsequent application to appoint an official liquidator, to apply to have their receiver appointed liquidator.

Summons and motion.

The summons asked for leave to proceed with a debenture-holder's action notwithstanding the winding up; the motion was by the official liquidator to discharge an order made in the action appointing a receiver and to appoint himself receiver for the debenture-holders in his place.

The company, in 1886, issued debentures to William Abbott, one of the vendors and managing director, in

(*a.*) Reported by H. C. ROPER, Esq., Barrister-at-Law.

payment of the balance of his purchase-money. These debentures constituted a charge on the whole of the company's undertaking and property, including uncalled capital, but not including freeholds and leaseholds. The freeholds were also mortgaged to Abbott, and the leaseholds were mortgaged to other persons. Abbott's debentures, amounting to £6,000, and his mortgage were transferred to Barney as trustee for the plaintiffs, the Birmingham District Bank, to secure the account of the company.

On the 30th of September, 1890, a winding-up petition was presented against the company. The debentures thereupon became immediately payable, and the bank, on the 2nd of October, commenced proceedings as debenture-holders to enforce their securities in respect of the overdraft of the company's account, amounting to more than £4,000.

On the same day an order was made by consent appointing a receiver.

On the 15th of October a winding-up order was made and an official receiver appointed. The bank were present as creditors when the order was made, but neither supported nor opposed it. The liquidator gave security to the amount of £10,000, but the receiver had given none.

It was stated that there would probably be surplus assets after satisfaction of the claim of the bank.

The summons and motion came on together.

Warmington, Q.C., and *R. J. Parker*, for the bank, opened the summons, and asked that their action should be allowed to proceed.

Renshaw, Q.C., and *Ashton Cross*, for the motion.—There is no reason why the action should go on. We admit the plaintiffs' rights, and offer them all the relief they are entitled to. We submit that the usual practice should be followed—*i.e.*, that the receiver be discharged and the official liquidator appointed receiver in his place: *Campbell* v. *Compagnie Générale de Bellegarde*, 24 W. R. 573, 2 Ch. D. 181; *In re David Lloyd & Co.*, 25 W. R. 872, 6 Ch. D. 339; *In re Henry Pound, Son, & Hutchins*, 38 W. R. 18, 42 Ch. D. 402. The bank did not oppose the appointment of the official liquidator.

Warmington, Q.C., and *R. J. Parker*.—Both questions are within the discretion of the court. The action ought to go on, as the accounts must be taken in the presence of Abbott. The company's property is of very doubtful value, and the object of the liquidator is to get his costs made a first charge on the assets. He ought not to be allowed to come before us. We did not oppose the appointment of the liquidator nor give security because we could do nothing till a liquidator was appointed. We only appeared as creditors. There is no rule which makes it incumbent on the court to appoint the liquidator receiver. It is only done when his powers will be useful in realizing the security: *Bartlett* v. *Northumberland Avenue Hotel Co.*, 53 L. T. N. S. 611, 34 W. R. Dig. 36. Those powers are not wanted here. If the liquidator were also receiver for us there would be a conflict of interest.

Renshaw, Q.C., in reply.—The liquidator's costs will in any case come after those of the mortgagees. A conflict of interest is of no consequence: *Tottenham* v. *Swansea Zinc Ore Co.*, 32 W. R. 716.

KEKEWICH, J.—I will deal with these applications separately.

The first is the summons by the plaintiffs in the action of Barney and others against Joshua Stubbs (Limited) and William Abbott for leave to continue their action, notwithstanding the winding-up order. The action for the moment is dead, and any application they can possibly make in it—not strictly an application in the action, but in the winding up—must be for leave to continue. I see no reason why it should not continue, and several reasons why it should. If the company, through their official liquidator, are willing to give the plaintiffs at once (that is to say, as soon as the forms of the court will allow) all that they are entitled to in the action, of course there would be no further cause for litigation, the account might be taken up, and there would be no reason for an action and judgment or any other form of proceedings; but the company have not absolute control of the proceedings in that way, because Mr. Abbott is a co-defendant, and the plaintiffs' security was constituted by a transfer, either to the plaintiffs or to a trustee for them by the debenture-holder of the debentures which had in the first instance been issued to Mr. Abbott. It is quite possible that when the action is alive something of that kind may be done; that is, if Abbott is willing and other parties will be bound, an order of that kind may be made at once, but I do not see that that is possible until the action is alive, and though I should certainly deprecate, so far as I can, and prevent any useless costs, still I think the action must be put on its legs, to use the common expression, in order that justice may be done between the parties. It does not seem to me by any means to be a common case of an action by a secured creditor against the company to realize his security. There is that difference between the parties. So I think that that action must go on.

Now a very much more important and difficult question is raised by the motion of the official liquidator. He seeks to discharge the receiver appointed in the action of the debenture-holders and to substitute himself, and Mr. Renshaw says, with perfect accuracy, that though there is no rule, there is a uniform practice on the subject. What is that uniform practice? That there shall be one representative of the company in general and of the secured creditors in particular, but, inasmuch as either the same, or at any rate very similar, accounts must be taken in both proceedings—the proceedings for the liquidation of the company and the proceedings for the ascertainment and payment of the debenture-holders—those accounts shall be taken—watched over—by the same person, being an officer of the court. So far I have no doubt that there has been a uniform practice, and it is a uniform practice founded on convenience, not, of course, to be extended to cases where its extension would do injustice, but found by experience seldom, if ever, to do injustice. If it is desired to go further and say that the uniform practice has been to appoint the liquidator receiver of the debenture-holders' securities, then I do not myself think that the practice has gone so far. Certainly, within my own experience, the appointment has been the other way—that a receiver for the debenture-holders has been appointed liquidator—and it is very important to notice the difference.

I have recently had a case before me which has given me considerable trouble in ascertaining how the liquidator was to be paid. The liquidator had done good work, and it was everybody's wish that he should be fairly treated, but the whole of the property was swallowed up by the debenture-holders, or nearly the whole, and it was extremely difficult to find anything out of which his fair charges and remuneration as liquidator could be paid. As often happens in those cases, there was no ill-feeling. The debenture-holders were aware that the liquidator had done good work, and there was some property applicable to that, and he was in the end paid. But there is considerable difficulty in some of these cases in doing

that, and it is needless to say that there is a temptation —an almost irresistible temptation—on the part of the liquidator to find something out of which to pay his charges and to take care that in the character of liquidator he is properly remunerated. That danger the court must look into and face. Also in regarding the cases which have laid down the rule, or, at any rate, have settled the uniform practice, one must not forget that the form of debentures has changed very much of late years, and that now, owing very much to the industry and ingenuity of a learned member of the profession, the debentures are made in such a form that there is nothing really left outside, and that the company (not strictly in technical language) really is mortgaged to the debenture-holders. Now I find that is so in this very case. It may be possible to get something. I am told it is possible to get something outside the charge, but the charge in the debenture which is before me is on "the undertaking and all its property, whatsoever and wheresoever, both real and personal, and present and future, not including freehold and leasehold property comprised in the indenture mentioned in the second condition indorsed hereon" (that may or may not be valuable) "but including the uncalled capital for the time being." Therefore, unless the security is sufficient to pay principal, interest, and costs, one sees that there is really nothing for the general creditors, and still less for the shareholders of the company.

Now why should I, under those circumstances, not leave the mortgagee in possession of his rights? Why should he not control the realization of his security and the ascertainment of the persons to whom the money is to be paid, and the proportions in which it is to be paid, and so forth? In the case cited by Mr. Renshaw in reply there was a question whether some particular property was included in the mortgage or not. Here, unless something can be made out of the words to which I have called attention, and which I have read, there is nothing really substantial at all, and therefore it seems to me it would be wrong to prevent the mortgagees from controlling the realization of the property, notwithstanding the uniform practice which has been mentioned and which is to be found in the case of *In re David Lloyd & Co.*, and the subsequent cases to which my attention has been called, and, as has been said, the numerous other cases, reported and unreported.

I was a little startled by one circumstance, which was this. It is distinctly sworn, and I do not say improperly, by Mr. Harris, who is the solicitor for the petitioning creditor, that on the appointment of the official liquidator who was of course proposed by the petitioning creditor, there attended before the chief clerk the solicitors to the Birmingham Bank, one of the plaintiffs in the action, and William Abbott and other creditors, and that they supported the appointment of Mr. Hill, the present official liquidator. If that had been really accurately true, exactly as the language of the affidavit says, I certainly should have been disposed to have acceded to the liquidator's application. I think the debenture-holders, who of course knew of the petition, for their action was founded upon it, who of course knew of the appointment of the official liquidator, and who really were there in one sense, and the banking company, which is one of the plaintiffs attending by a solicitor, ought to have at once come forward and said: "We oppose this appointment, we insist upon our man, our nominee, having the control at once; there ought to be one liquidator and one receiver, and that one man ought to be the nominee of the debenture-holders." They did not do that, and I think they were remiss in not doing it, but they did not. Now that I have had an opportunity of seeing the chief clerk and hearing all that can be said about it, I understand that the bank did not go so far as to support the appointment of Mr. Hill. No doubt it was desirable to appoint a liquidator as soon as possible. The plaintiffs were not there as plaintiffs in the action. I do not know how they could have been. They could only have been there as creditors, and I do not rely on Thomas Barney's absence. But they seem to have not opposed; they do not seem to have taken any part, and the utmost that can be said against them is that they assented. That being so, they may find it extremely difficult to displace the official liquidator, but I do not think their conduct goes so far as to preclude them from insisting upon their own receiver in their own action.

Therefore, I must refuse the application of the official liquidator and leave him in possession, at any rate for the nonce, of what he can get as official liquidator and leave the receiver in possession in the action. The plaintiffs' costs will be costs in the action, and the official liquidator's costs will be allowed in the winding up.

Solicitors, *Field, Roscoe, & Co.*, for *Smith, Pinsent, & Co.*, Birmingham; *Henshall Fereday*, for *Reece, Harris, & Harris*, Birmingham.

Q. B. Div. (Denman, Hawkins, and Stephen, JJ.) } Nov. 10, 11.

Ex parte CASTIONI. (*a.*)

Extradition—"Offence of a political character"— Habeas corpus *—Jurisdiction of magistrate—Extradition Act,* 1870 (33 *&* 34 *Vict. c.* 52), *s.* 3.

An offence of "a political character," for which a fugitive criminal is not to be surrendered under any treaty incorporating the provisions of the Extradition Act, 1870, *s.* 3 (1), *is any criminal act, as specified within the section "incidental to and forming part of a political disturbance."*

Upon an application for a writ of habeas corpus, *the court before whom the application is made has power to review the whole evidence brought before it, whether such evidence was brought before the magistrate who committed the fugitive criminal or not.*

Motion for a rule for a writ of *habeas corpus* on behalf of one Castioni, committed to prison by Mr. Lushington, as stipendiary magistrate sitting at Bow-street, London, upon an application of the Swiss Federal Government with a view to Castioni's extradition to take his trial on a charge of murder.

Under the provisions of the Extradition Act, 1870 (33 & 34 Vict. c. 52), a treaty of extradition was concluded between Great Britain and Switzerland, by article 11 of which it was agreed, following the terms of section 3 (1) of the Act, that "a fugitive criminal shall not be surrendered if the offence is one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try and punish him for an offence of a political character."

The following are the material circumstances relating to the charge:—

The Cantons of Switzerland were federated together under a central authority, the headquarters of which were at Berne. But each of the Cantons had a local or home Government of its own, and, according to a

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

constitution of its own, it appeared that in the State of Ticino the Conservative or, as it was more frequently called, the Ultramontane party had been in power for some fifteen years, and by the opposing or Liberal party complaints had been made that the Government in power had acted contrary to the Constitution, and that justice was not fairly administered. It was also complained that the elections had been unduly influenced, that there had been manipulation of the voting lists, and also peculation. Under the Constitution of Ticino there was a provision that if a certain number of people entitled to exercise the franchise, that number being fixed at 9,000, should address a petition to the Government demanding the revision of the Constitution the Government of the day should yield to them, and take the popular will according to the existing franchise as to whether that revision of the Constitution ought or ought not to take place. In the case of Ticino, on the 9th of August, 1890, that demand was constitutionally made and was signed by more than the requisite number of people. One month was allowed by the Constitution of Ticino to act upon that demand, which month expired on the 10th of September. The Government however took no steps, and their organs in the press declared that they would not. The matter was brought before the Federal Council by certain persons who were prominent in what was called the Liberal party, and the Federal Council were warned early in September, and again upon the eve of the insurrection, that unless steps were taken to tranquilize the public mind, and to show that it was the intention of the Government to act according to the Constitution, the consequences would be serious. The Federal Council, so far as it rested with them, communicated with the local Government of Ticino, but still nothing was done. Finally, a great shooting match was announced to take place on the 11th of September at Lugano, and danger was supposed to be imminent if in the meanwhile nothing were done. On the 11th of September the insurrection actually came to a head. Bruni, a leading lawyer, practising in the State of Ticino, was at the head of the insurgents. The rising in which he took part was in Bellinzona. On that day a body of people obtained arms and went to the arsenal, where they disarmed the guard and furnished themselves with a further supply of weapons, and marched to the Municipal Palace. There seemed to have been two sets of gates to the building, which were both shut when they arrived there. Bruni, as the mouthpiece of the insurrectionary party, demanded admittance. Castioni was one of those in the attacking party. Rossi, who appeared to have been a young man who had but lately joined the Government, was seen upon the steps leading to the Government House, and inside the gates were about eighty guards. Rossi from the steps parleyed with the armed body of men who, in the name of the people, demanded entrance. Rossi refused to give them entrance, warning them of the consequences of the illegal acts in which they were engaged. Several shots were fired, some from within the building and some from without; and then it appeared that a man in the crowd came forward with a hammer and broke the gates open. The populace rushed in, and there was evidence that would justify the magistrate in coming to the conclusion that Castioni did, after or about the time that the gates were broken open, fire a revolver, and that a shot struck Rossi, from the effects of which he subsequently died. The insurrectionary party had meanwhile seized and put in confinement several of the members of the existing Government. After the successful seizure of the arsenal and the Government House, other persons were also taken into custody and put in prison. A provisional Government was then formed, the two principal members of it appearing to be Bruni and Simon.

The Federal Government subsequently sent a special commissioner named Kuntsli to report on the whole proceeding. His report was objected to as evidence of any facts, but was allowed to be read as material to show what was the existing state of political affairs in Bellinzona at the time. In that report it was alleged that someone reported Castioni to have shouted out words to the effect that the blood of his brother called for vengeance. His brother had been killed or assassinated ten years before in the province. Bruni, in his evidence at the police court, stated that the death of Rossi "was not necessary for the success of the revolution," and "was an accident."

The magistrate found to the following effect:—"That he was satisfied that there was a political rising at the time when the alleged offence was committed, but that it did not follow that any offence committed during the rising was necessarily a political offence. He thought that the accused had failed to establish the fact that the murder of Rossi was a political offence, and that there was some evidence, though it was slender, of a personal motive—such as the evidence that Castioni exclaimed to a comrade, 'You are a victim! I, too, am a victim'; his words on seeing Rossi fall—'He is down'; and the expression reported in the commissioner's statement, though not strictly evidence—viz., 'The blood of my brother calls for vengeance.' On the whole he considered that those expressions were not those of a man committing a political offence," and he committed him to prison with a view to his being surrendered to the Swiss Government.

Further depositions were put in upon the present application by Castioni denying the shooting of Rossi, but stating that if the killing of Rossi was done by him or his friends it was an act done in the course of a political disturbance; and also alleging that he went to Italy for some marble upon a sculptor's commission, and that he never knew or saw or heard of Rossi until this occurrence.

Sir Charles Russell, Q.C., Grain, and *Elridge,* for the applicant.—This is an original motion, and not a review of the magistrate's decision. The court can decide upon the facts as brought before it, and is not bound by the magistrate's finding. Even if it is bound by the findings of fact by the magistrate, the court can review his decision either on the ground of want of evidence to warrant his evidence, or of fresh evidence being brought before them which was not before the magistrate. The magistrate is bound to intimate to a fugitive criminal if committed that he has a right to apply for a writ of *habeas corpus* within fifteen days (Extradition Act, 1870, s. 11). This implies a statutory right of appeal: *Ex parte Huguet,* 29 L. T. (N. S.) 40; *Reg.* v. *Maurer,* 31 W. R. 609, 10 Q. B. D. 513; and Clarke upon Extradition, 3rd ed., p. 170. The question for the court is one of mixed law and fact—viz., whether the evidence shows the offence to be one of "a political character"? The phrase was first introduced into the Extradition Act, 1870, s. 3 (1). It has never been the subject of judicial decision, and can only be interpreted with the aid of text-books. The following definitions have been offered:—Clarke on Extradition, 3rd ed., Appendix, p. cclvii., Notes on Political Offences: "The killing of a man in civil war, the seizure of property by the leaders of an armed rebellion, are examples of true political crime"; and *vide* speech of Lord Stanley in House of Commons, August 3, 1866, there cited; also John Stuart Mill's definition, *ibid.*: "Any offence committed in the course of or furthering of civil war, insurrection, or political commotions."

Stephen's History of the Criminal Law, vol. II., pp. 69—71, 1st ed.: "The general rule as to extradition is qualified by three exceptions, first, no person is to be surrendered if the offence in respect of which his surrender is required is one of a political character or if he proves . . . that the requisition for his surrender has in fact been made with a view to try or to punish him for an offence of a political character. . . . There are three senses which might be given to this expression standing alone. The first and most obvious sense is an offence consisting in an attack upon the political order of things established in the country where it is committed (*e.g.*, high treason, political riots, seditious conspiracies, &c.). The second sense is any offence committed in order to obtain any political object. The exception would cover all crimes committed under the orders of any secret society (*e.g.*, assassination, arson, &c.). It is monstrous to suppose that this interpretation can be the true one. The third meaning which may be given to the words, and which I take to be the true one, is somewhat more complicated. . . . I think the expression in the Extradition Act ought to be interpreted to mean that fugitive criminals ought not to be surrendered for extradition crimes if those crimes are incidental to and formed part of political disturbances." See also Report of Royal Commission on Extradition, 1877, Parl. Papers, 1878, c. 2039, s. III.: "Generally speaking, we would decline to recognize, therefore, the suggestion of a political motive as a ground on which a magistrate . . . should refuse a demand for surrender . . . unless the act, to which a political character was sought to be ascribed, occurred during a time of civil war or open insurrection." The application here can be based on Sir James Stephen's definition of the third meaning of the words. The offence charged is an extraditable offence, but one "incidental to and forming part of a series of political disturbances." The burden of proof that the offence was non-political is on the other side. The court cannot adjudicate upon the necessity or non-necessity of the act if it is shown to have been of a political character.

Sir Richard Webster, A.G., and *R. S. Wright*, for the magistrate.—The definition given by John Stuart Mill is too wide—"any act by any person done in the course of a successful revolution." There should be a distinction between "things done in the course of a political agitation" and "things necessary to and having for their object a particular political movement." The court must consider whether a thing done merely in the course of a political agitation does or does not amount to a thing necessary to and having for its object a political end. The evidence of Bruni, Castioni's witness, shows that he considered the death of Rossi to be "a misfortune and not necessary to nor the object of the political revolution." There was no evidence of several shots being fired by either party, nor of any determined resistance by the Government party. The shot which killed Rossi was fired after the gates had been broken down, and after the Government had intimated that if the gates were forced they would surrender to force. The shot was not necessary for the forcing of the gates. There was some evidence that personal motive might have been the cause of Castioni's firing at Rossi. He had not been personally affected by the political grievances, because he had lived in England for many years. There was evidence that he had only come to Ticino the day of the outbreak, and that he left after he saw Rossi fall. This was a question of fact for the magistrate. If there was some evidence for his finding to be based on, the court could not review his finding of fact. The court had only to consider whether there was general evidence that this particular offence was of such a political character that the magistrate was prevented, by the terms of the statute of 1870, from committing the prisoner with a view to his surrender. The magistrate has found that it was an act not "in furtherance of," or "necessary to," or "an overt act in" a political movement.

They cited Billôt Traitées d'Extradition, p. 102; Phillimore's International Law, 3rd ed., vol. I., pp. 551-2.

Sir E. Clarke, S.G., for the Swiss Federal Government.—Under article 9 of the Berne Treaty, 1880, the Swiss Government are entitled to be represented by the law officers of the Crown in cases where it may be thought necessary. The court could not question the magistrate's decision were it based solely on evidence of the fact that Castioni fired the shot. They might do so where there was overwhelming fresh evidence on the subject, but not otherwise. The real question before the court is whether, upon the facts as brought before them, the accused came within the treaty as a matter of law? The commissioner's report was not evidence except as showing the condition of things in this little community. It was admitted that there was a political tumult, but only this one death took place, and that death was declared by one of the leaders of the tumult to have been "accidental." There was no evidence of any serious resistance or of any shots being fired by the Government party. Rossi was unarmed. The evidence went to show that this was not a natural incident in the particular political disturbance. If the offence charged was an isolated act, unnecessary to the success of a revolution, and not called for by any violence, or reasonable fear of violence, that was not an offence within the privilege of the Act as "an offence of a political character."

Sir C. Russell, Q.C., replied.

The following sections of the Extradition Act, 1870, were cited:—

"2. Where an arrangement has been made with any foreign State with respect to the surrender to such State of any fugitive criminals, her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign State."

"3. The following restrictions shall be observed with respect to the surrender of fugitive criminals:—

"(1) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate of the court before whom he is brought on *habeas corpus*, or to the Secretary of State, that the requisition for his surrender has, in fact, been made with a view to try or punish him for an offence of a political character.

"(2) A fugitive criminal shall not be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to her Majesty's dominions, be detained or tried in that foreign State for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded."

"(7) A requisition for the surrender of a fugitive criminal of any foreign State who is in, or suspected of being in, the United Kingdom shall be made to a Secretary of State by some person recognized by the Secretary of State as a diplomatic representative of that foreign State. A Secretary of State may, by order under his hand and seal, signify to a police

magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal."

"If the Secretary of State is of opinion that the offence is of a political character, he may, if he think fit, refuse to send any such order, and may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody."

"(10) In a case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorizing the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged."

"(11) If a police magistrate commits a fugitive criminal to prison he shall inform such criminal that he shall not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*."

DENMAN, J.—This case is of such considerable importance that if I had the slightest doubt on the subject I should be disposed to reserve my judgment, not so much for the purpose of considering what judgment to give, but in order to give it in the best shape. But other considerations apply here. The man is in custody, and there should be no greater delay than necessary if our decision is to be for his discharge. After the very able and exhaustive discussion we have had before us I have no doubt whatever that this case is one in which we ought to order his discharge. There has been no legal decision to guide us on the meaning of the section in the Extradition Act, 1870, on which this case mainly depends. Many suggestions for its interpretation have been offered, and much light has been thrown on the language used by text-books and by great political authorities, and by a very learned philosopher—John Stuart Mill. Though not strictly legal authority, the interpretations offered have rightly been cited as very useful to our present decision, and especially the comments of my brother Stephen in his very valuable History of the Criminal Law; but I do not think it necessary or desirable for us to attempt to lay down a definition which would embrace every state of things which might bring particular cases within the description of "offences of a political character." It is no good to try and draw up an exact and exhaustive definition never to be departed from, and to be cited in future courts of law to meet cases which must vary in their circumstances.

It is necessary, however, first to express my view on one matter on which I hold a very strong opinion. If the description given by Mill of offences of a political character were to be construed as embracing "any act done in the course of a political rising" without reference to the object and intention of the political rising, that would be a wrong definition, and not one legally applicable. It was suggested that the sentence should be read in the following way: "any act done in the cause of, and in furtherance of, the political rising," substituting "and" for "or," and that the first phrase is only an alias for the second. At any rate, I agree with the Solicitor-General that the words taken in any other sense than that would give a wrong definition. To bring the case within the exception in the Act, and to avoid extradition for an act of murder, it must be at least shown that the act was done in furtherance of, or with the intention of assisting, or was an overt act in the course of active proceedings in a political matter, whether in the form of an actual rising, or in a dispute between two acknowledged political parties. There must be something of that sort shown to bring a case within the terms of the Act. Another point raised I must deal with. It was argued that it was for the parties claiming extradition to bear the *onus* of proving that the action was not of a political character, and on the other hand it was said that if the offence was shown to be extraditable, it was for the accused to prove the political character of his action. I do not think it is possible to decide the true meaning of the statute by any such test as to *onus*.

It was not intended that upon a scrap of a *primâ facie* case the rights of either one or the other party should have to depend upon the chance of the one throwing any particular *onus* or proof on the other. The words of the Act are against any such intention. The section runs, "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove, to the satisfaction of the police magistrate, or to the Secretary of State, or the court before whom he is brought on *habeas corpus*, that the requisition for his surrender has, in fact, been made with a view to try or punish him for an offence of a political character." Then come certain other restrictions in regard to his extradition, one, finally, that he "shall not be surrendered until the expiration of fifteen days from the date of his committal." In none of the sections is anything said as to the *onus probandi* being on the prisoner to prove that he comes within any of the restrictions or exceptions. There was also a contention advanced that we could not review in any way any decision of fact found by the magistrate. What the Solicitor-General seemed to say at first was that, when once the magistrate has made up his mind in a case on any question of fact we had no jurisdiction to review or hear the evidence, or even fresh evidence, on any fact so found. I think that such a contention cannot be maintained in the face of the Act, and the Solicitor-General rightly abandoned such a sweeping contention. The accused is, by the Act, to be expressly informed by the magistrate of his right to apply for a writ of *habeas corpus* within a given time. If he is so entitled to apply, it follows that the Queen's Bench or any court to which the application is properly made must have power to go into the evidence on the matter, and in some cases, if fresh and cogent evidence is produced before such court other than that produced before the magistrate, that court could not be crippled in their jurisdiction by the fact that the magistrate had, upon other evidence or in some cases even upon the same evidence, come to a different conclusion than that which might appear correct to the court.

With these observations, and after the admissions made, and rightly made, in the course of the arguments, this question comes to be one of mixed law and fact, and, in reality, one mainly of fact. We have to decide really whether the facts produced before this court bring the case within the third restriction, and show the offence to be one of a political character. It is not now disputed that a state of things existed in Ticino which went to show more than a mere small rising of a few people. It has been clearly made out that something serious, amounting, at the moment, to civil war, existed there on the occasion of this act being committed. An armed body of men, with arms seized from a Government arsenal, rushed to the municipal house, where the members of the Government were assembled. There was some firing. The gate is broken down. It is perfectly plain that Castioni had taken

part in the movement at an earlier part of the day. He had taken a share in binding certain captured members of the Government. He was seen with a pistol in his hand before the attack on the municipal house. He joins a multitude of men all armed. All this goes to show that he was taking an active part in the revolt from the first, and it seems to me quite immaterial that he had previous to this occasion lived for some time in England. A very small part of all the evidence produced in this case really affects the question we have to decide. The message of Commissioner Kuntsli we only allowed to be read, not in any sense as evidence of facts, but only as tending to show the character of the rising. It was never intended to be used by us for any other purpose. The question for us is simply whether the act done is to be adjudged, from the depositions and affidavits before us, an act done, not only in the course of, but as actually part of, a political rising.

I quite agree with Sir Charles Russell's observation, that we cannot decide this question by inquiring whether the act was a good or wise one for the furtherance of the political object in view. Such a consideration would not be consistent with the words of the statute. Nor would it be right to limit such action to any test of its necessity—for instance, by dwelling upon the fact that one witness for the accused admitted that the shooting of Rossi was unnecessary for the success of the revolution. The question is simply whether the act was, one of many, undertaken for a political object. There is only a very shadowy suggestion that the act was committed for any private object. The alleged allusion by the accused to the assassination of his brother is only asserted in the commissioner's message, and we cannot take that as evidence of the fact of such an exclamation. There is not a scrap of evidence before us to show that Rossi was in any way connected with the death of this brother of Castioni, which took place ten years ago. There is really very little dispute as to what actually took place in the attack on the municipal hall. I could go through the evidence if necessary and could point out that there is nothing to displace the view that at the moment when Castioni fired (assuming that he was sufficiently identified as the man who fired the particular shot) the reasonable presumption is that he, knowing nothing of Rossi personally and without any private spite against him, fired under the impression that his death or disablement would advance and be in furtherance of the very object of the rising—namely, to get rid of the existing Government and under the reasonable supposition that until the place was actually captured resistance of some sort was being made. That, I think, is the fair and reasonable presumption to be deduced from all the evidence before us. It is not necessary to demonstrate what was actually the position of affairs at the exact moment when the shot was fired. There was undoubtedly confusion and tumult, in which Castioni was actually involved, and I agree that we cannot measure the exact state of mind of men engaged under such circumstances by the standard of calm deliberation which might be calculated on under other circumstances. I think that this warrant for a *habeas corpus* ought to issue, and that it would be contrary to the spirit and to the meaning of the Act if we held otherwise.

HAWKINS, J.—I am of the same opinion. The first question for the magistrate to decide was whether there was *primâ facie* evidence of the shot which killed Rossi being fired by Castioni. No doubt there was a sufficient *primâ facie* case made out to that effect. But it is said the accused ought not to be given up unless the offence was proved to be in itself an extraditable offence, and by the statute the offence is not extraditable—that is to say, the accused is not to be surrendered where the offence is proved to be one of a political character. The magistrate here held that there was a *primâ facie* case made out upon which the accused might have been put on his trial in England for murder, and that the offence charged was not of a political character. We must ask ourselves whether, having regard to the whole circumstances of the case as shown upon the depositions before us, the offence charged was of a political character. Now it is impossible to say that, if a man has a right to move the High Court (or any other court) for a writ of *habeas corpus* for his own release, we might not go into all the matters brought before us. The court can in no way be precluded from adjudicating upon the facts of the case as presented to them. The magistrate only states his opinion that a *primâ facie* case has been made out for extradition of the accused. I have no doubt in my own mind that the magistrate has no right or jurisdiction to find finally as against the accused, who is expressly given this right of claiming a writ of *habeas corpus*, that the offence was one of a political character. It has been argued also that upon the person seeking his discharge lies the *onus* of proving the offence to be one of a political character. Upon the first point sections 9 and 11 of the Extradition Act, 1873, throw light. By these the magistrate is bound to receive any evidence tendered to show that the crime charged is an offence of a political character, and if, notwithstanding such evidence, he commits the accused he is bound to inform him that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*. Then, again, there is a power under section 7 given to the Secretary of State to discharge a fugitive criminal from custody, even after his committal, if he is of opinion that the offence is one of a political character. These provisions are sufficient to show that the magistrate's decision is by no means binding in law or fact, and that this court must consider the whole case as it is placed before them, whether on new or old evidence, to see whether the offence be one of a political character or not.

Assuming, then, that cogent evidence has been shown of murder, ought a fugitive criminal to be surrendered? If the murder be an offence of a political character, the accused is exempted by the Act from being surrendered. Now I entirely dissent from the proposition that any act done in the course of a political rising must be said to be of a political character. If, notwithstanding the fact of a political rising being proved, an act which takes place in the course of it is shown to be done for purposes of revenge, or if it were shown that the accused had deliberately shot an unoffending man in such a manner that he might be reasonably presumed to have been guilty of murder, such an act could have no relation to political crime, and must be universally punished. What is, then, a crime of a political character? Is there any definition? I think there is none so satisfactory and complete as that given by my brother Stephen in his learned and valuable History of the Criminal Law, vol. ii., p. 71, and I adopt that definition absolutely as the best capable of being given. I refer to the sentence, "I think the expression in the Extradition Act ought to be interpreted to mean that fugitive criminals ought not to be surrendered for extradition crimes, if those crimes are incidental to and form part of a political disturbance." Were, then, these acts here of a political character? There was a rising, a levying war on the existing Government, the parties engaged in the

rising anticipated violent resistance. Five men, members of the Government, were caught, bound, and placed at the head of the revolutionists for the very purpose of protecting themselves against the resistance and probable firing anticipated. They then proceed to attack the Government building.

It seems to me utterly immaterial whether the gate was broken down or not. The sole question is, Was this act of shooting Rossi done by the accused in his character of political insurgent at the time? His former or usual residence is immaterial. He was treated as a citizen of the place, and he is not to be deprived of the privilege given by the statute because, even after the place had been successfully broken into, he made use of a revolver in his political capacity as an insurgent. There is no evidence to satisfy a court that his object in going to the palace or in joining the revolt was to take Rossi's life from any private grievance or purpose of revenge for any act done by Rossi. It is not proved that Rossi was even known to him. Many actions done at such a time may be without or against all reason. We must not look too closely on the actions of men hot in a tumult of political excitement. Things may be done contrary to all reason, yet in furtherance of a political object, even though the action taken and the deeds done may be deplored, and however cruel and irrational they may seem afterwards under calm reflection. This rule must be made absolute.

STEPHEN, J.—So much has been said as to the definition which I attempted to draw in my book as to the meaning of the words "political offence" that I will only add that I adhere to the definition I have there laid down. As to the facts of this case, it is obvious that the act of shooting took place in a scene of great confusion and excitement. However wrong that act may have been, or however unnecessary, is not for us to consider. It was clearly an incident of the insurrection, and as such comes within the definition of a "political offence" before cited.

Rule made absolute, and discharge of prisoner ordered.

Solicitor for the applicant, *Phelan*.

Solicitor for the Crown, *The Solicitor for the Treasury*.

C. C. R. (Denman, J., Pollock, B., and Hawkins, Stephen, and Charles, JJ.) — Nov. 8.

REG. v. BOWERMAN. (a.)

Criminal law—Larceny—Fraudulent misappropriation —"Broker, attorney, or other agent"—"Security for the payment of money"—Bill of exchange without drawer's name—Larceny Act (24 & 25 *Vict. c.* 96), *s.* 75—*Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 18.

A document which is complete as a bill of exchange, except that it is not signed by the drawer, is "a security for the payment of money" within section 75 *of* 24 & 25 *Vict. c.* 96. *It is a question for the jury whether a person who had some interest in a bill-discounting transaction beyond that of a broker or agent only, was intrusted with the bill "as a broker or agent."*

Case stated by the Recorder of the City of London.

The prisoner had been tried at the Central Criminal Court upon an indictment under 24 & 25 Vict. c. 96, s. 75, which enacts as follows:—"Whosoever having been intrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any money or security for the payment of money with any direction in writing to apply, pay, or deliver such money or security or any part thereof respectively, or the proceeds or any part of the proceeds of such security, for any purpose or to any person specified in such direction, shall, in violation of good faith and contrary to the terms of such direction, in anywise convert to his own use or benefit, . . . such money, security, or proceeds, or any part thereof, respectively, . . . shall be guilty of a misdemeanour."

The prisoner was convicted, and the question for the court was whether he was properly convicted upon the following facts which were proved at the trial.

Messrs. Tebbitt Bros. being in need of additional capital, inserted an advertisement in the newspapers that they required from £10,000 to £15,000. To that advertisement the prisoner replied by sending by post his visiting card, "Mr. Bowerman, Belmont House, Peckham Rye, S.E.," with a memorandum on the back that, should personal services not be essential, he would be glad of particulars of the advertisement.

Shortly afterwards Mr. A. P. Tebbitt called upon the prisoner at his residence, and the prisoner then represented to him that he was a bill broker or money lender and a bill discounter, and that he had large facilities for advancing the capital required. At a subsequent interview it was arranged that the prisoner was to draw bills upon Messrs. Tebbitt Bros. to the extent of £5,000, and endeavour to get them discounted at a moderate rate of interest; a document was drawn up and signed by Mr. Tebbitt, setting out the terms of the arrangement, and this was the direction in writing referred to in the indictment. This document was as follows:—

"Mr. Bowerman.

"Dear Sir,—In accordance with our interview with you, we agree to enter into an arrangement with you in connection with bills of exchange by drawing upon us at four months, gradually, to the amount of £5,000, and endeavour to discount the same at a moderate rate of interest, but in no event is the rate to exceed 7½ per cent. on the 80 per cent. (to be paid us on the proceeds of the bills), or 2 per cent. over the Bank of England rate to be charged us, and half stamps as usual. The bills to be kept renewed for a period of three years, and when eventually paid off by us we undertake to provide the 80 per cent. proportion.—Yours truly, "TEBBITT BROTHERS.

"P.S.—We have accepted for you five bills—total amount £1,886 14s. 2d.—T. BROS."

And a similar document was signed by the prisoner and handed to Mr. Tebbitt. The prisoner then produced five stamped bill forms and drew five bills of exchange addressed to Messrs. Tebbitt Bros. for sums amounting altogether to £1,886 14s. 2d., and including among them the two bills referred to in the indictment. He handed them to the Messrs. Tebbitt for acceptance, and they accepted them, and handed them back to the prisoner, who signed a memorandum (at the foot of the document above referred to as having been handed to Mr. Tebbitt) that he had received those acceptances on account in pursuance of the arrangement, and also a memorandum as follows:—"In the event of my not discounting the said bills I agree to return them to you cancelled within three days.—F. B."

At the time these bills were handed to the prisoner the drawer's name was left blank, but the bills were in all other respects complete. The prisoner afterwards handed the two bills referred to in the indict-

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

ment to Mr. L. Berg, and requested him to discount them. When they were handed to him no drawer's name was upon them, and the prisoner requested Mr. Berg to sign as drawer, which he did. Mr. Berg then got the bills discounted and handed the prisoner the amount of the discount less his commission, and the prisoner, in violation of good faith, converted that sum to his own use.

The bills were described in the different counts of the indictment both as bills of exchange and as acceptances.

Poland, Q.C. (*Metcalfe* with him), for the prisoner. —The instruments which were handed over to the prisoner were inchoate only—bills of exchange without any drawer's name upon them. Such instruments are not securities for the payment of money within the section: *Reg.* v. *Harper*, 29 W. R. 743, 7 Q. B. D. 78; *Reg.* v. *Hart*, 6 C. & P. 106; *Stoessiger* v. *The South-Eastern Railway Co.*, 2 W. R. 375, 3 E. & B. 549; *McCall* v. *Taylor*, 13 W. R. 840. The transactions between the prisoner and the prosecutor amounted to a partnership, and the prisoner was, therefore, not a "broker or other agent": *Reg.* v. *Portugal*, 34 W. R. 42, 16 Q. B. D. 487.

Horace Avory, for the prosecution, was not called upon to argue.

DENMAN, J.—The first point that was argued before us was whether this document is a valuable security for the payment of money properly described as a bill of exchange or an acceptance. We think that there was very good ground for finding it to be so. It was said that in order to support the conviction it must have been such at the time when it was intrusted to the prisoner. Now what was the condition of this document at the time when it came to the prisoner's hands? At that time the amount had been inserted, it had been accepted by the persons to whom it was addressed, it was properly stamped, and all that was wanted to make it complete was the name of the drawer.

It appears to me that the case is covered by section 18 of the Bills of Exchange Act, 1882, which enacts that "a bill may be accepted before it has been signed by the drawer or while otherwise incomplete." It is thus laid down that a bill accepted before it is drawn may be considered to be an acceptance. Nothing remained but to add the name of the drawer and the instrument became available, as it was, in fact, made available in this case for purposes of fraud.

Several cases have been cited on behalf of the prisoner's contention, but they are all distinguishable from this case. In *Reg.* v. *Harper* an indorsement was required to make the instrument a valuable security, and no valid indorsement was ever made; the case is not *in pari materia* with the present. In *Reg.* v. *Hart* there was a very good ground upon which all the judges relied—viz., that the document was not a security for anything; no sum was filled in, and when people speak of a document being a security for money they do not mean a security for any sum which may be filled in, but a security for a certain sum. That case is an authority only to that extent. As to *Stoessiger* v. *South-Eastern Railway Co.*, there the document had never reached the hands of the drawer at all, and that is fatal to that case as an authority in the present. In *McCall* v. *Taylor* the document was not dated, and as the sum was not payable on demand there was no security for the payment of money at any time.

As to the Bills of Exchange Act, 1882, Mr. Poland has contended that, according to the definition of a bill of exchange, this document was not a bill of exchange; but I think that section 18 disposes of that argument. "A bill may be accepted"; that means there may be a valid acceptance, and that was so here. Immediately this document got into the hands of a person he could make it available at any moment; it is a valuable security. The prisoner took this valuable security and improperly converted it to his own use.

As to the point whether the prisoner was a broker or other agent, the only question for us to consider is, was there evidence to go to the jury on the point? But the prisoner himself described himself as a bill broker; as a bill broker he took this document for the purpose of getting it discounted, and fraudulently appropriated the proceeds, which were, to a considerable extent at all events, the property of the prosecutor. On this point also, I think the verdict was warranted, and the conviction must be sustained.

POLLOCK, B.—I was not without some doubt upon these points, but I have arrived at the same conclusion as my brother Denman. The question is not, Is this a bill of exchange? but, Is it a security for the payment of money? I am clear that it is such a security as a business man or a banker would take as a security for the payment of money. That disposes of the first point. As to the second, it was said that the prisoner had an interest in this transaction beyond that of a broker or agent. If that were so it does not follow that he was not a broker or agent within the meaning of the statute, and I entirely concur with my learned brother in thinking that the jury were justified in their finding.

HAWKINS, J.—I am of the same opinion. I think that it would be very dangerous to hold that this was not a security for money. The arrangement was that the prisoner should draw the bills; in pursuance of the arragement he got the bill stamps, drew the bills addressed to Messrs. Tebbitt, and handed them to Messrs. Tebbitt for acceptance; they accepted them and handed them back to the prisoner, who was to get them discounted. If under these circumstances they were not valuable securities my notion of valuable securities is altogether astray. Take the unindorsed cheque of a solvent person with money in his bank, it is deposited with some other person by the man in whose favour it was drawn; is it to be said that that is not a valuable security? undoubtedly it is a valuable security, and yet the indorsement was not on it when it left the drawer's hands. On the second question I entertain even less doubt. The prisoner introduced himself to the prosecutors in answer to an advertisement, and described himself as a bill broker. Apart from his being a bill broker he was an agent in every sense for the purpose of getting these bills discounted on the understanding that he should hand over the proceeds. I think there was evidence of his being both broker and agent, and as these documents were securities for the payment of money I think the conviction was right and must stand.

STEPHEN, J.—My opinion and the reasons for it have been so fully expressed by my brother Hawkins that I do not desire to add anything.

CHARLES, J.—I concur.

Conviction affirmed.

Solicitor for the prosecution, *The Solicitor to the Treasury.*

Solicitors for the prisoner, *Norris & Son.*

Court of Appeal.

From Chan. Div. Jan. 13.

In re MUNDY'S SETTLED ESTATES. (*a.*)

Settlement — Settled land — "Capital money" — "Improvements" — Land settled by deed — Will bequeathing money to be invested in lands to be settled to same uses — One settlement for purposes of Act — Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 (1), 33; 25 (*xix.*) (*xx.*).

By deed of settlement made in 1872 *certain lands stood limited upon trusts for persons by way of succession, and the settlement gave the trustees power to sell. Other lands were subsequently devised by will to the trustees for the time being of the settlement of* 1872 *upon the same trusts as were declared in the settlement of* 1872 *concerning the lands therein comprised; and by the same will the testator bequeathed his residuary personal estate to his three executors (one of whom was also a trustee of the settlement of* 1872) *upon trust to convert and invest in the purchase of lands to be settled upon the trusts in the will declared concerning the lands therein devised. Part of the testator's residuary personal estate now consisted of a large sum of money remaining as yet uninvested in the hands of the executors.*

Held, by the Court of Appeal (*reversing* North, J.), *that, having regard to sections* 2 (1) *and* 33 *of the Settled Land Act,* 1882, *and to the scope and purport of that Act, this money was "capital money" arising under the Act for the purposes both of the settlement of* 1872 *and of the will, or of either of them—the two constituting really one settlement for the purposes of the Act; and, consequently, that, as such "capital money," it might be applied in effecting improvements on the lands comprised in the settlement of* 1872.

In re Mackenzie's Trusts, 31 *W. R.* 948, 23 *Ch. D.* 750, *and* In re Tennant, 37 *W. R.* 542, 40 *Ch. D.* 594, *approved.*

Held, by North, J., *that, in the case of settled land consisting of a mining property, the erection of a new pumping engine and of new pumps for the purpose of carrying out an effective system of drainage were "improvements" authorized under section* 25, *sub-sections* (*xix.*), (*xx.*), *of the Settled Land Act,* 1882.

Appeal from North, J.

Certain lands in Derbyshire called the Shipley Estate were, by a deed of settlement dated the 2nd of November, 1872, conveyed by A. M. Mundy and his eldest son, A. E. M. Mundy, to the use of the father and son successively for life, with remainder to trustees (Sir H. Wilmot and Francis Smith) for a term of years upon certain trusts, with remainder to the first and other sons of the son successively in tail male, with remainders over in strict settlement; and the trustees were thereby empowered, with the consent of the tenant for life for the time being, to sell the premises thereby granted, and were directed to invest the moneys payable on such sale in the purchase of other lands to be settled to the same uses.

The father (A. M. Mundy) died in 1877, having by his will devised other lands not comprised in the settlement of 1872, to the trustees for the time being of that settlement, to the uses and upon the trusts and subject to the powers in the settlement of 1872 declared concerning the lands comprised therein; and he bequeathed his residuary personal estate to his executors (the said Sir H. Wilmot, Edward Hall, and the said A. E. M. Mundy) and directed his executors to invest the same in the purchase of lands, and to settle the lands so purchased to the uses and upon the trusts declared in the will concerning the testator's other lands therein devised.

The Shipley Estate was a large mining property, and a scheme for the effective drainage of the mines thereon had been prepared, which would require the erection of a new pumping engine and new pumps, the existing engine and pumps being worn out and insufficient. The trustees of the settlement of 1872 had no capital money under that settlement in their hands, but a large sum (£170,000) representing part of the testator's residuary personal estate was in the hands of the testator's executors, and it was desired to apply that sum in paying the cost of the execution of the works proposed by the scheme.

A summons was accordingly taken out by A. E. M. Mundy, the present tenant for life, to have it determined whether such an application of the money in question was authorized by the Settled Land Act, 1882.

North, J., held that the proposed works were "improvements" under section 25, sub-section (xx.), of the Settled Land Act, 1882, but he also held that the trustees were not authorized in applying the money in question, representing the testator's residuary personal estate remaining uninvested in the hands of the executors, in paying the costs of these improvements; his lordship referred to the cases and expressed doubts, first, as to whether the settlement of 1872 and the will could be considered as constituting one settlement, so that capital money arising under the will might also be deemed capital money under the settlement of 1872; and, secondly, whether the money in question, while remaining as money uninvested in the hands of the executors could be treated as "capital money" even under the will, without first going through the process of investing it in land and then selling the land and applying the proceeds.

From the latter part of this decision the applicant (the tenant for life) appealed.

The material sections of the Settled Land Act, 1882, are section 2, sub-section (1), which enacts that "any deed, will, . . . or other instrument or any number of instruments . . . under or by virtue of which instrument or instuments any land, or any estate or interest in land, stands, for the time being, limited to or in trust for any persons by way of succession, creates or is for the purpose of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires."

Section 33, "Where under a settlement money is in the hands of trustees and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this Act."

Cozens-Hardy, Q.C., and *Dibdin*, for the appellant. —The settlement of 1872 and the settlement under the will really constitute only one settlement, because the settlement under the will expressly incorporates the terms of the settlement of 1872. The limitations and the devolution of the estates are identical in both, and it is not material that the trustees of the settlement of 1872 and those of the will are not exactly the same persons; the two settlements, therefore, constitute one settlement: *In re Lord Stamford's Settled Estates*, 38 W. R. 317, 43 Ch. D. 84. Secondly, section 2, sub-section (1), and section 33 taken together show that the money in question is "capital money" under the Settled Land Act, 1882, and can, therefore, be applied as such in paying

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

the costs of the proposed improvements. The cases of *In re Mackenzie's Trust*, 31 W. R. 948, 23 Ch. D. 750, and *In re Tennant*, 37 W. R. 542, 40 Ch. D. 594 (which were referred to but doubted by North, J.), show that it is not necessary in order to treat the money in question as "capital money" to first go through the process of investing it in land and then selling that land.

Sydney Williams, for the trustees of the settlement, did not oppose the appeal.

LINDLEY, L.J.—[The Lord Justice stated shortly the facts of the case and the nature of the appeal, and proceeded:—] The money in question, and out of which it is sought to have the costs of these improvements paid, is a sum of £170,000 in the hands of the trustees of the will (one of whom is also a trustee of the settlement of 1872), and that sum represents, either wholly or in part, the residuary personal estate of the testator A. M. Mundy, and the trusts on which that sum of £170,000 is held are the trusts of the settlement of 1872. That is so by the express terms of the will. [The Lord Justice read the clauses above mentioned of the will, and continued:—] Therefore we have it that this £170,000 is, by the express terms of the will, to be laid out in lands, which are to be settled to the same uses and upon the same trusts and purposes as the lands comprised in the settlement of 1872, and there is no possible distinction, either present or future, between the persons who are interested in the settled lands—*i.e.*, the lands comprised in the settlement of 1872—and the persons who would be interested in the lands bought, if any are bought, with the £170,000. The limitations are the same, and the persons beneficially interested must be the same now and hereafter.

Under these circumstances, is there any real difficulty in doing that which the court is asked to do in this case? That turns upon an examination of section 2 (1) and section 33 of the Settled Land Act, 1882. [The Lord Justice read section 2, clause (1), and continued:—] Looking at those words, what is required to be found in order to constitute a settlement seems to be some instrument or instruments under which some estate or interest in land stands, for the time being, limited in trust for persons by way of succession. If you look at that language in a microscopic or narrow way, you may raise this difficulty and say, "Here is money to be laid out in land, but before it has been laid out in land at all, can it be said that there is any land which stands, for the time being, limited to the trusts of the settlement?" That is a hypercritical interpretation, which would lead to the inference that it cannot; but even if we were disposed to put such a narrow construction on those words, section 33 shows that that would be a mistake. [The Lord Justice read section 33, and continued:—] Now, taking that section in connection with section 2, sub-section (1), it seems to me that the Legislature has taken the trouble to say that that hypercritical interpretation ought not to prevail, and that where you have a direction that moneys shall be laid out in the purchase of lands to be settled upon persons by way of succession then those moneys are "capital moneys" within this Act.

That is the construction which has been placed upon this section by Chitty, J., in *In re Mackenzie's Trusts*, and which was followed by North, J., in *In re Tennant*, and it is also the view adopted, as I understand it, by Stirling, J., in *In re Lord Stamford's Settled Estates*, which was a more difficult case than either of the two preceding ones. If we look at the object of the Act it seems to me that we are perfectly safe in going thus far—that where you have two instruments, by one of which lands are settled, and by the other of which (referring, as here, to the former instrument) money is directed to be laid out in land to be settled to the same uses, then that money is capital money for the purposes of both, or of either. How the case would be if we had to deal with two distinct instruments with distinct limitations under them we need not consider. We are dealing with a case in which the will refers to the settlement and in which the limitations are the same, and it appears to me that there is no difficulty in this case when one bears in mind and construes this Act of Parliament for the purpose of carrying out the plain and clear object which the Legislature had in contemplation.

I think, therefore, that this appeal ought to succeed, and that the order made by North, J., should be varied by striking out the word "not" before the word "authorized."

LOPES, L.J.—The trusts of the fund in question and of the settlement of 1872 are identical. The devolution is also the same. It appears to me that this case is within section 2, sub-section (1), and section 33, and this conclusion is, to my mind, in accordance with the language of the Act and also in accordance with its spirit. I should be very sorry to be obliged to come to any other conclusion than that at which we have arrived.

I entirely agree with what has been said, and that this appeal should be allowed.

KAY, L.J.—I quite appreciate the difficulty which North, J., felt in this case. At present it seems to me that the case is a very arguable one on either of the points which he raised. The learned judge thought that there were difficulties in two respects; the one, whether this money could be considered "capital money" under the Act, because it had never been invested in land at all; and the other, whether the improvements which it was desirous to make were improvements on lands within the settlement by which the money was settled.

Now the facts are shortly these. There was a settlement of land to legal limitations by way of uses, by deed in 1872, and among the trusts of that settlement there was a trust by which the trustees had power to sell that land. Then there was a will under which the money in question is derived, and this will dealt also with land, but of course with other land—*i.e.*, lands not comprised in the settlement of 1872—and dealt with that land by directing it to go according to the uses and trusts of that settlement exactly and without any difference. Then the will also dealt with the money now in question, and directed that it should be invested in lands to be settled on the same uses and trusts, and in accordance with the powers contained in that settlement. There was this difference between the two instruments, that although one of the trustees of the will was also trustee of the settlement of 1872, yet the trustees of the will were not altogether the same as the trustees of the settlement, and of course, when the settlement under the will came to be made, it could not be made in the names only of the trustees of the settlement without their consent; it seems to me probable, therefore, that the power of selling the lands comprised in the will and the lands which ought to be bought under the trusts of the will, might be vested in persons different to those in whom was vested the power of selling the lands comprised in the settlement of 1872. In one sense, therefore, and in the strictest possible sense of the word, there were two settlements, one by the deed of 1872, and the other by the will, which was a separate settlement settling other lands, and moneys to be invested in lands, on trusts which were declared by reference to the settlement of 1872, but the trusts were identical. There was the same tenant

for life of the two, and if the money dealt with by the will had been invested in lands the same person would have been tenant for life of those lands, and after his life estate had determined, all the lands, both under the will and under the settlement would go by the same series of limitations which are explicitly set forth in the settlement.

Now, although the limitations are the same, yet, nevertheless, in one sense, those are two settlements. In the strictest sense of the word, they are separate settlements. But are they two separate settlements for the purpose and intention of this Act? No doubt a slight ambiguity arises on the terms of the section which has been referred to. Assuming that there is an ambiguity, what is the proper mode of construing an Act of this kind? The proper mode is to ascertain what the scope and intention of the Act is. Is it within the scope and purport of the Act that, where land and money are settled on identically the same trusts, the money should be applicable to the improvement of that land? It seems to me that, unless it were so, there would be a clear *casus omissus* in the Act, and I do not think that the language of the section can be read so hypercritically as to oblige us to come to any conclusion other than the conclusion we have come to.

In this particular case I have come to the conclusion (although I appreciate thoroughly the difficulties of the learned judge in the court below) that this money is capital money both for the purposes of the trusts of the will and of the trusts of the settlement of 1872; and having come to that conclusion, it then seems to me to follow that it is capital money which may be applied in making the improvements sought, on the lands comprised in the settlement of 1872. The will includes money as well as settled lands, and therefore the money is made "capital money" under the will; and it seems to me, on the second point—viz., whether it is applicable to the purposes of improvement of lands under the settlement of 1872—that the proper construction of the Act is to hold that the true scope and object of the Act is to make it so applicable.

I therefore agree with the rest of the court.

Appeal allowed.

Solicitor, *H. B. Wade*, for *Fowler, Warwick, & Neale*, Leicester.

From Q. B. Div. Dec. 1, 19.

HECKSCHER *v.* CROSSLEY AND ANOTHER. (*a.*)

Practice—Security for costs—Motion for new trial—Judicature Act, 1890 (53 & 54 *Vict. c.* 44)—*Ord.* 58, *r.* 15.

As a general rule, the Court of Appeal will not order a party moving for a new trial, under the Judicature Act, 1890, *of an action tried with a jury to give security for the costs of the motion.*

Application by the defendants for security for the costs occasioned by the plaintiff's application for a new trial.

The action had been tried by a judge with a jury, and the motion for a new trial was entered in the Court of Appeal in accordance with the provisions of the Judicature Act, 1890, and the rule made under that Act.

J. G. Witt, for the defendants.—The court has jurisdiction in this case to order security for costs. The effect of the Judicature Act, 1890, is to bring the case within ord. 58, r. 15, as the motion for a new trial is now an "appeal" within the meaning of this rule.

R. T. Reid, Q.C., Raven, and *Baines*, for the plaintiff, were not called upon to argue.

The COURT refused the application on the ground that the defendants' affidavits did not show with sufficient clearness that the plaintiff, if unsuccessful, would be unable to pay the costs, but they reserved their opinion on the question of jurisdiction.

Dec. 19.—Lord ESHER, M.R.—In this case an application for security for costs was made on the ground that the party moving for a new trial would not be able, if unsuccessful, to pay his opponents' costs. We took time to consider whether we ought to require security for costs to be given by a party moving in this court for a new trial under the Judicature Act, 1890. We have come to the conclusion that we ought to deal with these cases as nearly as possible in the same way as they were dealt with by the Divisional Court when the application for a new trial was made before them in the first instance. As a general rule no security was required to be given by a party moving for a new trial in the Divisional Court, and we think that we ought not to alter the practice in that respect now that they come in the first instance before us.

LOPES and KAY, L.JJ., concurred.

Application refused.

Solicitors for the plaintiff, *Cole & Higson.*

Solicitors for the defendants, *Crosley & Burn.*

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

From Q. B. Div. Dec. 19.

JONES *v.* MACAULAY. (*a.*)

Practice—Counter-claim—Default of defence thereto—Mode of obtaining judgment—R. S. C., 1883, *ord.* 23, *r.* 4; *ord.* 27, *rr.* 2, 11.

Where a plaintiff makes default in delivering a defence to a counter-claim, the defendant cannot sign judgment upon default, but must move for judgment under ord. 27, *r.* 11.

Higgins *v.* Scott, 21 *Q. B. D.* 10, 36 *W. R. Dig.* 155, *followed.*

The plaintiff having brought an action for £1,024, the price of goods sold and delivered, the defendant delivered a defence, and counter-claimed for £100 for medical attendance. The plaintiff not having delivered a defence to the counter-claim, the defendant applied at the Central Office to enter judgment on the counter-claim, but it was refused. The defendant thereupon applied *ex parte* at chambers for leave to enter judgment on the counter-claim. The judge at chambers held, upon the authority of *Higgins* v. *Scott*, 21 Q. B. D. 10, 36 W. R. Dig. 155, that judgment could only be signed upon a motion for judgment under ord. 27, r. 11, and dismissed the application. The Divisional Court affirmed this decision.

Cluer, for the defendant, moved *ex parte* by way of appeal from this decision.—The case is not expressly provided for by the rules. By ord. 23, r. 4, a reply to a counter-claim is to be subject to the rules applicable to statements of defence. In order 27 the word "plaintiff" must be construed as including a plaintiff by counter-claim. Hence ord. 27, r. 2, which pro-

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

vides that if the plaintiffs' claim be only for a liquidated demand, and the defendant does not deliver a defence, the plaintiff may enter final judgment for the amount claimed. The present counter-claim is for a liquidated demand, and therefore the defendant can enter judgment upon it. Ord. 27, r. 11, which provides for a motion for judgment, applies to all other actions than those in the preceding rules of that order. In *Higgins* v. *Scott*, the counter-claim was for unliquidated damages. In *Burkhardt* v. *Im Thurm*, noted in the Annual Practice for 1890-91, p. 496, the counter-claim was for a liquidated demand, but that case ought not to be followed.

He also referred to ord. 27, r. 9; ord. 32, r. 6; *McGowan* v. *Middleton*, 31 W. R. 835, 11 Q. B. D. 464; *Street* v. *Crump*, 32 W. R. 89, 25 Ch. D. 68.

Cur. adv. vult.

Dec. 19.—Lord ESHER, M.R.—In this case there was a claim and a counter-claim, and no defence to the counter-claim has been delivered. The question is whether the defendant can sign judgment upon such default, or whether a motion for judgment is necessary. The question is simply one of practice. I can see nothing in the rules that is contrary to the practice laid down in *Burkhardt* v. *Im Thurm*. I think the practice there laid down, that a motion for judgment is necessary, is a good practice. The appeal must therefore be dismissed.

LOPES, L.J.—I am of the same opinion. The decision of the court below seems to me to be in accordance with the rules. The question depends upon orders 23 and 27. The case seems to me to be within ord. 27, r. 11, which says that in all other actions than those in the preceding rules of this order, if the defendant makes default in delivering a defence, the plaintiff may set down the action on motion for judgment. In my opinion ord. 23, r. 4, which has been relied upon, has no application here. It is important to notice the headings of the different orders. The heading to order 23 is, "Reply and Subsequent Pleadings." That order applies to an action proceeding with pleadings in the usual course. Order 27 is headed "Default of Pleading," and rule 11 seems to me to apply to a default in pleading to a counter-claim, and it provides that a motion for judgment is necessary. That appears to me to be the plain reading of the rules. I therefore think that the decision in *Higgins* v. *Scott* is right. Moreover, there is a good reason for this. Suppose an action was brought for £500, and the defendant counter-claimed for £100, and no defence to the counter-claim was delivered. If the defendant was entitled to sign judgment he could issue execution for £100 while the claim against him for £500 would be pending. This rule was framed with the view of preventing that, and to enable the court to keep its control over the action. The defendant, therefore, must come to the court upon motion for judgment.

KAY, L.J.—I entirely agree. The practice has been established by the case of *Higgins* v. *Scott*, and it is entirely consistent with the rules. It would be extremely inconvenient to allow a defendant to sign judgment and issue execution upon his counter-claim while the claim was still pending.

Appeal dismissed.

Solicitor for the defendant, *Hood Barrs*.

From Prob. Div. and Adm. Div. } Nov. 19; Dec. 3, 16.

REDFERN v. REDFERN. (a.)

Divorce—Practice—Discovery—Affidavit of documents—Doctrine that "no one is bound to criminate himself," whether applicable where adultery is the charge—Jurisdiction—Infant—Evidence Further Amendment Act, 1869 (32 & 33 *Vict. c.* 68), *s.* 3—*R. S. C.*, 1883, *ord.* 68, *r.* 1 (d).

Although section 3 *of the Evidence Further Amendment Act,* 1869, *does not relate to discovery at all, but merely to evidence given at the trial of divorce suits, yet it recognizes and is based on the existence of the doctrine that a person questioned as to the fact of his or her adultery is not bound to answer. A party cannot be compelled to discover that which, if discovered, may tend to subject him to any punishment, penalty, forfeiture, or ecclesiastical censure, and, though the fear of ecclesiastical censure is now practically obsolete, it is only natural that the doctrine that no one is bound to criminate himself should be applicable to a charge of such gravity as adultery, notwithstanding that it is not a criminal, but only an ecclesiastical offence.*

Although, as a general rule, it is not a sufficient ground for refusing an order for discovery, or for an affidavit of documents, that it may tend to criminate the party against whom it is sought, or that he may thereby be rendered liable to a penalty or ecclesiastical censure, the proper course being to raise that objection, not on the summons for discovery, but in the affidavit made in answer thereto, and with respect to the particular interrogatories or documents as to which the objection applies; yet, if it is evident that the discovery or affidavit of documents is wanted solely for the purpose of proving adultery against the party against whom it is sought, the order ought not to be made.

The court, however, has power to order discovery or an affidavit of documents, even in divorce suits, upon issues other than adultery, subject to the doctrine that no one is bound to criminate himself and to the ordinary rules as to privilege.

Semble (per Lindley, L.J.), *that the rule prevailing in the Chancery and Queen's Bench Divisions, not to grant discovery against an infant, never extended to the ecclesiastical courts, and does not now extend to proceedings in divorce, the invariable practice in which is inconsistent with that rule.*

Mayor *v.* Collins, 38 *W. R.* 349, 24 *Q. B. D.* 361, *distinguished.*

Decision of Butt, J., *affirmed, but on different grounds.*

Appeal from Butt, J.

This was a suit by the husband for dissolution of marriage on the ground of the wife's adultery. The wife was an infant.

The petitioner having taken out a summons asking that the respondent might be ordered to make an affidavit of documents, the objection was raised that, the respondent being an infant, no discovery could be granted against her, and that, the sole object of the order asked for, being to obtain the production or admission of criminating documents, she could not, even irrespective of the question of infancy, be compelled to make the affidavit.

The registrar refused to make an order for an affidavit of documents; and Butt, J., held that he was bound by the case (in the Queen's Bench Division) of *Mayor* v. *Collins*, 38 W. R. 349, 24 Q. B. D. 361, to refuse the application on the ground of the respond-

(a.) Reported by R. H. DEANE, Esq., Barrister-at-Law.

ent's infancy, and he accordingly affirmed the registrar's refusal to order the respondent to make such an affidavit.

The husband appealed.

Section 3 of the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), enacts as follows: "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

Inderwick, Q.C., and *Searle*, for the appellant.—It was no doubt the practice in chancery to refuse to compel an infant to answer interrogatories, but there is a distinction between that and making an affidavit of documents. [They referred to the Divorce Act, 1857 (20 & 21 Vict. c. 85), ss. 22, 48, and 52.] There is no general order or rule extending the common law practice or the practice in equity to divorce proceedings; but in *Winscom* v. *Winscom*, 12 W. R. 535, 3 Sw. & Tr. 380, at p. 384, it appears that the Divorce Court assumed authority to require discovery, and that practice has since been followed. The decision in *Mayor* v. *Collins*, by which the learned judge below thought he was bound, is not applicable, because it is based on the Rules of the Supreme Court, 1883, and those rules do not apply to divorce proceedings: ord. 68, r. 1 (*d*). [They referred also to *Southwark, &c., Water Co.* v. *Quick*, 26 W. R. 328, 341, 3 Q. B. D. 315, 321; *Dyke* v. *Stephens*, 33 W. R. 932, 30 Ch. D. 189; and to an unreported case of *Novelli* v. *Novelli*.] We shall rely, if necessary, upon the large inherent powers which the ecclesiastical courts formerly possessed. They had inherent power to grant discovery: *Dun* v. *Coates*, 1 Atk. 288; *Boxley* v. *Stubbington*, 2 Lee, 501. Section 3 of 32 & 33 Vict. c. 68 will be relied on for the respondent, but it has no application to a case like the present. [LINDLEY, L.J.—Does that section apply to discovery at all?] No, it is not addressed to preliminary proceedings at all, it only applies to the actual trial, as is evident from the preamble to the Act. [BOWEN, L.J., referred to *Ranger* v. *Great Western Railway Co.*, 7 W. R. 426, 4 De G. & J. 74.] The next friend of infant plaintiffs has been ordered to make an affidavit of documents: *Crowe* v. *Governor and Company of Bank of Ireland*, 19 W. R. 910. That decision is based on *Ranger* v. *Great Western Railway Co.* [*Finlay, Q.C.*, referred to *Harvey* v. *Lovekin*, 33 W. R. 188, 10 P. D. 122]. The procedure in divorce is not a criminal procedure: *Mordaunt* v. *Moncreiffe*, 23 W. R. 12, L. R. 2 Sc. & D. 374, 387. [BOWEN, L.J.—Is adultery a criminal offence within the meaning of the rule that no person is bound to criminate himself?] Clearly not. The jurisdiction which the Court of Chancery exercises over infants is confined to infants who are wards of court: *Hyde* v. *Hyde*, 36 W. R. 708, 13 P. D. 166, where the Court of Appeal came to the conclusion that the jurisdiction which the Chancery Division exercised over wards of court was very peculiar, and ought not to be extended to the other divisions. The Evidence Amendment Act, 1869, s. 3, makes parties to the suit competent to give evidence. The literal effect is to make a person charged with adultery a competent witness to disprove, but not to prove, the charge, but in practice it is never treated as making them incompetent witnesses even to that extent. They are called, and do prove adultery every day: *Hebblethwaite* v. *Hebblethwaite*, 2 P. & D. 29, 18 W. R. Prob. Dig. 7. The Act was intended to enlarge, not to restrict, the capacity to give evidence.

Finlay, Q.C., and *Rufus Isaacs*, for the respondent.—The broad, general ground on which the practice of the Queen's Bench Division as to infants rests appears in *Morgan* v. *Thorne*, 7 M. & W. 400, 408. There is no good ground for contending that the same practice is not applicable in divorce. In *Harvey* v. *Lovekin* it was held that a party interrogated may decline to answer interrogatories tending to criminate him. The rule that no one is compelled to answer questions tending to make him liable to penalties extends to forfeitures and to ecclesiastical censures as well as to penalties. All that *Hebblethwaite* v. *Hebblethwaite* decides is, that if a willing witness is called, the Act does not prevent his giving evidence. The rule should, at any rate, be maintained in the case of infants. The old practice in divorce as to ordering discovery appears in the case of *Shaw* v. *Shaw*, 2 Sw. & Tr. 642, 10 W. R. Div. Dig. 23; and *Pollard* v. *Pollard*, 3 Sw. & Tr. 613, 13 W. R. Div. Dig. 14. There was no greater power in the Divorce Court to give discovery against infants than in the equity or common law courts: *Fuller* v. *Ingram*, 7 W. R. 302; Dodd and Brooks' Probate Practice, ed. 1865, pp. 907, 911, note (z). The *onus* is on the appellant to show that such a practice exists in divorce, and he has been unable to produce a single case to that effect. The rule is, that a case against an infant must be made out without his own assistance, and a next friend or guardian *ad litem* is not a party, and discovery, therefore, cannot be ordered against him. *In re Corsellis, Lawton* v. *Elwes*, 31 W. R. 414; *Ingram* v. *Little*, 31 W. R. 858, 11 Q. B. D. 251. The R. S. C., 1883, ord. 19, r. 13, which provides that allegations of fact in pleadings, if not denied, shall be taken to be admitted, expressly excepts infants from its operation.

Inderwick, Q.C., replied.

Cur. adv. vult.

Dec. 16.—LINDLEY, L.J.—The question raised by this appeal is, whether an infant respondent in a suit for dissolution of her marriage, on the ground of her adultery, ought to be required to make an affidavit of documents. Butt, J., has decided that she ought not, and he so decided in supposed conformity with a decision of the Queen's Bench Division in *Mayor* v. *Collins*, which is to the effect that an infant is not bound to make such an affidavit in an action in the Queen's Bench Division. That case, however, turned upon the Rules of the Supreme Court—viz., ord. 31, r. 12—and upon the practice of the Court of Chancery before, and of the Chancery Division of the High Court since 1875—when the Judicature Acts came came into operation (see Judicature Act, 1873, s. 25, sub-section 11; R. S. C., 1883, ord. 1, r. 2, and ord. 72, r. 2). But, by ord. 68, r. 1 (*d*), the Rules of the Supreme Court do not apply to proceedings for divorce, or other matrimonial causes, except when expressly made applicable to such proceedings. There is no rule of the Supreme Court expressly relating to discovery in such proceedings; and the question raised by this appeal must be decided on grounds other than those on which Butt, J., decided it.

When we turn to the Divorce Acts and the rules made under them, no express provision can be found relating directly to the subject in question. There is neither statutory enactment, nor rule, relating directly to discovery or affidavits of documents. The Divorce Act, 1857 (20 & 21 Vict. c. 85), enacts (section 22) that in all suits and proceedings other than proceedings to dissolve any marriage, the

court shall proceed on the principles and rules which prevailed in the ecclesiastical courts, but subject to the provisions of the Act, and to the rules and orders made under it; and, by section 53, the court is directed to make such rules and orders concerning the practice and procedure under the Act as it may consider expedient, with power to revoke or alter the same. Now, although no rules have been made relating to discovery or affidavits of documents, yet it is plain that the ecclesiastical courts had, and exercised, the power of compelling suitors in those courts to make discovery; and that this practice has been continued, and discovery, by interrogatories and by affidavit of documents, has been adopted in proceedings for dissolution of marriage, which were beyond the power of the ecclesiastical courts. It is obviously inexpedient to have two sets of rules applicable to discovery in the same court—viz., one set for those matrimonial causes over which the ecclesiastical courts had jurisdiction, and another for those matrimonial causes over which those courts had no jurisdiction; and it is desirable that the practice and procedure should, as far as possible, be the same in both classes of causes.

This view has, I believe, been adopted by the successive judges of the Divorce Court, and a practice has been established, based partly on the old ecclesiastical practice and partly on the rules which prevailed at common law and in equity, and which now prevail in in other branches of the High Court. The power of the ecclesiastical courts to require discovery has been long established and recognized (see 3 Burn's Ecclesiastical Law, 298, and *Harvey* v. *Lovekin*, and the cases there referred to). This power, has, in fact, been constantly exercised by the Divorce Court in divorce cases; see *Euston* v. *Smith*, 32 W. R. 596, 9 P. D. 57, and *Harvey* v. *Lovekin*, in which latter case the practice in this respect was held by the Court of Appeal to be legal, although not founded on any express rule. The practice of requiring affidavits of documents in divorce proceedings seems to have been introduced, or at least settled, in 1864, in *Winscom* v. *Winscom* and *Pollard* v. *Pollard*, and it has prevailed ever since; and, although not introduced or sanctioned by any express order or rule of the Divorce Court, the decision in *Harvey* v. *Lovekin* is an authority for upholding the practice. It was contended that a suit for divorce for adultery was a criminal proceeding, or, at all events, that adultery exposed the adulterer to punishment, or to some kind of penalty —*i.e.*, penance or fine. It was, however, decided by the House of Lords in *Mordaunt* v. *Moncreiffe*, 374 that a suit for divorce for adultery was a purely civil, and in no sense a criminal, proceeding. The cases there cited show clearly that no indictment lies at common law for adultery (see 2 Salk. 552); neither is there any statute making it punishable. But adultery, like other forms of fornication and lewdness, expose the guilty party to ecclesiastical censure and punishment (2 Burn's Ecclesiastical Law, 403), and discovery may be resisted on this ground. It is true that ecclesiastical punishment for such offences is practically obsolete, but I cannot say that the jurisdiction of the courts in this respect has ceased. Indeed, the enactment to which I am about to refer is based on the theory that adultery is punishable, and that no person, therefore, is bound to answer any question tending to prove himself or herself guilty of it.

The practice of requiring discovery in divorce cases is not opposed to the statute 32 & 33 Vict. c. 68, s. 3, which relates to the examination of parties to divorce suits as witnesses, but that statute clearly recognizes the doctrine that a person asked about his or her adultery is not bound to answer. By that statute parties to proceedings instituted in consequence of adultery are competent witnesses in such proceedings, "provided that no witness in any proceeding, whether party to the suit or not, shall be liable to be asked, or bound to answer, any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery." Discovery was enforced, both in the ecclesiastical courts and in the Court of Chancery, long before parties to suits in those courts were competent witnesses in such suits, and the statute in question does not, in truth, relate to discovery at all. A very little reflection will show that, in suits for dissolution of marriage, discovery, whether by interrogatories or affidavit of documents, may be perfectly consistent with the provisions of that Act. In every such suit the marriage of the parties has to be proved; discovery addressed to that subject may be wanted, and, if wanted, is clearly permissible. Again, in a wife's suit for dissolution on the ground of adultery and cruelty or desertion, discovery as to these last matters is equally permissible. On the other hand, adultery being an ecclesiastical offence, and the recognition of this state of the law by the Legislature being obvious from the prohibitory words in the statute, it would be wrong to compel discovery by means of interrogatories the object of which is to obtain answers tending to show that the person interrogated has been guilty of adultery. So, with regard to an affidavit of documents, if there is reason to believe that a party has documents relating to matters in question in the cause, other than his or her adultery, it would be quite right to require an affidavit as to such documents; but, if there is reason to believe that the affidavit is required only for the purpose of discovering documents tending to prove adultery by the person required to make the affidavit, no order for such an affidavit ought to be made. The objection, however, that a person's affidavit of documents, or answer to an interrogatory, may tend to criminate him, is an objection which, as a rule, ought to be raised to the production of a document, or to answering an interrogatory. Exposure to punishment, or to a penalty, does not, as a rule, afford a ground for refusing an order for discovery, or for an affidavit of documents. But if discovery, or an affidavit of documents, is wanted solely for the purpose of proving adultery, no order for discovery or for an affidavit ought to be made. Such an order would be oppressive and unjust.

The next and last point for consideration, and the one mainly relied upon by the appellant, is that an infant cannot be compelled to make any affidavit of documents or other discovery. It has certainly been the long-established rule in Chancery not to require an infant to make discovery, and the same rule was followed in the Queen's Bench Division in *Mayor* v. *Collins*. If this matter were open to discussion, I should think the Chancery rule too rigid. Be this as it may, I can find no trace of any such rule in the ecclesiastical courts, and the invariable practice in the Divorce Court has, I am informed, been inconsistent with any such rule. I see no reason why this practice should be declared wrong. The point, however, does not require decision in this case, and I say no more about it. Having made the above observations, I ask myself what useful purpose can possibly be attained by compelling the respondent in this suit to make an affidavit of documents? The only possible purpose must be to extract from her an admission that she has or had documents which tend to prove her own adultery. The pleadings allude to other matters, which are, however, wholly immaterial; but the sole question in

the cause is whether she has committed adultery or not. Guided by the principles explained above, I think she ought not to be required to make any affidavit of documents, not because she is an infant, for I should come to the same conclusion if she were adult. She cannot be compelled to produce the letters which the plaintiff desires to see; she cannot be asked any question tending to show that she has been guilty of adultery, and that being the case, to order her to make an affidavit of documents would, in my opinion, be wrong. The appeal, therefore, will be dismissed, with costs.

BOWEN, L.J.—It is one of the inveterate principles of English law that a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture, or ecclesiastical censure. In these days, when the thunders of the Church have become less formidable, the rule, so far as it relates to ecclesiastical censure, seems to wear an archaic form; but adultery is a charge of such gravity as to render it not unnatural that we should find that the doctrine that "no one is bound to criminate himself" should be applicable to it. Based upon the traditions of a law belonging to an earlier age, and a fear of ecclesiastical monitions, which are now technical and obsolete, the privilege in such a case has never been abrogated. The principle has been recognized as governing similar subject-matter by common law and equity alike (see *Finch* v. *Finch*, 2 Ves. sen., at p. 493; *Chetwynd* v. *Lindon*, 2 Ves. sen. 450). The ecclesiastical courts have dealt with the question in a like manner. In *King* v. *King*, 2 Rob. Ecc. 153, Dr. Lushington held (in a cause of divorce by reason of adultery) that a party in her personal answers to a libel was not bound to answer upon oath to articles which, though not on the face of them criminatory, might by possibility furnish a link in the evidence against herself (see also *Swift* v. *Swift*, 4 Hagg. 139, at p. 154).

Such was the law at the date of the passing of the Divorce Act, at which time, it must be remembered, the parties to a suit were incapable in the superior courts of giving evidence themselves on oath in their own case. The statute 14 & 15 Vict. c. 99, which rendered parties to a suit or action competent and compellable to give evidence, provided by section 4 as follows:—"Nothing herein contained shall apply to any action, suit, proceeding, or bill in any court of common law, or in any ecclesiastical court, or in either House of Parliament, instituted in consequence of adultery." And in section 2 of the Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), there was included a similar provision. Such was the law at the time when the present Divorce Court was instituted, and it remains to be seen whether the Legislature has anywhere justified a practice, hitherto unknown, of compelling a party to a divorce proceeding to make answer upon oath of any matter which might tend to prove him or her guilty of adultery. By section 43 of the Act of 20 & 21 Vict. c. 85 (the Divorce Act, 1857), the court was empowered to order the attendance of the petitioner, and to examine, or permit him or her to be examined or cross-examined, on oath on the hearing of any petition; but the section provided that no petitioner should be bound to answer any question tending to show that he or she had been guilty of adultery; and, by section 48, the rules of evidence observed in the superior courts of common law were made applicable to, and were to be observed in, the trial of all questions of fact in the court (see *Deane* v. *Deane*, 1 Sw. & Tr., at p. 90). An important change in the law was no doubt effected by the Act 32 & 33 Vict. c. 68, being "an Act for the further amendment of the law of evidence." [The Lord Justice read section 3 of that Act, and continued:—] It seems to result from the history of the subject already set forth that no power existed down to the Divorce Act, and that no power has since been given by the Legislature, to compel a witness to make any answer on oath which would tend to show that he or she was guilty of adultery.

On the principles of law hitherto recognized as applicable to such cases, no interrogatories, moreover, addressed directly or indirectly to the sole proof of adultery, ought to be permitted, and, on similar grounds, the court cannot properly compel discovery on oath of documents which can only be material so far as they may tend to establish that issue, although in ordinary cases such an objection would naturally be raised, not on the summons for discovery, but in the affidavit made in answer thereto. I do not doubt for a moment that the court has the power of allowing interrogatories and discovery both in ordinary cases, and even in divorce suits, upon issues which are not directed to the proof of adultery; subject always to the ordinary principles of the law of privilege, and to the same doctrine (wherever applicable) that no one is bound to criminate himself.

In *Euston* v. *Smith*, which was a suit of nullity, Sir James Hannen stated that he found it to be in accordance with the practice in the Divorce Division to allow interrogatories, a view which was subsequently adopted in the Court of Appeal in *Harvey* v. *Lovekin*. The Ecclesiastical Court in like manner had, in former times, and still has, the power of compelling the discovery of documents (see *Dunn* v. *Coates*). But it is contrary to the principles of law recognized alike in the common law courts, the Chancery Division, and the ecclesiastical courts, that a wife or husband should be compelled to answer on oath as to matters tending to show adultery, whether in the shape of discovery of documents or of any other fact, and the legislation affecting the Divorce Court has done nothing to disturb, but much to recognize this, to my mind, salutary principle. It is true that the House of Lords, in the case of *Mordaunt* v. *Moncreiffe*, adopted the conclusion that a divorce suit is not a criminal or penal proceeding, but their judgment in no way conflicts with the view which I have above expressed. The question as to the liability of infants to orders for discovery of documents in the Divorce Court does not, therefore, arise in the present case, which is to be decided on a still broader ground. Whether in matrimonial causes infants are compellable to make discovery, or to answer interrogatories, as to matters other than adultery, is a question I prefer myself to leave open till the point arises with reference to some specific issue, the character of which may possibly be material to the inquiry which will have then to be pursued. It is, perhaps, questionable whether infants have any special protection in the Divorce Court, but I express no final opinion on the subject. If the opinion at which I have arrived as to the issue of adultery had been in conflict with the practice of the learned judges in the Divorce Court, I should feel much hesitation in disturbing what, upon that hypothesis, would have been the settled course of the court, but there seems no reason to think that interrogatories addressed solely to the issue of adultery have ever, otherwise than *per incuriam*, been allowed, or that, when the only issue was adultery, the practice of discovery of documents has been deliberately adopted by the judges of that court. So far as any laxity of practice may have crept in, it has, I think, been due to the fact that other issues, besides that of adultery, are often necessarily ventilated in a divorce suit. On the ground above mentioned I think the appeal should be dismissed, with costs.

FRY, L.J.—I have had the benefit of reading the judgments delivered by my brethren, and I cannot usefully add anything to what they have said. I agree with them, and for the reasons which they have given—that discovery ought not to be required from the litigants in a divorce suit for the purpose of proving adultery. The appeal must therefore be dismissed, with costs.

Appeal dismissed.

Solicitors, *J. B. Churchill; Eldred & Bignold.*

High Court of Justice.

Chan. Div. Chitty, J. } Nov. 12.

In re MEEUS'S APPLICATION. (*a.*)

Trade-mark—Old mark—User of part—Amendment of application — Disclaimer — User in British port—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 69, 71, 72, 74, *sub-section* (2).

An applicant seeking to register a trade-mark as an "old mark" must prove that the entire mark proposed (with the exception of immaterial differences) was used as a whole before the 13*th of August,* 1875. *Proof that some part of such mark was used before that date will not entitle him to register that part as an old mark.*

In re Palmer's Trade-Mark, 32 *W. R.* 306, 24 *Ch. D.* 504, *discussed.*

The court has no power judicially to amend an application, but can merely determine whether or not the comptroller shall proceed with such application as it stands.

Orr-Ewing *v.* The Registrar of Trade-Marks, 28 *W. R.* 17, 4 *App. Cas.* 479, *explained.*

Section 74, *sub-section* (2), *of the Patents, Designs, and Trade-Marks Act,* 1883, *must be strictly construed, so that disclaimer of part of the mark proposed can only be made in the application, and only of devices, words, &c., that are common to the trade.*

Semble, *user of a distinctive mark on goods lying in the holds of ships which are merely touching at British ports is not sufficient user to acquire a trade-mark here.*

Summons.

This was a summons under the Patents, Designs, and Trade-Marks Act, 1883, asking that the Comptroller-General might be directed to proceed with the registration of the applicant's mark, notwithstanding the opposition of Messrs. Blankenheijm & Nolet.

The applicants, Louis Meeus & Co., carried on the business of distillers of a spirit known as "Geneva" at Antwerp, and proposed to register as an old mark —*i.e.*, as a trade-mark used before the 13th of August, 1875—a label for bottles consisting of a key ornamented with ears of corn, with the signature "Louis Meeus" written across it, and the word "Antwerp" printed underneath, the whole being enclosed by a circular band, on which was printed "Geneva 'Key' Brand Louis Meeus." A considerable quantity of the applicants' "Geneva" had been imported since 1874 to the United Kingdom, and ordered by merchants and agents here under the name of "Key Brand Geneva," but the greater part of such imported "Geneva" was at once transhipped and re-exported.

The summons was opposed by Messrs. Blankenheijm & Nolet, distillers of Geneva at Rotterdam, in Holland, whose Geneva, for at least twenty years before the application, had been known in the British market as "Key Brand Geneva" or "Key Geneva."

Romer, Q.C., and *Chadwyck Healey*, for the applicants.—Importation to a British port of goods marked with our mark is sufficient user in England, although the goods are never taken out of the hold, or only transhipped and re-exported. We have at least had a concurrent user with the respondents. Section 74 of the Patents Act, 1883, as explained by section 16 of the Patents Act, 1888 (51 & 52 Vict. c. 50), clearly contemplates a distinction between essential and unessential features, so that *In re Palmer's Trade-Mark*, 32 W. R. 306, 24 Ch. D. 504, does not affect us. The essential part of our mark is the distinctive device of the key and the corn, and if we have proved our claim to these we are entitled to register with the other unimportant additions: *Orr-Ewing* v. *Registrar of Trade-Marks*, 28 W. R. 17, 4 App. Cas. 479. They must prove absolute fraud to prevent us registering: *In re Heaton's Trade-Mark*, 32 W. R. 951, 27 Ch. D. 570.

Byrne, Q.C., and *A. J. Walter*, for Blankenheijm & Nolet.—*Orr-Ewing's case* only decided that the marks therein proposed were legitimate subjects of trade-marks. The decision was simply against the registrar, not the public. See also *Perry Davis* v. *Harbord*, 7 Pat. Cas. 336, 15 App. Cas. 316. Again, the "user" must be open to many persons: *In re Münch*, 50 L. T. N. S. 12, 32 W. R. Dig. 212; *McAndrew* v. *Bassett*, 12 W. R. 777, 4 De G. J. & S. 380; *In re Hodson's Trade-Mark*, 34 W. R. 616; *Jackson* v. *Napper*, 35 W. R. 228, 35 Ch. D. 162, 4 Pat. Cas. 45, at p. 56; *In re The Australian Wine Importers (Limited)*, 37 W. R. 578, 41 Ch. D. 278, at p. 283; *In re Rivière's Trade-Mark*, 32 W. R. 390, 26 Ch. D. 48; *Eno* v. *Dunn*, *ante*, p. 161, 15 App. Cas. 252, at p. 262. The public know our Geneva as "Key Brand Geneva," and in their interests the applicants ought not to register. [CHITTY, J., referred to *In re Arbenz's Application*, 35 W. R. 527, 35 Ch. D. 248.]

Chadwyck Healey, in reply.—The key is a device, and not within the proviso of the 64th section of the Act of 1883, or the 10th section of the Act of 1875. It is within the "three marks rule" in *Jelley's case*, 51 L. J. Ch. 639, 30 W. R. Dig. 209. *Palmer's case* and *Leonard* v. *Ellis*, 32 W. R. 530, 26 Ch. D. 288, turned on words, and came within the proviso of the section. Our device, a key, was used before the 13th of August, 1875, and we have added the maker's name and address, and the title "Geneva Key Brand" as the name of the article, and we do not claim exclusive use of these immaterial additions. As to user see *In re Wragg's Trade-Mark*, 29 Ch. D. 551, 33 W. R. Dig. 218. If necessary, we can disclaim now: Sebastian on Trade-Marks, 3rd ed., p. 384, where all the authorities are reviewed; and our proposed trade-mark can be registered with the disclaimer of all but the key and corn, as *In re Burland's Trade-Mark*, 38 W. R. 89, 42 Ch. D. 274. The rule against deceiving the public does not apply to a conflict of old marks. All the cases against us are between an old and a new mark, such as the *Australian Wine case*. As to the cases cited by the other side, *Münch's case* only decided that the mark was not within the three marks rule; *Rivière's case* expressly left the point undecided: see 26 Ch. D., at p. 54. It was, I think, an old mark. The "user" observations in *Jackson* v. *Napper* are not contained in the authorized reports. Goods are vendible on the market, though never offered for sale or seen by vendor or purchaser. It is all done by a piece of paper in the City. Again, mere discontinuance of

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

user without evidence of distinct intention to abandon does not bar our right: *Mouson* v. *Boehm*, 32 W. R. 612, 26 Ch. D. 398.

CHITTY, J., after stating the facts, proceeded:—Now the summons to proceed was taken out under the 29th rule of the Patent Rules of 1883, and is in the proper form—viz., that the comptroller may be directed to proceed with the application of Louis Meeus, notwithstanding the opposition of Blankenheijm & Nolet. The procedure under the 69th section of the Act of 1883 is this: The application is made to the comptroller, he directs advertisements of the marks brought in as old marks, those advertisements give notice to the trade or persons interested that they may come forward and oppose. The opponents deliver a written notice of opposition, stating their grounds, and then there is a reply on the part of the applicant, and, in the language of sub-section 4, the case is thereupon deemed to stand for the determination of the court. In passing, I observe that the 3rd and 4th sub-sections, under which the application was made, have been since repealed by the Act of 1888.

Now what is the case, according to the language of the enactment, which stands for determination? It is the question of the registration of the particular mark brought in, and where it is asserted that it is an old mark, as in the case before me, the application is, as a whole, to register the entire mark as brought in, as an old mark. The court then has to determine whether in the case before it the application has to proceed or not. I need scarcely observe that if another or different mark were brought in it would have to be re-advertised, and other opponents who might not think fit to come forward and oppose the registration of the particular mark which they have seen, might for good reasons come forward and oppose an application to register, say, a part of the whole mark brought in. Conceivably it might be much more injurious to certain traders that a part of the whole thing proposed should be registered than that the whole should be registered.

I come then to consider the question of the user of the proposed mark. [His lordship here reviewed the evidence, and after holding, in the result, that the applicant had failed to prove any user of the mark proposed as a whole in the United Kingdom, or, in fact, elsewhere, before the 13th of August, 1875, proceeded:—] It becomes, then, to my mind, not necessary to consider the evidence of user of part of the mark—viz., the key with or without the ears of corn—which has been adduced on the part of the applicants as having taken place before this statutory date. That evidence consists mainly of two importations into ports in this country merely for the purpose of transhipment to the Havannah, and on the evidence it would seem there were two cases, with a mark possibly of the key outside, in the ship's hold, and that there was only a nominal transhipment—*i.e.*, there was no distinct evidence of any kind to show that the goods were taken out of the ship, but it is quite open on the evidence to conclude that the ship was touching only at the ports named, and that the goods, without the cases being seen, were passed on in the same ship to the Havannah. But it is not necessary to consider this user, which, at the utmost, is user of a part of the mark only, because the question I have to consider is the user of the mark as a whole. If and so far as it should be necessary to consider the evidence of partial user in detail, I state my opinion that the result of it is adverse to the applicants.

Of the many authorities cited at the bar I need only mention two. The first is *In re Palmer's Trade-Mark*, which has been followed in many subsequent cases. There Palmer proposed for registration three words, "Braided Fixed Stars," and the Court of Appeal having found, as a fact, that these words had not been used separately as a trade-mark before the 13th of August, 1875, held that Palmer could not register that part of the entire mark which he had, in fact, used before the statutory date. That case, therefore, decided that where the mark proposed to be registered was less than the whole mark used before the date in question, registration could not be permitted, and it seems to follow that the applicant who comes forward and alleges that the mark which he proposes for registration has been used before the statutory date has to show that it has been used just as he proposes it should be registered—*i.e.*, the whole combination, except immaterial differences. In the case before me the words "Geneva Key Brand" form a very important and material part of the trade-mark.

The other authority is one that was cited by the applicant's counsel with the view of inducing the court to give a direction to the comptroller to proceed, not with this application, but with some other application—viz., an application to register the key, with the ears of corn—and reliance was placed upon the order of the House of Lords, in which a direction was given to the registrar to proceed with Orr-Ewing's application to register as trade-marks the distinctive devices of animals on the labels with the name and address of Orr-Ewing's firm. The labels contained something more than the devices of animals, but it is important to see how that case came before the House of Lords. As is well known, the business of forming the first Register of Trade-Marks was found to be so serious and so large, as regards textile goods, that a committee of experts was appointed in regard to goods of this class for the purpose of sifting the various trade-marks used in that trade. The committee were appointed under general orders which had a statutory effect, and it was their duty to divide the marks that were brought before them into two classes, one class, the first class, being those which they considered fit and proper to be registered, and the other, the second class, being those that they thought were not proper to be registered, and it was part of the orders, which had, as I say, a statutory effect, that it should not be lawful for the registrar—that was then the title of the officer who had the control of the register—to register any person as proprietor of any cotton mark in the second class of the list except in pursuance of an order of court. An application for such an order was made to Hall, V.C., and he directed the registrar to proceed, but the Court of Appeal were of a different opinion, and held that a committee of experts was a tribunal in the nature of a tribunal of commerce, and that in dealing with their decision the court ought not to interfere unless satisfied they had proceeded upon some wrong principle or in some improper manner. The House of Lords, however, overruled that decision, and looked into the marks of Orr-Ewing themselves, and, after examining them, thought that they had shown a *primâ facie* case for being allowed to proceed with an application for registration of the distinctive devices that I have already referred to.

The result, therefore, of that decision was simply to remove what was a statutory impediment, or *quasi*-statutory impediment, or bar, that had been placed against the registrar even entertaining the question of the application. The House of Lords did not decide that Messrs. Orr-Ewing were entitled to register the device, as is explained in the speeches of Lord Cairns and others of the noble lords; they left the question entirely open, so that they merely removed that initial difficulty which stood in Orr-Ewings' way

by reason of the decision which the committee of experts had come to. Mr. Orr-Ewing, after he had obtained the order of the House of Lords, had to start before the registrar, and his marks had to be advertised, and any opposition that persons interested thought fit to make could have been brought forward. That case, therefore, is no authority for the proposition on which the applicants' counsel rely. It is difficult exactly to ascertain the nature of the proposition that they put forward, but it seems as if they were asking me now judicially to amend the application that has been made before the comptroller, and which application stands for my decision at present. Obviously the decision of the House of Lords does not affirm that proposition. Here, as I have said, I have to determine in my judgment, aye or no, whether the comptroller is to proceed with this application.

Then an ingenious suggestion was made, I rather think by Mr. Chadwyck Healey, for the first time, in his reply, as to disclaimer, and the suggestion appeared to be in some way or other that Louis Meeus was entitled, here in court, to disclaim some part of the trade-mark proposed for registration. After some little discussion, as I understood the proposition, the proposal was now to disclaim the whole of the trade-mark that has been brought in for registration except the key and the signature. Now on this suggestion or argument reference was made to the 74th section of the Act of 1883, which is to the effect that nothing in the Act is to be construed to prevent the comptroller entering on the register, as an addition to any trade-mark in the case of a mark in force before the 13th of August, 1875, "any distinctive device, mark, brand, heading, label, ticket, letter, word, or figure, or combination of letters, words, or figures, though the same is common to the trade in the goods with respect to which the application is made." And by the 2nd sub-section of that section "the applicant for entry of any such common particular or particulars must disclaim in his application any right to the exclusive use of the same, and a copy of the disclaimer is to be entered on the register." In passing, again, I merely mention that that sub-section has been repealed by the Act of 1888, and other provisions have been substituted for it. The disclaimer, therefore, according to the section, must be in the application. The words are express. Nothing is said about the disclaimer at the bar in the course of the determination of the matters which I have to determine under the 69th section. And, further, the disclaimer that is required here is a disclaimer of any such common particular or particulars. Such common particular or particulars, means words and so forth which are common to the trade. There is no pretence for saying that the important words "Geneva Key Brand" are common to the trade. That is not the case for the applicant that is presented to the court. There are but two traders in this country who are entitled to use that term—that is, the applicants and the respondents. The evidence which I have briefly referred to at the commencement of this judgment shows that "Geneva Key Brand" or "Key Brand Geneva" is a term which for twenty years and upwards has been the designation in the market by which the respondents' goods have been known. The result is that there is no room for the suggestion that the disclaimer could be made in such a case as this, because it is hardly necessary for me to point out again that I am dealing with these special statutory enactments, and there is no room, therefore, for any disclaimer at the bar. The disclaimer is too late, and the proposed disclaimer is not within the enactment. There is another point upon which the respondents have relied—viz., that to allow this mark to go on the register would be to place on the register, or to allow that there should be placed on the register, a mark calculated to deceive the public. It is not necessary for me to determine that question, because what I have already stated is sufficient, in my judgment, to dispose of the application, but it must not be for a moment assumed that I have arrived at any conclusion adverse to the respondents on that ground. As the case stands, though I am not called upon to decide it judicially, my strong impression is that it would be calculated to deceive, and, as the respondents have alleged, to injure them in the trade which they have established for years in this country. The result is that I think Louis Meeus's application fails, and I must dismiss it with costs.

Summons dismissed.

Solicitors for the applicants, *Hollams, Sons, Coward, & Hawksley.*

Solicitor for the respondents, *Frank A. Rehder.*

Chan. Div. Kekewich, J. — Dec. 20.

In re AGRICULTURAL HOTEL CO. (LIMITED). (a.)

Company — Capital — Reduction — Preference and ordinary shares—Resolution for reduction of ordinary shares only—Confirmation by court—Companies Act, 1867 (30 *&* 31 *Vict. c.* 131), *ss.* 9, 11—*Companies Act,* 1877 (40 *&* 41 *Vict. c.* 26), *s.* 3.

Under the Companies Acts, 1867 *and* 1877, *the court has power to sanction a special resolution for the reduction of the ordinary capital only of a company, the preference capital remaining unreduced.*

In re Union Plate Glass Co., 37 *W. R.* 792, 42 *Ch. D.* 513, *not followed.*

In re Gatling Gun Co., 38 *W. R.* 317, 43 *Ch. D.* 628, *and* In re Barrow Hæmatite Steel Co., 37 *W. R.* 249, 39 *Ch. D.* 582, *followed.*

Petition.

The Agricultural Hotel Co. was incorporated in June, 1863, with a capital of £100,000 divided into 10,000 shares of £10 each. Only 4,326 shares were issued; all these shares were fully paid up.

In April, 1867, a special resolution was passed under a power contained in the articles of association of the company, for the increase of capital by the issue of 500 preference shares of £10 each, bearing interest at the rate of 10 per cent. (afterwards reduced to 6 per cent.); and in July, 1872, another special resolution was passed for the further increase of capital by the issue of 500 preference shares, called B. preference shares, of the same value and bearing the same rate of interest. The latter resolution provided that the interest on the B. preference shares should be postponed to the interest on the former preference shares (therein called A. preference shares), but should have priority to any dividend on the ordinary shares, and also provided for a preference in respect of capital over the ordinary shares in the event of a dissolution of the company, but subject to a similar preference in respect of capital in favour of the A. preference shares. Of the A. preference shares 415 only were issued, but all the B. preference shares were issued; all these shares were fully paid up.

The company was indebted to the amount of £27,100, which was secured partly by mortgages partly by debentures. The articles of association, as duly varied by resolution, authorized a reduction of capital.

(a.) Reported by JAMES H. BAKEWELL, Esq., Barrister-at-Law.

In July, 1890, resolutions were duly passed and confirmed that the ordinary share capital of the company should be reduced from £100,000 to £50,000, and that such reduction should take effect by cancelling paid-up capital unrepresented by available assets to the extent of £21,630, being £5 per share in respect of the 4,326 ordinary £10 shares which had been issued and were fully paid up, and by reducing the nominal amount of the remaining 5,674 ordinary shares from £10 to £5 each, being a reduction in the unissued ordinary share capital of £28,370. A petition was presented by the company for the confirmation of these resolutions.

Warmington, Q.C., and *Eve*, for the company.—It is proposed to reduce the ordinary but not the preference capital. The decisions of the judges of this division as to such a reduction are conflicting.

They referred to *In re Union Plate Glass Co.*, 37 W. R. 792, 42 Ch. D. 513; *In re Barrow Hæmatite Steel Co.*, 37 W. R. 249, 39 Ch. D. 582; *In re Quebrada Railway, Land, and Copper Co.*, 40 Ch. D. 363, 37 W. R. Dig. 34; *In re Gatling Gun Co.*, 38 W. R. 317, 43 Ch. D. 628; *In re American Pastoral Co.*, 62 L. T. N. S. 625, 38 W. R. Dig. 32.

KEKEWICH, J.—If the opinion of Kay, J., stood alone it would have been my duty at once to follow it and to say, as he said, that the question must be decided by the Court of Appeal. But a decision of North, J., has been cited to me, not only expressly differing from the opinion of Kay, J., but so differing with reference to former decisions of the same judge, and after he had considered the case of *In re Union Plate Glass Co.* Then there is the later case, before North, J., of *In re American Pastoral Co.* I think that, under the circumstances, I am bound to exercise my own judgment in the matter, and my opinion is in favour of the view taken by North, J., and not of that taken by Kay, J.

I do not express any opinion whether the company can reduce any part of one class of capital. Here the application is to reduce the whole of the ordinary capital, leaving intact the preference capital, and the preference capital and the ordinary capital seem to stand in different classes, quite apart from the distinction to which Mr. Warmington has called my attention between the preference capital in this case and the preference capital in the case of *In re Union Plate Glass Co.* All I say is that if the company desires to reduce, and has by proper resolution purported to reduce, the whole of its ordinary capital, that may be done and may be sanctioned by the court, notwithstanding that there is, outside and above that, preference capital. I think it better to say so in plain terms rather than to endeavour to find distinctions, which may or may not be tenable, between the case before Kay, J., and the cases before North, J.

Order as prayed.

Solicitors, *Kingsford, Dorman, & Co.*

Chan. Div.
Fry, L.J. } Aug. 7, 8, 1890.

In re BOWDEN.
ANDREW *v.* COOPER. (*a.*)

Trustee—Breach of trust—Following assets—Statute of Limitations—Trustee Act, 1888 (51 & 52 *Vict. c.* 59), *s.* 8 (1) a, b, (3)—*Parties—R. S. C.*, 1883, *ord.* 16, *r.* 4.

An action for breach of trust was brought by a newly-appointed trustee against the survivor of the former trustees and the representatives of two deceased former trustees, to make them replace trust money, lost through investments made (more than six years before the action) without proper valuations and on insufficient securities. The executor of G., one of the deceased trustees, had, after duly issuing the statutory advertisements, administered his testator's estate, and then retained the balance as trustee of certain trust legacies, which it was insufficient to pay in full. The court gave leave at the trial to amend the statement of claim so as to make the action one against G.'s executor as a trustee, and not merely as an executor, and so that the amount retained for the legacies might be followed in his hands; but such amendment was allowed only upon the terms that the action was to be treated as commenced on the day of the trial, and that the defence was to be treated as amended so as to allow G.'s executor to claim the benefit of any statutes of limitation.

Held, that the Trustee Act, 1888, *s.* 8, *sub-section* (1) (b), *did apply to the case, though sub-section* (1) (a) *did not.*

Held, also, that, in view of R. S. C., 1883, *ord.* 16, *r.* 8, *the beneficiaries entitled to the legacies were not necessary parties to an action to follow the legacies in the hands of a trustee.*

Trial of action.

William Bowden by his will devised and bequeathed his real and personal estate to trustees upon trust to convert the same, and to hold the proceeds in trust for such of his eight children in his said will named as should survive him and attain twenty-one in equal shares, the shares of daughters (of whom there were six) being settled.

The testator died in 1864, leaving all the eight children surviving him, and they all attained twenty-one. In 1869 three new trustees of the will were appointed by the court. They were Baxter, Daniel Greatorex, and the defendant Cooper; and in the year 1874 they advanced a sum of £4,000, part of the trust estate, upon a mortgage of real estate (land and buildings) situate at Birkenhead, and in the same year they advanced another sum belonging to the trust estate to another person upon the security of another mortgage. Part of the latter sum had been paid off, but at the time of the action £2,600 still remained due on this security.

About the end of 1878 the two surviving trustees (Baxter having died in 1876) made a further advance on the first-mentioned security, additional buildings having been erected. In 1882 Andrew (the plaintiff) was appointed trustee in Baxter's place.

At the commencement of the following year D. Greatorex died, having by his will left his real and residuary personal estate to Richard Greatorex and Worthington (the latter of whom disclaimed) upon trust to appropriate two legacies of £6,000 and £5,000, and to hold the same upon trusts mentioned in the will. The testator also named four executors, of whom only the defendant, R. Greatorex, proved and acted. After administering the estate, there remained to meet the two legacies a sum of £8,000 only, which he invested upon mortgage in his own name.

The securities upon which part of Bowden's estate had been invested having proved insufficient, this action was commenced in 1889 against Cooper, Baxter's executors, and R. Greatorex as executor of D. Greatorex. The plaintiff alleged that the advances on mortgage had been made on insufficient security and with no proper valuation, and he claimed that Cooper was personally liable, that Baxter's executors were liable to the extent of their testator's assets, and that R. Greatorex was liable as executor of D. Greatorex to make good out of his testator's

(*a.*) Reported by R. H. DEANE, Esq., Barrister-at-Law.

estate the sums of £4,000 and £2,600, with interest, and that the defendants generally might be ordered to replace those sums. He further claimed that Cooper was liable personally, and R. Greatorex out of his testator's estate, to make good the further advance, with interest, and that, if necessary, the estates of Baxter and D. Greatorex might be administered by the court.

R. Greatorex's defence was to the effect that he had duly advertised for creditors of his testator's estate, and had not administered the estate till the time for creditors to come in had expired, and that the £8,000 was, therefore, not in his hands as executor.

The action was tried before Fry, L.J., sitting as an additional judge of the Chancery Division. It was clear upon the evidence that no proper valuations had been made, and it followed (the securities having proved insufficient) that the trustees who advanced the money were liable to make good the losses sustained in consequence.

Section 8, sub-section (3), of the Trustee Act, 1888, provides that section 8 shall apply only to actions or other proceedings commenced after the 1st of January, 1890.

Warmington, Q.C., and *Methold*, for the plaintiff.—We are entitled to judgment in the terms of the claim.

Neville, Q.C., and *T. L. Higgins*, for Baxter's executors.—The court will not under the circumstances make an immediate order to replace the whole amounts, but will order the securities to be realized, and the deficiencies, then ascertained, to be replaced.

Clare, for the executors of Cooper (who had died since the action was commenced).

S. Hall, Q.C., and *E. S. Ford*, for R. Greatorex.—As the action is constituted, the assets cannot be followed in the hands of R. Greatorex, who is sued as executor only, and not as trustee; for his liability in the capacity of executor was at an end after the issue of the statutory advertisements and the expiration of the time for creditors to come in: *Clegg* v. *Rowland*, 15 W. R. 251, L. R. 3 Eq. 368. But if the action, as constituted, can be treated as an action to follow the assets, the *cestuis que trust* ought to have been made parties: *Clegg* v. *Rowland*. [FRY, L.J., held that if on the pleadings R. Greatorex was sued as trustee, on the principle of following the assets, then by R. S. C., 1883, ord. 16, r. 8, *cestuis que trust* were not necessary parties, and he accordingly dissented from the *dicta* of Malins, V.C., in *Clegg* v. *Rowland*, but he thought it not clear that the statement of claim did ask such relief against R. Greatorex as trustee, and therefore held that the plaintiff should be put to his election whether he would proceed on the present pleadings, or amend his claim on the terms that the action should be treated as commenced on that day, and that the defence of R. Greatorex should be taken as amended in such a way as to enable him to claim the benefit of every statute of limitations on which he could rely. The plaintiff elected to amend on those terms, and the case accordingly proceeded on that footing.] As this action is now to be treated as commenced to-day, section 8 of the Trustee Act, 1888, applies: see sub-section (3) of that section. The action is therefore barred by the Statute of Limitations, because by section 8 (1) (*a*) of the Trustee Act, 1888, trustees are no longer excluded from the benefit of the former statute except in cases of fraud.

Methold, in reply.—The section referred to of the Trustee Act, 1888, cannot apply, because an action like the present, for breach of trust, could not be brought against anyone who was not a trustee.

FRY, L.J.—It is not seriously contended in this case that these investments were not breaches of trust, it being clear on the evidence that the securities were insufficient, and that no proper valuations were made. What I propose to do is to order the securities to be realized and the deficiency ascertained, and to direct an inquiry how such deficiency is to be made up out of the different estates liable. I will take time to consider the point as to the liability of R. Greatorex.

Cur. adv. vult.

Aug. 8.—FRY, L.J.—This action for breach of trust has been brought by a newly appointed trustee against an old trustee, and the representatives of two deceased trustees. The estate of Daniel Greatorex, one of those deceased trustees, was administered some years ago, after the usual statutory advertisements had been issued. His executor accordingly raised the objection that if the plaintiff sought to follow the funds, which remained in his hands, not as executor, but as a trustee of trust legacies, the persons beneficially interested in those legacies were necessary parties to the action. I decided adversely to that contention, but the further question arose whether upon the pleadings this could be treated as an action to follow assets, or was merely an action against Greatorex's executor in his character as such. There was a difficulty on the pleadings as they stood, because, according to the statement of claim, the sum of £8,000, which was all that was available to pay the legacies, had been appropriated to them, and had been invested on a mortgage in the name of Richard Greatorex, the executor, and was "now held by him as executor and trustee of the will of Daniel Greatorex," and was "applicable to answer the claim raised in this action." Some embarrassment obviously arises from the statement that the money is held by him in those two characters. The claim then proceeds to ask for a declaration that Richard Greatorex is liable as executor of D. Greatorex, out of his estate, to make good the breaches of trust, and (consequentially) that so far as necessary the real and personal estate of D. Greatorex may be administered under the direction of the court. Moreover, the writ, which has never been amended, claimed against R. Greatorex as executor. The plaintiff, however, having elected to amend his statement of claim so as to make this an action for following assets, upon the terms which I consider fair, the question arose whether under the circumstances, the Trustee Act of 1888 afforded R. Greatorex a good defence to the action. The last of the breaches of trust took place more than six years before the commencement of the action.

Section 8 provides that "in any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply." It is plain to my mind that none of those exceptions apply to the present case, so as to take it out of the section. Then sub-section (1) (*a*), which contains the first of the "following provisions" referred to in the paragraph I have read, is as follows: "All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him."

The defendant, R. Greatorex, relied on that provision, but I do not think it can apply to the case, because it is obvious in the first place that a person

could not be sued for breach of trust if he had not been a trustee; and, secondly, so far as I am aware, no statute of limitations confers any right or privilege in respect of a breach of trust. But it appears to me that the next following provision, contained in sub-section (1) (*b*), to which my attention was not called, does apply to the case. It is this: "If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies" (both those conditions are fulfilled by the present action), "the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received."

That appears to me to afford this defendant a good defence. For, if this had been an action for debt for money had and received, and such debt had arisen more than six years ago, and there had been no acknowledgment of it in the meantime, the lapse of time would have afforded a good defence. The clause goes on (omitting a part that is immaterial here) "but so, nevertheless, that the statute . . . shall not begin to run against any beneficiary, unless and until the interest of such beneficiary shall be an interest in possession." That restriction does not apply to the present case, because this action is brought, not by a beneficiary, but by one trustee against another. It appears to me, therefore, that a good defence is afforded by the section, and it follows that the action, as against Richard Greatorex, must be dismissed with costs.

Upon consideration, it seems to me that the inquiry I proposed yesterday might raise troublesome questions of law, and that the better course will be to order a sale, and direct the chief clerk to certify the amount remaining due in respect of the breaches of trust, and to reserve further consideration.

Action dismissed as against the defendant R. Greatorex. Judgment for plaintiff as against the other defendants.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Claye & Son*, Manchester; *Wynne, Holme, & Wynne*, for *Cooper & Sons*, Manchester; *Becher*, for *Hedgcock & Ducker*, Manchester; *Chester & Co.*, for *Bullock & Worthington*, Manchester.

Q. B. Div. (Hawkins and Stephen, JJ.) — Oct. 29; Nov. 12.

GUARDIANS OF THE POOR OF THE IPSWICH UNION (*Appellants*) *v.* GUARDIANS OF THE POOR OF THE MACCLESFIELD UNION (*Respondents*). (*a*.)

Poor law—Lunatic—County asylum—Private patient becoming pauper — Chargeability—Lunatic Asylums Act, 1853 (16 & 17 *Vict. c.* 97), *ss.* 95, 96.

A lunatic was sent by her relations from a parish in the Ipswich Union to the asylum at Macclesfield as a private patient. Subsequently they gave notice to the asylum that they would cease paying for her maintenance as a private patient. The clerk to the asylum thereupon gave notice to the guardians of the Macclesfield Union that the lunatic had been transferred to the list of pauper patients chargeable to their union. The guardians accordingly paid a sum for her maintenance.

Held, that none of the provisions of the Lunatic Asylums Act, 1853, *applied to the circumstances of the case; that the lunatic was not chargeable to the Macclesfield Union; that the payment by that union was made under a mistake; and consequently that an order upon the Ipswich Union to repay the sum was bad.**

Case stated by the Court of Quarter Sessions for the county of Chester upon an appeal against an order of justices directing the Ipswich Union to pay to the Macclesfield Union a sum of £21 7s. paid by the latter union to the treasurer of the county lunatic asylum at Macclesfield for the maintenance and care of Margaret Jane Robinson, a lunatic, and also to pay to the said treasurer the reasonable charges of the future maintenance and care of the said lunatic as long as she should remain in the said asylum.

The court of quarter sessions affirmed the order subject to the following case:—

1. Margaret Jane Robinson, the pauper, is the daughter of Henry Robinson, now residing at Shrewsbury.

2. The said Margaret Jane Robinson was born at Ipswich on the 4th day of June, 1854. Her father subsequently took a house in the parish of Stratford, in the West Ham Union, in the county of Essex, and resided there for some years.

3. The said Henry Robinson, in or about 1874, went to reside at Hadley, in the Cosford Union, in the county of Suffolk, and continued to live there up to January, 1885. In 1884 the pauper, who had been away from home in different situations, returned to her father's house, and remained there until she went to Ipswich, as hereinafter stated. She was described as "rather affected in the head" during the time she was at Hadley, and unable to do any work beyond light domestic duties, but she frequently walked out by herself, and she was consulted about going to Ipswich, and described as quite able to judge for herself about removing there, as in the next paragraph stated.

5. In January, 1885, the said Henry Robinson went to live at 43, Alpe-street, in the parish of St. Matthew, in the Ipswich Union, and the pauper accompanied him. She continued to reside with him there until March, 1886, but during the latter part of the time became "worse in her mind."

6. In March, 1886, the said pauper was conveyed as private patient to Parkside Lunatic Asylum, at Macclesfield aforesaid. She was so conveyed there by a female attendant who had been sent from the asylum to Ipswich for the purpose, and she has been confined as a lunatic patient therein until the present time under an order signed by her said father, who, in April of the same year, removed from Ipswich to Shrewsbury.

7. On the 22nd of October, 1888, the clerk of the said county asylum wrote to the clerk to the guardians of the Macclesfield Union informing him that the relatives of the said pauper had given notice that they would cease paying for her maintenance as a private patient from the 30th of September then last, and that she had been transferred to the list of pauper patients chargeable to the Macclesfield Union as from the 1st of October then last. No order of a justice or justices was made directing the said Margaret J. Robinson to be received into the said asylum as a pauper lunatic, and no steps other than the writing of the said letter by the clerk of the asylum were taken with a view to the admission of the said Margaret Jane Robinson in the said asylum as a pauper lunatic.

8. The guardians of the Macclesfield Union accordingly paid for the maintenance of the said pauper as

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

* But see now sections 286 and 295 of the Lunacy Act, 1890 (53 Vict. c. 5), which came into operation on the 1st of May, 1890.

a lunatic primarily chargeable to the Macclesfield Union from the 1st of October, 1888.

9. It is admitted that the said pauper is not settled in any parish in the Ipswich Union.

10. On the 19th of November, 1889, the said guardians of the Macclesfield Union applied for and obtained the order of adjudication and maintenance hereinbefore referred to upon the Ipswich Union in respect of the said pauper.

If the court should be of opinion that the order of adjudication and maintenance was bad, that order, and the order of sessions confirming the same, were to be quashed, otherwise the said orders were to be confirmed.

The arguments and the statutory provisions bearing upon the case are sufficiently stated in the judgment of the court.

E. Honoratus Lloyd and *R. C. Glen*, for the appellants.

Jelf, Q.C., and *Marshall*, for the respondents.

Cur. adv. vult.

Nov. 12.—HAWKINS, J., delivered the judgment of the COURT:—This case raises the question whether an order made by two justices of the peace for the county of Chester directing that the appellants should pay to the respondents the amount paid by the latter for the maintenance of a certain pauper lunatic, was a valid order or not. [His lordship stated the facts shortly, and proceeded:—] The question, therefore, arises whether she was properly placed on the list of pauper patients chargeable to the Macclesfield Union. There never was any order made by a justice for her admission into the asylum as a pauper lunatic. It is admitted that she never was settled in any parish in the Ipswich Union, and also that she had acquired a *status* of irremovability in that union. On behalf of the appellants it is contended that the pauper lunatic never was chargeable to the Macclesfield Union, and that the respondents cannot, therefore, recover from them the amount they have paid for her maintenance. We are of opinion that this contention must prevail.

In order to see in what asylum, and at whose expense, a pauper lunatic may be confined, it is necessary to consider various sections of the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97), an act which was passed to consolidate and amend the laws for the provision and regulation of lunatic asylums for counties and boroughs and for the maintenance and care of pauper lunatics in England. By section 43 of that Act it is provided that if an asylum is more than sufficient to accommodate all the pauper lunatics of the county or borough to which the same belongs, the pauper lunatics of other counties or boroughs may be admitted upon certain terms as to payment. Then section 67 contains provisions for sending pauper lunatics to asylums. The medical officer of health is to inform the relieving officer of the presence of any pauper resident in the parish who is or is deemed to be a lunatic, and the relieving officer is to inform a justice of the fact, and he is to order the pauper to be brought before him; then the justice, with the assistance of a medical man, is to decide whether the pauper is a lunatic, and, if he finds that the pauper is, to order his removal by the relieving officer to an asylum. Section 68 provides that every lunatic wandering at large or not being properly taken care of shall be apprehended and taken before a justice, and by him sent to an asylum. Then section 72 enacts that every order of a justice for the reception of a lunatic into an asylum may authorize his admission, not only into the asylum of the county or borough in which the place from which the lunatic is sent is situated, but also into the asylum of another county or borough, but every lunatic shall be sent to an asylum of the county or borough in which the place from which he is sent is situated, unless there be some special circumstances, by reason whereof he cannot conveniently be taken there. The next section (section 73) provides that no pauper shall be received into any asylum without an order under the hands of one justice, or under the hands of an officiating clergyman, or one of the overseers, or the relieving officer of the parish. Then there are several sections dealing with the maintenance of lunatics, and they begin with section 94, which only applies where it appears to the justices that the lunatic has property which is applicable to his maintenance. Then section 95, upon which the argument before us was founded, provides that when any pauper lunatic is confined under the provisions of this Act he shall, for the purposes of this Act, be chargeable to the parish from which, or at the instance of some officer or officiating clergyman of which, he has been sent, unless and until such parish shall have established, under the provisions herein contained, that such lunatic is settled in some other parish, or that it cannot be ascertained in what parish such lunatic is settled.

Although the lunatic in the present case became a pauper, having no property applicable for her maintenance, her friends having refused to provide for her, she was not confined in the asylum under the provisions of this Act, and, therefore, section 95 does not apply to her case. Then section 96 enacts that it shall be lawful for the justice by whom any pauper lunatic is sent to an asylum to make an order upon the guardians of the union or parish, or the overseers of the parish, for payment to the treasurer of the asylum of the reasonable charges for the lodgings and maintenance of such lunatic in such asylum. Then comes section 97, which may be shortly stated as authorizing justices to inquire into and adjudge the settlement of a lunatic and order the payment of her maintenance by the guardians of the union to which the parish in which such lunatic is adjudged to be settled belongs; and section 98 provides that if the settlement of the lunatic cannot be ascertained, a pauper lunatic may be made chargeable to the county in which he was found. In the present case it cannot be suggested that this pauper lunatic was found in the county, or that she comes within the provision for arresting lunatics found at large. The last section I will refer to is section 102, which says that the costs of pauper luuatics who are irremovable are to be borne by the parish wherein they were exempt from removal.

Now there can be no doubt that if it could be made out that this pauper lunatic was sent to the lunatic asylum at Macclesfield, under the provisions of this Act, the cost of her maintenance could be recovered from the appellants, but there was no order of justices under this Act authorizing her to be sent to this asylum, for she was sent there, in the first instance, by her relatives. Then, when they ceased to pay for her, no order was obtained from a justice making it incumbent on the asylum to receive and maintain her.

There is certainly nothing in the Act itself which makes her chargeable to the respondents, and if an order had been made, she would have been chargeable to the appellants, not to the respondents. It was a mistake upon the part of the authorities of the asylum to say that she was chargeable to the respondents. The respondents, therefore, should not have paid the amount they did to the asylum, and as they were not liable, they cannot recover the amount from the appellants. So far as I can see, there is no provision

in the Act providing for the very singular circumstances which have arisen in the present case. We are not called upon to decide whether the asylum authorities could have obtained an order making the appellants pay direct to them, but this order, having been made under an Act which does not authorize it to be made, is bad and fails. There is a provision contained in 25 & 26 Vict. c. 111, s. 26, which authorizes the detention of a person who has been a private patient, and subsequently becomes a pauper lunatic; but so far as I can ascertain, there is no provision for his maintenance. The case is not affected by the Lunacy Act, 1889 (52 & 53 Vict. c. 41). In all these circumstances, the order must be quashed simply upon the ground that there was no liability upon the part of the respondents for the maintenance of this pauper lunatic.

Appeal allowed.

Solicitor for the appellants, *Rexworthy*, for *Vulliamy*, Ipswich.

Solicitors for the respondents, *Stephens & Stephens*, for *May*, Macclesfield.

Q. B. Div. (Grantham, Vaughan Williams, and Lawrance, JJ.) Nov. 7.

SUTTON *v.* WADE.
GALE *v.* OVEREND.
MOORE *v.* ATKINSON. (*a.*)

Election law — Parliament — Registration — Notice of objection to overseers—Signature of objector—List of names after signature — Authentication — Form I., No. 1, in schedule to Registration Order, 1889—*Registration Act*, 1885 (48 *Vict. c.* 15), *s.* 18.

A notice of objection given to overseers was as follows:—"I hereby give you notice that I object to the names of the persons mentioned and described below being retained on the list as parliamentary electors for the parliamentary city of N." (signed by the objector). After the signature of the objector came a list of the names of the persons objected to. An objection was taken that this notice was a departure from the form, and was bad, on the ground that the signature of the objector ought to have been after the list of names.

Held, that the notice of objection did not substantially depart from the form in the schedule to the Registration Order, 1889, *and was good.*

In *Sutton* v. *Wade*, which was an appeal from the revising barrister for the city of Norwich, the question was as to the validity of the notice of objection given to the overseers.

It was proved that the respondent, the objector, had duly signed and served on the appellant, the person objected to, a personal notice of objection to his name being retained on the list of parliamentary electors, and there was no question as to this notice.

The notice to the overseers was in the following form:—

"I hereby give you notice that I object to the names of the persons mentioned and described below being retained on the List No. 1, Division No. 1, as parliamentary electors for the parliamentary city and county of the city of Norwich, and as citizens for the municipal city and county of the same city.

"Dated this 18th day of August, 1890.

"(Signed) WILLIAM ARTHUR WADE."

Then followed a list of the persons objected to, with their addresses.

The whole of the notice was written and printed on the same side of a sheet of paper. The name of William Arthur Wade was the signature of the respondent, and the notice was not otherwise signed by him. The name of the appellant, Henry Sutton, appeared in this list, together with the names of the other persons objected to.

It was contended before the revising barrister on behalf of the appellant that the above notice to the overseers was not a good notice of objection, on the ground that the name of the appellant did not appear in the body of the said notice, and that as the signature of the respondent (the objector) preceded the names of the appellant and of the other persons objected to, the notice was not signed at the foot thereof, as required.

The revising barrister decided that the notice was a good notice of objection to the name of the appellent, on the ground that the name of the appellant was sufficiently incorporated by reference in the body of the said notice, which was duly signed at its foot in accordance with (Form I.), No. 1, prescribed by the Registration Order, 1889, schedule 3, and having regard to the proviso in section 18 of the Registration Act, 1885; and as it was proved that the appellant was not qualified to be on the list of electors, he allowed the objection, and expunged the name of the appellant from the list.

The appellant appealed, and the revising barrister stated this case.

The question for the opinion of the court was whether the notice to the overseers was a good notice of objection to the name of the appellant.

R. S. Wright, for the appellant.—The form is Form I., No. 1, in the Schedule 3 of the Registration Order, 1889, and in that form the place of signature of the objector is at the foot or end of the notice, and after the name of the person objected to. The signature of the objector ought to be at the bottom of the notice: *Toms* v. *Cuming*, 7 M. & G. 88. The signature of the objector is for the purpose of authentication, and there can be no authentication where the names come after the signature, as names might be added improperly. The question here is as to what is the effect to be given to the proviso at the end of the 18th section of the Registration Act, 1885, that a disregard of any form shall not of itself invalidate any list or notice. This does not apply to an entire departure from the form such as the present: *Humphrey* v. *Earle*, 36 W. R. 510, 20 Q. B. D. 294; *Wood* v. *Chandler*, 36 W. R. 522, 20 Q. B. D. 297. The principle of those cases applies here. The case of *Smith* v. *Holloway*, 14 W. R. 202, L. R. 1 C. P. 145, is different from the present.

Mattinson, for the respondent.—The first statute dealing with the subject is 6 Vict. c. 18, and that statute provides, in section 17, for the giving of two notices, a notice to the voter and a notice to the overseers. That statute makes no provision for the place of signature of the objector. As an illustration that the signature need not be at the bottom, there is the Statute of Frauds, where the signature need not be at the end. In this statute of 6 Vict. c. 18 there is no provision as to the place of the signature of the objector. *Smith* v. *Holloway* is in the respondent's favour on that point. [He was stopped.]

In *Gale* v. *Overend*, which was an appeal from the revising barrister for the borough of Leeds, the same question arose as to the validity of the notice, the revising barrister holding that the notice was bad.

Asquith, Q.C., for the appellant.

Macaskie, for the respondent.

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

In *Moore* v. *Atkinson*, which was an appeal from the revising barrister for the borough of Whitehaven, the signature of the objector was at the end of the list of names, and the notice was held to be bad on the ground that the form made no provision for a list of names, and that there must be a separate notice of objection to the overseers in the case of each person objected to.

Mattinson, for the appellant.

H. D. Warr, for the respondent.

GRANTHAM, J.—We are of opinion that in each of these cases the notices sent to the overseers was a sufficient compliance with the form in the schedule, and that consequently the notices were good notices of objection. Our judgment, therefore, is that in the first case—*Sutton* v. *Wade*—we hold that the revising barrister was correct, and in the other two cases—*Gale* v. *Overend* and *Moore* v. *Atkinson*—we hold that the decision of the revising barrister must be reversed. The chief thing we have to bear in mind about these notices of objection is this, that notice has to be given to the person objected to, and unless it can be shown that this has been done the objection will be bad. But the statute further requires that the overseer should have notice of all persons objected to, as the overseer prepares the list, and he requires to know what the objections are. Referring to *Trotter* v. *Walker*, 13 C. B. N. S., at p. 38, Erle, C.J., says, "If the sole object of the statute was merely to authenticate the document, the signature was undoubtedly sufficient," and he holds that that is the object of the statute—namely, to authenticate the document. All that has to be done is to authenticate the document which gives a list of the persons objected to. In that case of *Trotter* v. *Walker*, a stamp, in which the name was almost illegible, was held to be sufficient. Much less particularity is required when the name itself is written, so long as it is clearly written to indicate the name and the address of the person objected to by the person who signs the objections. No doubt the statute must be fairly complied with, but not only is there a power, under the 18th section of the Act of 1885, to disregard technical objections, but there is a positive enactment that a disregard of any form or instruction shall not of itself invalidate any list or notice. Even apart from that section I see nothing in any of these forms which creates any doubt or difficulty in finding out who had been properly objected to. No doubt the form was prepared as though for an objection to one name only, but it has been sanctioned by authority that there could be no objection to the names of all the persons objected to appearing on one list. The object of the Legislature seems to have been arrived at by a correct list being given to the overseer of the persons upon whom individual notices of objection had been served. It seems, therefore, that we are bound to give effect to these notices, and that if we did not we should be disobeying the terms of the 18th section of the Act of 1885.

VAUGHAN WILLIAMS, J.—I am of the same opinion. The objection here is that these notices are not in the form provided in the schedule to the Registration Order, 1889. If the departure from the form is a departure in point of form only, but not in substance, then by section 18 of the Act of 1885 we ought not to give effect to the departure. The real question here is whether this is a substantial departure from the form, a departure so as to make the notice given substantially different from that given in the form. If the departure be such as to raise any question which could not be raised if the form had been followed, then it is a substantial departure, otherwise it is not a substantial departure. Here in substance the objection taken is that the notice of objection to the overseers has not been properly authenticated. If I thought that the notice was not properly authenticated, I should hold that a departure in substance, and not merely in form, and that the notice was bad. When we come to look at the notices themselves, it seems to me that there can be no further question as to the authentication than if the signature of the objector had followed the names. I hold, therefore, that these notices have been properly authenticated, and that they are good notices of objection.

LAWRANCE, J., concurred.

Appeal in Sutton *v.* Wade *dismissed; appeal in* Gale *v.* Overend *and in* Moore *v.* Atkinson *allowed.*

Sutton v. *Wade.*—Solicitor for the appellant, *C. S. Gover.*

Solicitors for the respondent, *Oldman & Clabburn.*

Gale v. *Overend.*—Solicitors for the appellant, *Paterson, Snow, Bloxam, & Kinder.*

Solicitors for the respondent, *Ford & Warren.*

Moore v. *Atkinson.*—Solicitor for the appellant, *J. E. Shaw.*

Solicitors for the respondent, *Helder & Roberts.*

Q. B. Div. (Day and Lawrance, JJ.) Nov. 3.

POWELL *v.* THOMAS. (*a.*)

Practice—Appeal from county court—Notice of motion—Service of—R. S. C., 1883, *ord.* 59, *rr.* 10, 12.

Service of notice of motion upon the London agent of a country solicitor, on appeal from a county court, is not sufficient to satisfy ord. 59, *r.* 12.

Appeal from Glamorganshire County Court.

A preliminary objection to the appeal was taken on the ground that a notice of motion had not been served on the solicitor for the respondents at Swansea within twenty-one days from the date of the order, although it was alleged that a notice of motion had been served within this time upon his London agents.

E. Ford, for the respondents.

Ashton Cross, for the appellants.

The COURT upheld the objection, and expressed the opinion that in an appeal from a county court service of notice of motion on a London agent of a country solicitor is not sufficient to satisfy ord. 59, r. 12.

Appeal dismissed.

Solicitor for the appellants, *R. White*, for *Cox*, Swansea.

Solicitors for the respondents, *Thomas & Metcalfe*, for *Leyson*, Swansea.

(*a.*) Reported by G. K. PALEY, Esq., Barrister-at-Law.

Court of Appeal.

From Chan. Div. Jan. 16.

In re DICK.
LOPES *v.* HUME-DICK. (*a.*)

Trustee—Investment—Power to vary existing investments —Trust Investment Act, 1889 (52 *&* 53 *Vict. c.* 32), *ss.* 3, 6.

In the absence of any express prohibition in the instrument creating the trust, the power to vary investments given by section 3 *of the Trust Investment Act,* 1889, *applies as well to investments—of the classes specified in sub-sections* (a) *to* (o) *of that section—existing prior to, or not made under, the Act of* 1889, *as to investments made under the powers given by that Act.*

In re Manchester Royal Infirmary, 38 *W. R.* 460, 43 *Ch. D.* 420, *disapproved on this point.*

Appeal from Stirling, J.

Mr. Quintin Dick, by his will dated August 30, 1844, gave all his real and personal estate to his executors and trustees therein named, upon trust to convert into money such part of the same as should not consist of money or securities for money or Government securities, and to invest the same in the public stocks or funds of Great Britain, and to stand possessed of the same and all other his residuary estate upon trust to lay out the same or any part thereof in the purchase of freehold lands of inheritance in Ireland to be vested in the trustees upon the trusts and to and for the uses, &c., therein mentioned.

The testator died on March 26, 1858. The present trustees of the will were Lord Justice Lopes and Sir Gustavus Hume. Part of the testator's residuary estate had been laid out in the purchase of lands in Ireland, but part of it still remained invested in Government stocks in the names of the trustees. The trustees had been requested by the present tenant for life of the residuary estate to sell so much of the said Government stocks as would be sufficient to raise a sum of £106,900 cash, and to invest this sum upon mortgage of certain freehold estates in the county of Wilts.

The will contained no power to vary investments, and although it did not authorize an investment of the trust funds in a mortgage of real estate, it did not expressly prohibit such an investment.

An originating summons was accordingly taken out by the trustees to determine the question whether they had power under the Trust Investment Act, 1889, to make the proposed investment.

Stirling, J., sitting in chambers, held, on the authority of *In re Manchester Royal Infirmary*, 38 W. R. 460, 43 Ch. D. 420 (a decision of North, J.), that the trustees, having no power under the will to vary investments, were not authorized by the Trust Investment Act, 1889 (52 & 53 Vict. c. 32), to sell out existing investments for the purpose of investing the proceeds in the manner sanctioned by the Act.

The material sections of the Trust Investment Act, 1889, are as follows:—Section 3, which enacts: "It shall be lawful for a trustee, unless expressly forbidden by the instrument (if any) creating the trust, to invest any trust funds in his hands in the manner following—that is to say (*a*) In any of the parliamentary stocks or public funds or Government securities of the United Kingdom; (*b*) On real or heritable securities in Great Britain or Ireland;" and the section contains a series of other sub-sections running down to (*o*) enumerating various other classes of investments, and then concludes as follows: "And also from time to time to vary any such investment."

Section 6 enacts:—"This Act shall apply as well to trusts created before as to trusts created after the passing of this Act, and the powers hereby conferred shall be in addition to the powers conferred by the instrument (if any) creating the trust."

From this decision the tenant for life appealed.

Phipson Beale, Q.C., and *Farwell*, for the appellant.—The words "any trust funds in his hands," contained in section 3, although no doubt they apply to and include money or cash in the hands of a trustee, do not necessarily mean only money or cash in the hands of the trustee, but include also existing investments standing in his name. The words "in his hands" cannot be construed literally, as a trustee never keeps trust moneys actually in his own hands, but would pay them into a bank. [KAY, L.J.—But the words may mean money awaiting investment in the hands of the trustee.] No doubt they include that, but they are not confined to that. The words at the end of section 3, "and also . . . to vary any such investment," clearly show that the section applies to existing investments of a like nature to those previously specified. Section 6 expressly says that the Act is retrospective, and that the powers conferred thereby are to be in addition to the powers conferred by the trust instrument. The whole object and scope of the Act is to enlarge trustees' power of investment; it is an enabling Act, and if there be any ambiguity in the words of section 3, a wide construction ought to be put on them. *In re Warde*, 2 J. & H. 191, 10 W. R. Ch. Dig. 50, was a decision on Lord St. Leonards' Act, 1859 (22 & 23 Vict. c. 35), s. 32, but in that Act there was no power at all given to vary investments, and therefore that case is no authority on the present Act. In *In re Clergy Orphan Corporation*, 22 W. R. 789, L. R. 18 Eq. 280, which turned on section 11 of the 23 & 24 Vict. c. 38, Malins, V.C., held that the trustees of a charity might sell out trust funds then invested in Consols for the purpose of reinvestment in other securities authorized by the general order of February 1, 1861, with regard to cash under the control of the court. The view taken of the Act of 1889 by North, J., in *In re Manchester Royal Infirmary* was not necessary for the decision in that case. [KAY, L.J.—Suppose the trust instrument gives power to invest in investments, some of which are authorized by section 3 of the Act of 1889, and some of which are not so authorized. Do you say that the effect of the Act is to give power to vary the former, but not the latter?] Yes; the proper mode of construction is to read into the investment clause contained in the trust instrument the words of section 3 of the Act.

They referred also to *Waite* v. *Littlewood*, 41 L. J. Ch. 636, and *In re Cooper's Trusts*, W. N., 1873, p. 87.

Hornell, for the trustees.

Cozens-Hardy, Q.C., and *E. Beaumont*, for the remaindermen, the respondents.—The words, "and also to vary any such investment," only apply to investments made under the powers given by the Act of 1889, and not to investments already existing when the Act came into operation, and which were, therefore, not made under the powers given by the Act. Section 3 only gives a trustee power to invest "any trust funds in his hands," and those words only cover "money in the hands of a trustee awaiting investment," and do not apply to existing investments. The same words, "any trust funds in his hands,"

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

occur in Lord St. Leonards' Act, 1859, and it was held in *In re Warde* that they only covered money awaiting investment in the hands of a trustee, and did not apply to funds already invested. That decision was well known when the Act of 1889 was passed; and as section 3 of that Act uses the very same words as Lord St. Leonards' Act, it is clear that the words, "and also to vary any such investment," were not intended to apply to existing investments, but only to investments made under the authority of the Act of 1889. That Act, therefore, does not touch the present case.

Phipson Beale, Q.C., was not called on to reply.

LINDLEY, L.J.—The question raised on this appeal is one of very great importance to all trustees who have moneys to invest, or who have money invested. Now the facts with which we have to deal are these. Under a will made in 1844, certain trustees have considerable sums of money invested in Government securities—properly invested under the trusts of the will. They have power under the will to sell out those investments, and invest the money in land; but at present they have got the money invested in their names in Government securities, and they had no power under the will to vary the securities which they were empowered to invest their trust moneys upon.

Now, in that state of things, in 1888 the Government reduced the interest or dividend payable upon Government securities. The effect of that was, of course, very great indeed, and in consequence of that reduction it was seen that it was necessary, or, if not necessary, that it was, at least, desirable to extend the powers which were formerly enjoyed by trustees as regards the investment of trust moneys. That being the general object of this Act of Parliament, we have now to construe it and to apply it to the present state of things. [The Lord Justice read section 6 of the Trust Investment Act, 1889, and continued:—] That is a section which is in some respects remarkable, because it says in plain language that the Act shall apply to trustees who hold moneys under trusts created before the passing of the Act; and the whole object is to redress the inconvenience and, perhaps, injustice which would be the inevitable result of the reduction of the interest payable upon Government securities if there were no such Act as this. Then, having made the Act perfectly retrospective, as I understand it, section 3 says this:—"It shall be lawful for a trustee, unless expressly forbidden by the instrument (if any) creating the trust, to invest the trust funds in his hands in manner following, that is to say."

Now the expression, "trust funds in his hands," probably does apply to trust funds requiring investment. I think probably that is so. They may invest such moneys in a great variety of investments, which are specified in sub-sections beginning with (*a*) and running down to (*o*); and then the section says this, "And also from time to time to vary any such investment." Now this last expression, "and also from time to time to vary any such investment," appears to me to be of the utmost importance. There were no such words in Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 32), the Act on which *In re Warde* was decided; and without saying whether *In re Warde* was right or wrong, which is a matter which concerns nobody, it seems to me that *In re Warde* is no authority on the construction of the present Act at all. It is said the words are capable of being read in this sense, that the power to vary shall only apply to cases in which money has been invested under this Act of Parliament. That is one construction which is possible; but the other construction, which I confess I prefer myself, is this, that it is a power to vary any of the investments enumerated in section 3, sub-sections (*a*) to (*o*), whether made under the Act or not. The second construction appears to me to be that which is most in accordance with the objects which the Legislature had in view in passing that Act. There is no authority against that construction, except the intimation of opinion, which there clearly was, on the part of North, J., in *In re Manchester Royal Infirmary*. I cannot confirm that view. I think that the view adopted by the learned judge is too narrow, and would be most unfortunate for all trustees and their *cestui que trusts*. I am of opinion that a wider view ought to prevail, and consequently that this appeal ought to be allowed.

FRY, L.J.—I am of the same opinion. We must approach the consideration of this statute with the knowledge that from the year 1859 down to 1889—that is, a period of thirty years—various attempts have been made by the Legislature to enlarge the powers of trustees with regard to their investments. The decreasing of the difficulty of making investments of a kind which would be sought for by trustees was, no doubt, the object and motive of that legislation. We must, therefore, look upon this as an enabling statute; and, as already has been pointed out, it is expressly retrospective, and is therefore an enabling statute, not only in respect to investments and instruments made and executed after the passing of the Act, but also with regard to those made before the passing of the Act.

Now, bearing that in mind, I approach the construction of section 3, which is the most material section, and I find that it enables trustees, unless summarily forbidden by the instrument creating the trust (if any), to invest any trust funds in their hands in the manner which is mentioned. It gives a very large discretion and power of selection among a series of trust funds.

Now, pausing there, it seems to me that only indicates moneys which, according to the ordinary description, are in the hands of trustees for investment. It does not apply to sums already invested. Then come the words at the end of the section giving power, "and also from time to vary any such investment." Such as what? The Legislature has not told us. It seems to me that it must mean either any such investments as are hereinbefore mentioned, or any such investments as shall hereafter be made under the power conferred by this section. Which of the two things should it be? In my opinion, it is the former, and it should be read as if the words "any such investment" were followed by the words "as hereinbefore mentioned." I think, therefore, the power of variation applies to investments of the specified character, whether the investment be made by the testator during his lifetime or whether the investment be made by the trustees under a power to invest. Now I have come to that conclusion, induced in the first place very largely by the view that I take of the object of the Act—the object of the Act being to enlarge the powers of selection of investments given to trustees who are exposed to the difficulty of obtaining remunerative investments of a particular kind. But there are other circumstances in the case which incline me to the same conclusion. Now, in the first place, it would be a very strange result if, in a case where a testator leaving trust funds invested in securities of the description enumerated in the Act, *e.g.*, parliamentary stocks, and not giving any power of variation, and leaving cash which was to be invested by the trustees also in parliamentary stock, the trustees should find themselves placed in this position, viz., that they had power to vary one portion of the stock—viz., the parliamentary stock pur-

chased with the cash after the passing of the Act—but that they had not power to vary the other portion of the same class of stock invested in before the Act. I think that is an impossible conclusion, and it is not one which we ought to arrive at. But, again, the fact that the Act applies to documents existing at the passing of the Act seems to me to be very strong to show that it must apply to enable a variation to be made of the stocks in which investments have been made under the power of the existing document, because otherwise it is obvious we should be doubting very much the operation of the power of the section. But, again, the 6th section provides "that the powers hereby conferred shall be in addition to the powers conferred by the instrument creating the trust." It consequently follows that the true mode of construing this power is, as was said by Mr. Farwell, to read it into the will, and then the power to vary investments applies to all investments made under the will and under the Act of Parliament, unless they are excluded by the express language of the will. The intention of the Act evidently is, that the powers given by the Act should be in addition to the powers of the trustees under the will.

For these reasons I think that the decision of the learned judge below, following as he did the view expressed by North, J., in *In re Manchester Royal Infirmary*, was wrong, and that the trustees have power to vary.

KAY, L.J.—It seems that there is considerable ambiguity in construing this Act of Parliament. For my part I cannot wonder that the learned judge should arrive at the conclusion which he did, looking at the existing decisions and the words of this Act; but upon the whole I think the true mode of dealing with an ambiguity of this kind is to look at what was the scope and intention of the Act of Parliament, and to construe the Act in such a manner as will best carry out the general purpose and object of the Act. Now the words of the Act have been referred to, and I will not read them again, and certain illustrations have been given of what would be the consequence of reading the words of the Act giving the power of variation of investments as applying only to investments made under the Act. It is extremely easy to put difficult cases with regard to either view of construction. The power to vary such investments, even if you read the whole section into the will, only means a power to vary such investments as are mentioned in section 3. It is quite possible there might be under the will or settlement investments not mentioned in section 3, which, if the will or settlement contained no power to vary, would not be variable under the power given in this section, even if you read it into the will. That is a difficulty which was put to counsel during the argument, and a difficulty which would still remain even after the construction which the court has put upon it. However, it is easy to put difficult cases whichever construction be adopted, and it seems to me that having regard to the object of this statute, which was, speaking generally, to enlarge the powers of trustees even under existing trusts as well as under trusts created in future, it is more consistent with that object to give the wider interpretation to this power of variation than the narrower one; and I, therefore, prefer to say that this power of varying investments means varying such investments as are mentioned in section 3 of the Act, whether those investments are made under the power given by the Act, or whether they were made before the Act by the settlor or testator himself, or by the trustees since the trust has arisen. If the investments so made, whenever made, are within any of the investments described in sub-sections (*a*) to (*o*) in section 3 of the Act, then I think the words at the end of that section give power to vary such investments.

For these reasons I agree with the other members of the Court of Appeal.

I fear that our decision will subject trustees to greater importunities on the part of tenants for life than heretofore, and, therefore, I wish to add that in changing existing investments trustees have to exercise a discretion, and that it would not be a proper exercise of that discretion to change the investment merely for the sake of increasing the income of the life tenant, if in so doing the security of the capital fund is diminished.

Appeal allowed.

Solicitors for the appellant, *Arnold & Henry White.*

Solicitors for the respondents, *Munns & Longden.*

From Chan. Div. Dec. 3, 18.

In re MCGOWAN.
MCGOWAN *v.* MURRAY. (*a.*)

Solicitor—Costs—Taxation—Negotiating sale subject to sanction of court—Fees paid to estate agents to obtain evidence as to value in order to procure sanction—"Commission"—Scale fee for negotiating sale by private contract—General Order under Solicitors' Remuneration Act, 1881, *Schedule I., Part I., r.* 11.

Where real estate is being sold by private contract under the order and direction of the court in an administration action, a solicitor who does everything that a solicitor can do in arranging the sale and the price and terms and conditions thereof, which only further require the sanction of the court to become binding, "arranges the sale," &c., within the meaning of rule 11 *of the General Order (under the Solicitors' Remuneration Act,* 1881), *Schedule I., Part I., and is, therefore, not disentitled to the scale fee "for negotiating a sale of property by private contract" under the scale of charges in Schedule I., Part I., aforesaid, by the mere fact that the contract for sale does not become a binding one till sanctioned by the court, provided that it is ultimately so sanctioned and an actual sale is consequently effected.*

Fees paid or payable by the client in such a case to valuers (though they may be auctioneers or estate agents), not for assisting to negotiate the sale, but in order to obtain their evidence to satisfy the court that the price offered is a fair and proper one, and thus obtain its necessary sanction, are not "commission paid by the client to an auctioneer or estate or other agent" within the meaning of the said rule, so as to disentitle the solicitor to the aforesaid scale fee.

Decision of Kay, J. (ante, *p.* 90), *reversed.*

Appeal from Kay, J.

This was an appeal by the defendant, and by a party having leave to attend, from an order of Kay, J., disallowing objections to taxation in this action, in which real estate was being administered by the court.

It appeared that the trustees of the estate which was the subject of the action had, during its pendency, conducted through their solicitor negotiations for the sale of the property under administration. The solicitor carried the negotiations to a successful issue to the extent of procuring an offer from a bank to purchase it, but the agreement which, consequently upon that offer, was entered into for the

(*a.*) Reported by R. H. DEANE, Esq., Barrister-at-Law.

purchase of the property by the bank, was (the estate being under administration by the court) necessarily conditional upon the sanction of the court being obtained. The solicitor got affidavits (to satisfy the court that the price offered was fair and proper) from two skilled valuers, who were estate agents, for which he paid them a small fee, which he charged to his clients. The court being satisfied upon the evidence procured by the solicitor (including the affidavits by the two skilled valuers) that the price offered was a fair and proper one, sanctioned the sale.

The General Order made in pursuance of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), provides, by Schedule I., Part I., r. 11 (*inter alia*), that "the scale for negotiating shall apply to cases where the solicitor of a vendor or purchaser arranges the sale or purchase, and the price and terms and conditions thereof, and no commission is paid by the client to an auctioneer or estate or other agent." The scale fee for "negotiating a sale of property by private contract" appears at the beginning of the scale of charges in Schedule I., Part I., in the General Order aforesaid.

When the costs came to be taxed, the taxing master allowed the costs of obtaining the sanction of the court, but disallowed the scale fee for negotiating (which the solicitor had charged in his bill of costs), mainly on the ground that commission had been paid to estate agents (referring to the fees paid to the valuers).

The question having come before Kay, J., on a summons to review the taxation, he held that the word "arranges," in rule 11, meant "finally arranges, so that a binding contract is created," and that inasmuch as the bank here was not bound until the court sanctioned the agreement, the sale could not be said to have been finally arranged till such sanction had been given to it, and the solicitor therefore had not arranged the sale within the meaning of rule 11. The judge accordingly dismissed the summons, and upheld the decision of the taxing master (see the report, *ante*, p. 90).

From that judgment the defendant and A. Murray (a party attending) appealed.

Sir H. Davey, Q.C., and *J. D. Davenport*, for the appellants.—The negotiation was in fact complete, notwithstanding that the sanction of the court was required to make the contract binding; and with respect to the commission paid to the estate agent, it was not paid for arranging the sale. In *Parker* v. *Blenkhorn* and *Newbould* v. *Bailward*, 37 W. R. 401, 14 App. Cas. 1 (before the House of Lords), in which the decision of this court in *In re Newbould*, 36 W. R. 161, 20 Q. B. D. 204, was reversed, it was held that even where the auctioneer's commission is paid by the client, rule 11 does not deprive the solicitor of all remuneration for work done in respect of the conduct of the sale, but that under the General Order, r. 2 (*c*), he is entitled to a *quantum meruit* for such work, the remuneration to be regulated according to the old system as altered by Schedule II. Here the solicitor has been allowed nothing at all for the negotiating. The scale fees apply equally to sales in court as to outside sales: *Stanford* v. *Roberts*, 32 W. R. 404, 26 Ch. D. 155; *In re Merchant Taylors' Co.*, 33 W. R. 693, 30 Ch. D. 28; *Humphreys* v. *Jones*, 34 W. R. 1, 31 Ch. D. 30, 32. All that rule 11 means is that the solicitor is not to be remunerated according to the scale unless he does the work himself; so that, if, for instance, the negotiation is managed by an estate agent, the solicitor is not to be paid for it, but is simply to be paid a *quantum meruit* for what he has done, if he has done anything: *In re Wilson* (a lunatic), 29 Ch. D. 790, 34 W. R. Dig. 185. The negotiation is finished before the matter goes to the court for its approval. As to the amount paid to the valuers, it was so paid to obtain the necessary evidence of value to lay before the court—it was not paid to them as agents for conducting the negotiation.

Levett, for the respondents.—The judgment of the learned judge is right. The negotiation is not complete until the court has sanctioned the agreement. It might have come to nothing through the non-approval of the court. The solicitor has not done the whole of the work. If he is to have the scale fee he must himself advise as to the value of the property to be sold. How can it be said that the sale has been arranged when no one is bound? Having taken part of the costs on the *quantum meruit* footing, he cannot take the rest according to the scale. Rule 11 lays down two conditions for entitling the solicitor to be paid by the scale: (1) he must arrange the sale and the price and terms and conditions thereof; and (2) no commission must be paid by the client to an auctioneer or estate or other agent. Neither of these conditions has been complied with in this case. The client is charged in the bill of costs with the amount paid to the agents. The arranging of the price could not be complete until the sanction of the court is obtained, and that could not be obtained without the skilled evidence of an estate agent to show that the price offered is a fair and proper one. [BOWEN, L.J.—Does not the solicitor arrange the price when he has done all that a solicitor as such can do to arrange it?] No! Obtaining an offer is not arranging the sale. [BOWEN, L.J.—Then the scale can only apply where the solicitor has authority to contract?] Unless negotiating a sale is equivalent to merely getting an offer, the learned judge was right. The price here was not arrived at without payment of a fee to an estate agent. [*Sir H. Davey, Q.C.*, undertook that, if necessary, the charge for paying the agent should be struck out of the bill of costs, as it appeared from *In re Wilson*, 29 Ch. D., on p. 794, that if the solicitor pays the agent out of his own pocket he can claim the scale fee.] The case ought to be decided as it stands, and not altered in the way proposed. It is well settled practice that you must stand on your objections: R. S. C., 1883, ord. 65, r. 27, sub-rule 41. Points not raised in the objections before the taxing master cannot be taken upon the hearing of a summons to review: *In re Nation, Nation* v. *Hamilton*, 57 L. T. N. S. 648, 36 W. R. Dig. 56. [BOWEN, L.J.—The court can impose terms.] According to their own statement, the trustees consulted the skilled person before verbally accepting the offer, and it was only on that advice that they did accept it. Therefore, the price was not arranged by the solicitor as required by the rule.

LINDLEY, L.J.—We need not trouble you, Sir Horace Davey. This case raises a very important question upon the taxation of solicitors' bills of costs, where sales are conducted under the order or direction of the court. Everyone knows that in cases of that kind there never is or can be any binding contract until the approval of the court has been obtained. Every sale under the direction of the court takes this turn:—Proposals are laid before the court for its approval; if the court does not approve, of course the proposals go off, or have to be modified. If the court does approve them, of course there is a binding contract. The rule relating to this matter which we have to consider is to be found in Schedule I., Part I. of the General Order made under the Solicitors' Remuneration Act. The schedule says this, in Part I., "Scale of Charges on Sales, Purchases, and Mortgages, and rules applicable thereto." Then "Vendor's

solicitor for negotiating a sale of property by private contract, 20s. per £100." Then there are the words, "For sale of property by public auction," which I may pass over. Then there is an item for deducing title, which I only refer to because it includes the "preparation of contract or conditions of sale," so much. Then in connection with that we have rule 11: "The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer." That does not apply here, because this was a sale by private contract. Then it goes on: "The scale for negotiating shall apply in cases where the solicitor of a vendor or purchaser arranges the sale or purchase, and the price and terms and conditions thereof, and no commission is paid by the client to the auctioneer or estate or other agent."

Now the facts in this case were shortly as follows. A lady whose estate was being administered in Chancery was entitled to £6,000 upon mortgage of some property, and there was a foreclosure order made. I do not think it had been made absolute, but it was close upon being made absolute, and steps were taken to have the property sold. The solicitor to the trust had an offer from some bankers. They said they would buy it out and out for £5,000. He thought that a fair price. He knew perfectly well that, even if it were a fair price, he could not effect a sale on behalf of his client at that or any other price without obtaining the sanction of the court; and he knew he could not obtain that sanction without laying before the court proper evidence that the price was a fair one. So that what he does is this: He goes to certain gentlemen who he knew had valued the property some years before, and asks them whether £5,000 was a fair price. They said it was, and he got them afterwards to make an affidavit to that effect, for which he paid three guineas and a half, and one guinea. He carries the case into court, and the sale at £5,000 is approved. Then he says, "Now pay me for negotiating that sale the scale charges, and pay me in addition what I have paid these two gentlemen for satisfying the court that the proposals I have laid before the court are fit and proper and ought to be allowed."

The taxing master has disallowed that, and Kay, J., has upheld the taxing master's decision. The taxing master disallowed the claim for two reasons: "First of all," he says, "you have not negotiated the sale within the meaning of this rule; and, secondly, your client has paid commission to an agent."

Now let us see what the first proposition involves. I think I do not misunderstand the taxing master, who is an extremely experienced officer, when I construe his observations as amounting to an intimation of opinion upon his part that this scale fee never applies to sales under the direction of the court. His ninth observation is this:—"It is not at all clear to my mind that, where the sale or purchase has to be approved by the court, that negotiation fee can ever be supported, as in every such case a considerable sum in addition to the negotiation fee must be paid by the client, and this the solicitor knows before starting on the business." Now it appears to me there is a little confusion of thought there as to what "negotiation" means. What is a solicitor who has the conduct of the sale in court to do? What is his business as a negotiator? I cannot understand that it is anything more than this:—To obtain all the terms and all the conditions (including the cost price) which are to be laid before the court. It is his business to negotiate those—it is not his business as negotiator to see to their performance. That is quite another matter. But when he draws up and finally settles the proposals, which are laid before the court for its approval, that appears to me to finish the part of the business which can properly be called negotiation. If in the course of doing that he charges his client, or his client pays or has to pay—I do not attach any importance to actual payment—if in the course of discharging those duties which are involved in the negotiation, his client pays, according to the language of the rule, any commission to an auctioneer, estate or other agent, then the scale fee is not applicable.

Now, supposing that I am right to that extent, it appears to me that this solicitor did in the language of this rule, as the solicitor of the vendor, arrange the sale, and the price and the terms and conditions thereof—that is to say, he brought the parties to a point, and said, "There are the terms, there is the price, and there are the conditions." That is the negotiation. Therefore, so far it appears to me he is within the rule.

Now it is said he is excluded by the second clause of this rule, "and no commission is paid by the client to an auctioneer or estate or other agent." That appears to me to mean necessarily this, that no commission is paid by the client, or payable—I put that word in—"to an auctioneer or estate or other agent," as part of the negotiation. It cannot be that no fee is to be paid, or no commission is to be paid, by the client while the negotiation is pending—that is not what the rule prohibits.

Now, what the solicitor has done is this; I take the facts in substance from Mr. Tatham's affidavit, which is obviously a truthful one, and from what is stated in the objections, which is to the same effect. What Mr. Tatham says in substance is this:—"I negotiated the sale, but I knew perfectly well, in order that that condition of obtaining the approval of the court should be performed, that I must obtain evidence to satisfy the court that the contract was a proper one; and it was for that purpose that I paid these fees, and not as part of the negotiation." And he says, "I am entitled to the scale fees plus these." I think he is right on that. Mr. Levett says that in this particular case the facts are not quite in accordance with the statement I have made. He says, in effect, "You, the solicitor, went and negotiated with this surveyor, and even if you did not pay him, you became liable to pay him for it as part of the negotiations." Well, the solicitor explains that; he says, "I might have gone to the surveyor after I had got this proposal, but I did not go after that, because I knew perfectly well it would be absurd for me to go to the court unless I had got the evidence that the price was fair, and therefore I got the surveyor's opinion as to that before, instead of after." Still the question arises, Did he get that opinion as part of the negotiations, or did he get it for the purpose of performing the condition? It appears to me that he got it for the latter purpose, and that the view taken by the solicitor is right, and that the appeal must be allowed.

BOWEN, L.J.—I am of the same opinion, and I must add my views, as we are differing from the learned judge who decided the case. I begin by stating that we are not now discussing the case, nor are we discussing the construction of the rule with regard to a case, in which the sale has gone off, and what I am going to say applies to cases in which the sale has not gone off, but has been effected, and in which the negotiations with the agent have terminated in a successful sale.

Now what does the rule say? It lays down two conditions upon which alone the scale for negotiating is to apply. The first is an affirmative or positive condition. The solicitor must have arranged the sale

or purchase, and the price and the terms and conditions thereof. The second is a negative condition. He must have done that, but the client must not have paid any commission to an auctioneer or estate or other agent. The first is affirmative. The second, which also must exist before the scale can be applied, is a negative condition. Not only must the first condition have been fulfilled, but the prohibition of the second condition must not have been infringed. When the second condition says that no commission must be paid by the client, it means, I think, it must neither be paid, nor must the client be made liable in law to pay, because I think the one is really the same as the other in the eyes of the law. Where those two conditions are fulfilled the scale applies.

Now, the first observation which it seems to me to be necessary to make is that this rule cannot be intended not to apply to cases where the agent has only power to negotiate, it cannot be that it is only meant to be applicable in cases where the agent has power to contract, and to complete the whole contract, as well as to complete the negotiation. If that is so, What does it mean? What does the first condition mean when it says that the solicitor, before the scale applies, must arrange the sale or purchase, and the price and terms and conditions thereof? It means, I think, in cases like that which we are considering, where the sale is ultimately effected, that the solicitor "arranges," if he brings the negotiation to a close which leaves his principal free to accept or not, and his principal afterwards does accept. Negotiation, I should have thought, in the ordinary meaning of the English language, is that which passes between parties or their agents, in the course of, or incident to, the making of the contract; and if the negotiation is brought to a close which leaves the principal at liberty to say, "You have done this; I accept the offer," then the agent has done all that a negotiating agent can do, and within the meaning of the rule he has "arranged" the sale, the sale afterwards being effected. Mr. Levett says that the arrangement is not complete if the principal has had to consult somebody else, or, if the principal chooses to consult somebody else, before he consents. Really, with great respect to one of the most ingenious arguments we have had in this court, it is an absurdity, and Mr. Levett had to admit that his argument went to this—that a solicitor had not arranged a sale if the principal went down to Brighton to consult his wife before he accepted. Now, is that possible? But if the solicitor has nevertheless arranged completely, although the principal may take time to consult a third person, why is it not arranged completely as regards the solicitor, and as regards a third party, because the principal has to get the sanction of the court before he can effectuate the sale? It seems to me that it is clear that the solicitor has "arranged" if he has done all that a man can do who is appointed an agent to negotiate. If that is so, then the first branch of the definition is fulfilled. The solicitor here has arranged the sale.

Is the negative condition complied with? Has any commission been paid by the client to an auctioneer or estate or other agent? The answer seems to me to be clear—that no commission has been paid at all to anybody. A commission means a payment on a particular scale paid to an agent; but this fee has not been paid by the solicitor on behalf of the client to anybody as an agent. It was paid to obtain the expert evidence of a witness. That is really what it was intended for. However you characterize it, the last words, it seems to me, in which you can characterize it, are as commission paid to an auctioner or estate or other agent.

To my mind the learned judge was wrong, with great respect to him, and it is clear where he went wrong—he thought that the rule was a much harder rule. The learned judge put a construction upon this rule which would exclude, it seems to me, from the operation of it a vast amount of business which the rule must have been intended to cover. It certainly covers, to my mind, cases in which the agent is appointed as agent to negotiate only, and I think it certainly ought to cover cases in which sales are effected under the sanction of the court. The learned judge says:—"Arrange, I think, in this rule 11, which only applies to negotiations, means that the negotiation must be a complete negotiation resulting in a binding contract."

If he means by that that the solicitor cannot get the fee because he is only an agent to negotiate, it seems to me that it makes the rule inapplicable to a vast mass of business, and if he means that, to make the scale fee applicable, the negotiation must result in a binding contract by the principal accepting that which has been done without being obliged to apply for the sanction of the court, I do not myself see any valid reason for the distinction.

FRY, L.J.—I will endeavour with what brevity I can to express my concurrence in the opinions of my learned brethren. We are concerned with interpreting a rule which describes under what circumstances the vendor's solicitor is to be entitled to a fee for negotiating a sale of property by private contract. Now it appears to me that there is no better ascertained distinction than that which exists between negotiating for a contract and the contract itself, and though the negotiation continues up to the point when the consent of the consenting party is given, it ceases there. Now the cases in which the scale fee is applicable are defined in these words: "The scale fee for negotiating shall apply in cases where the solicitor of a vendor or purchaser arranges the sale or purchase, and the price and terms and conditions thereof." According to my view of the facts of this case the solicitor did, in fact, arrange the sale, the price, the terms, and the conditions. He had an interview with the bank manager, who he found was willing to give a sum of £5,000. He then settled the terms with the bank manager or the solicitor of the bank—he arranged with them the terms and conditions of the contract, and then presented it in that form to the court. I think, therefore, in point of fact, he did arrange all the things that are there mentioned.

Now it is said by the learned judge that in such a case as this the solicitor does not "arrange," but that the court "arranges." We are not dealing with a case in which the court has refused to accede to or approve of the terms which had been settled by the solicitor. It may be that there are circumstances in which it might be truly said that the judge in chambers has arranged the terms or the conditions of sale. About those cases I say nothing. Nothing of the kind occurs in the present instance. So far as we have heard, the contract as settled by Mr. Tatham in conjunction with the solicitors of the bank was adopted and approved by the court. Therefore I think the affirmative words are amply satisfied in this case.

The second inquiry is this. Has any commission been paid, or, I may say, is any commission payable, by the client to an auctioneer, or to an estate or other agent? The auctioneer is out of the question. The only thing that can be said is that two fees, one of three and a half guineas, and the other of one guinea, were paid to two gentlemen, who I suppose may be described as estate agents. They are called valuers, and no doubt carry on business as

estate agents. They were not employed in this case as agents, and therefore they could earn no commission, and therefore no commission was either paid or payable to them. What was paid, or is payable, to them, are fees, in the one case for inspecting, and making an affidavit as to the value of, the property, and in the other for making an affidavit with regard to the value of the property without inspecting. They are not commissions. I think the solicitor, therefore, has brought his case within the very terms, and within the meaning and spirit, of this rule, and therefore this appeal must be allowed.

Appeal allowed.

Solicitors for the appellants, *Cunliffes & Davenport*, for *Darbyshire, Tatham, & Worthington*, Manchester.

Solicitors for the respondents, *Bower, Cotton, & Bower.*

From Q. B. Div. Jan. 12.

SHOWERS AND OTHERS, *Appellants.*
ASSESSMENT COMMITTEE OF THE CHELMSFORD UNION, *Respondents.* (*a.*)

Poor rate — Rateability—Residence of police officers—Occupation for public purposes—Police station.

Certain buildings under one roof and surrounded by a wall consisted in part of private residences, occupied by the appellants, who were the chief constable and other officers of police, and their families, and in part of store rooms, parade ground, and stables used for police purposes. There were no cells used for the reception and detention of prisoners. All the buildings were used exclusively for police purposes, the Chief Constable being bound to reside there as a condition of his appointment. Each officer paid a rent for the premises occupied by him, such rent being deducted from his pay. The appellants having been assessed to the poor rate in respect of the buildings occupied by them as residences,

Held, that, upon the facts, the appellants had a separate beneficial occupation of the premises, which were used by them as private residences, and not for public purposes, and that they were therefore rateable in respect thereof.

Decision of the Queen's Bench Division, ante, *p.* 174, *affirmed.*

Appeal from the judgment of the Queen's Bench Division (reported, *ante*, p. 174), upon a case stated on appeal against a poor rate.

The case is fully set out in the report in the court below.

Channell, Q.C., and *Woollett*, for the appellants.

W. J. Grubbe and *W. B. Duffield*, for the respondents, the assessment committee, were not called upon.

The following cases were referred to in addition to those cited in the court below:—*Jones* v. *Mersey Docks*, 13 W. R. 1069, 11 H. L. Cas. 443, and *Reg.* v. *Stewart*, 6 W. R. 35, 8 E. & B. 360.

PER CURIAM (Lord ESHER, M.R., and BOWEN and FRY, L.JJ.):—The question in this case is simply one of fact. The appellants occupied these houses beneficially, and they paid a rent for them. It is clear upon the facts stated in the case that this building, called Springfield Court, is not one building. Each appellant occupied a separate house, and he occupied it as a private residence, and not for public purposes. The appellants, therefore, are liable to be rated. But, even assuming that this is all one building, still, upon the facts stated in the case, it is obvious that it is not a police-station, and within the rule of exemption on that ground. A police-station is a well-known term, and there are here none of the ordinary essentials of a police-station. The appeal must, therefore, be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Patersons, Snow, Bloxam, & Kinder*, for *H. & H. W. Gibson*, Ongar.

Solicitors for the respondents, *Duffield & Bruty.*

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

From Q. B. Div. Dec. 3, 8.

DE PASS *v.* CAPITAL AND INDUSTRIES CORPORATION (LIMITED).
VINALL (*Garnishee*). (*a.*)

Practice — Garnishee — Affidavit of judgment creditor alleging specific debt—Affidavit of garnishee specifically denying—Ord. 45, *r.* 1.

Where, on an application for a garnishee order, the applicant specifies a particular debt owed by the garnishee to the judgment debtor, it is not sufficient for the garnishee to deny that he owes that particular debt, but he must state that he is not indebted to the judgment debtor at all.

On such an application it is sufficient for the applicant to state that he is informed and believes that the garnishee is indebted to the judgment debtor.

Coren *v.* Barne, 37 *W. R.* 415, 22 *Q. B. D.* 249, *approved.*

Appeal from the decision of a divisional court (Mathew and Grantham, JJ.).

The plaintiff having recovered judgment for £148 in the action against the defendant, which remained unpaid, obtained a garnishee order *nisi* against Vinall on the following affidavit made by his solicitor:—"I am informed by Mr. W. E. Walker, the managing director of the defendant company, and verily believe, that F. J. Vinall, of 79. Camden-road, London, wine merchant, is indebted to the defendant company in the sum of £100 and upwards for unpaid calls due in respect of 300 shares held by him in the defendant company." Upon the application to make this order absolute Vinall appeared to show cause, and filed the following affidavit:—"I have paid to the Capital and Industries Corporation (Limited) all sums payable by me in respect of the 300 shares held by me in the corporation, save and except such sums as are still uncalled on such shares, and which sums I am advised I am not liable to pay until a call is properly made."

The master required Vinall to make an affidavit stating that he was not indebted to the company at all, and on Vinall's refusal referred the matter to the judge. Vaughan Williams, J., at chambers, after giving Vinall an opportunity of amending his affidavit in this respect, which Vinall declined to do, made the order absolute. The Divisional Court reversed this order, thinking that as the plaintiff had chosen in his affidavit to specify a particular debt it was sufficient for Vinall to deny that he owed that debt. The plaintiff appealed.

Winch, Q.C., and *Clavell Salter*, for the appellant.—The plaintiff has put more than was necessary in his affidavit. Under ord. 65, r. 1, he need only state that the third party "is indebted" to the debtor.

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

Chan. Div. North, J. Nov. 13.

In re JEFFERY.
BURT *v.* ARNOLD. (*a.*)

Infant — Contingent legacy — Income — Maintenance — Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict.* c. 41), *s.* 43.

A testator gave his residuary estate to trustees in trust for sale, conversion, and investment, and out of the income of the investments to pay certain life annuities, and subject thereto the fund was to be held upon trust for all and every the present and future-born children of his two daughters respectively (except a specified son of one of them) who, whether in the testator's lifetime or after his death, being a son or sons, should have attained or should attain the age of twenty-one years, or, being a daughter or daughters, should have attained or should attain that age or should have married or should marry.

Held, that the whole surplus income belonged to those grandchildren who had attained twenty-one at the time it accrued, and that section 43 of the Conveyancing and Law of Property Act, 1881, empowering trustees to apply for the maintenance of an infant the income of property held in trust for him contingently on attaining twenty-one, was not applicable to the case.

Adjourned summons.

William Jeffery by his will, dated the 1st of July, 1886, gave his residuary estate to F. Arnold and B. Blatch upon trust for sale and conversion and investment of the proceeds, and out of the income of the investments to pay certain life annuities, and the testator directed that, subject to the trusts thereinbefore declared, the proceeds of the sale and the investments thereof for the time being should be held upon trust for all and every the present and future born children of his son Clayton William Jeffery, and all and every the present and future born children (except W. C. Burt) of his daughter Matilda Jane Burt, and all and every the present and future born children of his daughter Paulina Mary Burt, who, "whether in my lifetime or after my decease, being a son or sons, shall have attained or shall attain the age of twenty-one years, or, being a daughter or daughters, shall have attained or shall attain that age or shall have married or shall marry," and if more than one in equal shares as tenants in common, such children of his sons and daughters to take *per capita* and not *per stirpes*. And the testator declared that the shares of his granddaughters not born in his lifetime should be for their separate use.

The testator also directed that the shares of his grandchildren born in his lifetime should be settled upon them and their children.

The testator died on the 20th of February, 1887, leaving his son Clayton William Jeffery, who afterwards married but had no children; his daughter Matilda Jane Burt, who had, besides W. C. Burt and a child who died a minor in the testator's lifetime, a son who was of age and a daughter who was under twenty-one and unmarried; and his daughter Paulina Mary Burt, who had nine children, four of whom were of age, and who was living apart from her husband and maintaining her children.

The surplus income of the testator's residuary estate after payment of the annuities given by his will was represented by a sum of £1,221 Consolidated £2¾ per Cent. Annuities standing in the names of the trustees.

This was an originating summons taken out by Paulina Mary Burt and her children, and served upon the trustees of the will and the son who was of age of Matilda Jane Burt, for the determination of the questions who were entitled to the surplus income, and whether Paulina Mary might be repaid out of the surplus income the moneys which had been expended by her for the maintenance of her children, and also whether part of the surplus income might be paid to her for the future maintenance of her infant children by virtue of section 43 of the Conveyancing Act, 1881.

Section 43 of the Conveyancing Act, 1881, enacts as follows: "(i.) Where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not.

"(ii.) The trustees shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year."

G. Curtis Price, for the plaintiffs.—This is a case in which the income of the shares to which the infants are entitled contingently on attaining twenty-one is applicable for the maintenance of the infants, and Mrs. Burt ought to be repaid out of the surplus income the sums she has expended on the maintenance of her infant children, and to receive part of the surplus income for their future maintenance: Conveyancing Act, 1881, s. 43 (i.); *Hill* v. *Grant*, 33 W. R. 511, 29 Ch. D. 331.

Coltman, for the defendant other than the trustees.—The surplus income of the trust fund belongs to those of the children who have for the time being attained twenty-one, and section 43 (i.) of the Conveyancing Act, 1881, is inapplicable to this case.

He referred to *Shepherd* v. *Ingram*, Amb. 448; *Mills* v. *Norris*, 5 Ves. jun. 335; *Scott* v. *Earl of Scarborough*, 1 Beav. 154.

Wright Taylor, for the trustees.

Curtis Price, in reply.—*Shepherd* v. *Ingram*, *Mills* v. *Norris*, and *Scott* v. *Earl of Scarborough* are at variance with the later case of *Brandon* v. *Aston*, 2 Y. & C. C. C. 24, 30.

NORTH, J.—The 43rd section of the Conveyancing Act, 1881, provides:—[His lordship read the section and proceeded.] Now, eliminating the words not applicable in the present case, it comes to this. Where property is held by trustees in trust for an infant either for life or for any greater interest contingently on his attaining twenty-one, the trustees may, at their discretion, pay to the infant's parent, or otherwise apply for the infant's maintenance, education, or benefit, the income of that property, or any part thereof. A construction, which I am bound by, has been given by the Court of Appeal to this section in the

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

case of *Hill* v. *Grant*. The decision is this, that section 43 of the Conveyancing Act, 1881, empowering trustees to apply towards the maintenance of an infant the income of property held in trust for him contingently on his attaining the age of twenty-one years, does not authorize the allowance of maintenance where, apart from the Act, the infant on attaining twenty-one would only be entitled to the legacy without interest. That decision settles the law as far as I am concerned. If the infants attain twenty-one would they be entitled to the past income of their shares? If not this section does not apply. Would an infant, on attaining twenty-one and so becoming entitled to a share, be entitled to say, "Where is the past income of my share, pay it over to me?" On reading the will it is impossible to say what the share will be which any infant will become entitled to on attaining twenty-one. If I cannot say what any share will be, it is impossible to give the income of any share or say what sum should be allowed for maintenance in respect of any share. If any share were vested, then I might consider whether, if an infant must receive something, I could not render the fund available for the maintenance of the infant; but here the infants are entitled contingently on attaining twenty-one. Then, again, is there any past income which an infant could call for on attaining his majority? The cases seem to show that the income of the trust fund belongs to the children who for the time being have attained twenty-one, according to *Shepherd* v. *Ingram*, *Mills* v. *Norris*, *Scott* v. *Earl of Scarborough*. It is suggested that the later case of *Brandon* v. *Aston* is at variance with these cases. But I do not think the point was decided in that case. I do not find that the adult children asked to have the income of the whole trust fund. The learned judge stated that he should allow the adult children the interest of their shares, which, if not otherwise right, might be supported by analogy to the course frequently taken by the court as to maintenance, and no parties objected.

Then there is the still later case of *Furneaux* v. *Rucker*, W. N., 1879, at p. 135, in which the circumstances are stated thus:—"Bequest in trust for the daughter of the testatrix for life, and after her decease for all her children living at the death of the testatrix who, being sons, should attain twenty-one or who, being daughters, should attain that age or marry, in equal shares. The daughter, who survived the testatrix, died, leaving three children, two sons and a daughter, born in the testatrix's lifetime. The Master of the Rolls considered that the income of the property up to the time when the eldest child attained twenty-one should fall into the residue, and that on his attaining twenty-one he was entitled to the whole of the income until the next child attained twenty-one, when the two eldest were entitled to share the income until the youngest attained a vested interest in the property, when the *corpus* would be divided between them in equal shares." This decision seems to be a decision in point; and I decide this case in the same way. I should be glad to decide the other way if I could.

Solicitors, *Harlow; Whitehouse & Etherington.*

Chan. Div. Stirling, J. } Oct. 25; Nov. 18.

In re PYLE WORKS (LIMITED). (*a.*)

Company—Borrowing powers—Indemnity by company to directors to secure promissory notes and guarantees given by directors—Mortgage of uncalled capital.

A limited company, incorporated in 1880, *of which one object was (clause* 3 (L)) *"to borrow money by mortgage or otherwise, receive money on deposit, and issue transferable and other bonds and mortgage debentures, and any other securities founded or based upon all or any of the real and personal assets or upon the credit of the company," was in liquidation under an order of the* 16*th of February*, 1889. *In* 1882 *the company had obtained an overdraft from a bank on security of two joint promissory notes, payable on demand, given by two directors, M. and G. These notes were renewed at various times down to* 1889. *M. and G. also executed guarantees to two railway companies. In April*, 1882, *the board resolved that, under article* 81 *of the company's articles, the directors should be indemnified, and in March*, 1886, *a similar resolution was passed, and also that they should be secured by means of a charge on the uncalled capital. In May*, 1886, *a mortgage by way of indemnity to M. and G. was executed "of the uncalled-up amounts of £4 per share on* 5,000 *shares." M. and G. had made payments to the bank and to the railway companies, and now claimed the benefit of their security.*

Held, upon the evidence, that it was part of the agreement that M. and G. should be indemnified by a charge upon the uncalled capital, and that, the overdraft being a borrowing of money, the transaction was a borrowing on the security of the uncalled capital, and to that extent the mortgage was valid.

Held, also, that clause 3 (L) *authorized the issue of securities founded upon uncalled capital.*

Held, also, that, under the articles, the indemnifying of a director was a legitimate business purpose of the company.

Adjourned summons.

The question in this case was whether a mortgage of uncalled capital, dated the 3rd of May, 1886, in favour of Robert McIlwraith and Edward Gotto, two of the directors of the company, was valid.

The company was incorporated in 1880 under the Companies Acts, 1862 and 1867. The objects of the company were, *inter alia*, to acquire certain mines, and (clause 3 (L) of the memorandum of association) "to borrow money by mortgage or otherwise, receive money on deposit, and issue transferable and other bonds and mortgage debentures, and any other securities founded or based upon all or any of the real and personal assets or on the credit of the company."

Among the articles of association were—

"81. Everydirector, and also every auditor, manager, secretary, and other officer, and his heirs, executors, administrators, and assigns, shall be indemnified by the company from all losses and expenses incurred by them respectively in or about the discharge of their respective duties, except such as happen from their own respective wilful acts or defaults."

"102. The business of the company shall be managed by the board, who shall, on behalf of the company, adopt and carry out the agreements mentioned in the memorandum of association, and exercise all such powers of the company as are not by Act of Parliament, or by the regulations of the company for the time being in force, expressly declared to be exercis-

(*a.*) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

able by the company in general meeting; subject, nevertheless, to such regulations (not being inconsistent with the aforesaid provisions or regulations) as may be prescribed by the company in general meeting; but no regulations made by the company in general meeting shall invalidate any prior act of the board which would have been valid if such regulation had not been made."

Powers of directors:—

"106. They may let, mortgage, sell, or otherwise dispose of, either absolutely or conditionally, and in such manner and upon such terms and conditions in all respects as they think fit, any of the property of the company, and may accept payment or satisfaction for any property so disposed of in fully paid-up or other shares, or partly in shares of the company or any other company and partly in cash, or in any such other manner whatsoever as they deem expedient."

"111. They may from time to time borrow on bonds or debentures of the company, or on mortgage of all or any part of the property of the company, and either with or without including in any such mortgage all or any definite proportion of the capital of the company then uncalled, such sums of money as they from time to time think expedient."

"116. They may do all such acts, enter into all such contracts and engagements, and pay, apply, and dispose of any of the moneys or property of the company, and generally act in such manner as they shall from time to time deem necessary or expedient for carrying out all or any of the objects or purposes of the company, and may also from time to time, and either temporarily or permanently, omit, postpone, or abstain from carrying out all or discontinue the further carrying out of any one or more of such objects as they shall from time to time, in the exercise of their discretion, deem most to the advantage of the company."

In 1882 the company found it necessary to obtain an overdraft from their bankers, who were willing to give the required accommodation on the security of a promissory note signed by two directors. At this time there were five directors—McIlwraith and Gotto, the claimants, R. C. Grant, J. S. Fletcher, and M. W. Cave, the last named being since deceased. It was arranged that the note should be given by the claimants, and a promissory note, dated the 14th of April, 1882, for £2,500, payable on demand, was given by them to the bankers.

On the 28th of April, 1882, the following resolution was passed:—"Resolved that, under article 81, the directors who have made themselves jointly responsible with the company for a sum of £2,500 by a promissory note signed by Mr. Gotto and Mr. McIlwraith be, and are, hereby indemnified. This promissory note having been requested by the company's bankers as a security for a loan to the company; the bank having asked a second promissory note for £2,500 as a security for a further loan to the company for that sum, and Messrs. Gotto and McIlwraith having consented to sign such note, Resolved that, on their doing so, they be indemnified in respect of such liability, in accordance with article 81, as above."

A second promissory note for £2,500, payable on demand, was, on the 29th of April, 1882, given by McIlwraith and Gotto to the bankers for a similar purpose. The two notes were renewed from time to time, the last renewals being on the 29th of January and the 4th of February, 1889. On the 23rd of May, 1886, McIlwraith and Gotto executed guarantees in favour of the Great Western and London and North-Western Railway Companies for sums which might become due from the Pyle Works (Limited) to those railway companies. The guarantees were as follows:—

"Great Western Railway.—Conditions of Guarantee.

"We, the undersigned, Robert McIlwraith, Rochester-buildings, Leadenhall-street, and Edward Gotto, The Lodge, Hampstead, two of the directors of the Pyle Works (Limited), do hereby guarantee and agree that, in consideration of the Great Western Railway Co. giving credit to the Pyle Works (Limited), we will be personally responsible for the payment of all moneys from time to time owing by the Pyle Works (Limited) to the Great Western Railway Co., and will pay the same on demand in case of default by the Pyle Works (Limited)."

This guarantee was duly executed by these two directors on the 26th of May, 1886.

The guarantee given to the London and North-Western Railway Co. was in a somewhat fuller form, and was as follows:—

"In consideration of your opening a ledger account in favour of the Pyle Works (Limited) for carriage of materials to be both received and forwarded over your system and other systems connected therewith, we hereby jointly and severally agree to guarantee the due payment of such account on the following conditions."

Ten conditions followed with reference to the carriage of the goods, including, (3), to the effect that the accounts were to be made up monthly and must be paid in full within eight days after the 12th of each month; and (10), that in case of failure to observe any of the conditions the credit accounts would be closed and cash payments required to be made for the future, and in case the account should not be paid in accordance with the conditions the company was to have the right to detain any goods or wagons by way of lien, and to sell them, and apply the proceeds in or towards the liquidation of the debts due to the company. This guarantee was duly executed by the same two directors on the 26th of May, 1886.

At a meeting of the directors of the Pyle Works (Limited) on the 18th of March, 1886, it was resolved "that, Messrs. McIlwraith and Gotto having guaranteed the loan to the company of £5,000 by the British Linen Co.'s Bank, be indemnified, and that a charge on the uncalled capital be given them in respect of this loan, and that they, having guaranteed the Great Western Railway and the London and North-Western Railway ledger accounts, that a similar charge be given for £1,500; and it is resolved that the company's solicitors be instructed to prepare the charge, and that the company's solicitors, Messrs. Grant & Beesley, be instructed to affix the seal of the company to the documents."

The mortgage of the 3rd of May, 1886, was given in pursuance of the last-mentioned resolution. It contained recitals that the company had been incorporated with a capital of £100,000, divided into 10,000 shares of £10 each, that 6,000 shares had been issued and allotted, and that from 5,000 of them the sum of £6 per share, and no more, had been called up, and that the remainder of the 6,000 had been paid up in full or issued as fully paid up, and that a mortgage was given on the 3rd of January, 1882, to Messrs. F. & J. B. Greenwood (see 38 W. R. 282, 674, 44 Ch. D. 535) on 3,500 of the shares to secure the repayment to them of the sum of £2,500 and interest thereon. It was further recited that the mortgagees (McIlwraith and Gotto) had, at the request of the company, guaranteed to the British Linen Co.'s Bank the repayment of a sum of £5,000 which had been advanced by the bank to the company with interest at four per cent. per annum, and had also at the like request guaranteed to the railway companies above-mentioned the payment of such sum as might be owing to those companies by the com-

pany for carriage of goods upon their ledger account with the railway companies, and that "the said guarantees were given by the said mortgagees upon the express condition that the said company should execute to them the mortgage hereinafter contained to secure them (the said mortgagees) against any loss or damage they may sustain by reason of giving the said guarantees." After such recitals the company, in consideration of the premises, thereby covenanted with the mortgagees that the company, their successors and assigns, would forthwith, immediately after the mortgagees, or either of them, should pay any moneys under the guarantees, repay the same, with interest at £4 per cent., and would otherwise indemnify their, and each of their heirs, &c., against all loss or damage by reason of entering into the said guarantees, and that, in further consideration of the premises, the said company, as beneficial owners, did hereby assign unto the said mortgagees "all the said uncalled-up amounts of £4 per share on 5,000 shares" of the said company (these 5,000 shares including ordinary and preference shares), on which £6 per share only had been paid up.

This was expressed to be subject to a prior mortgage of the 3rd of January, 1882, above-mentioned, to Messrs. Greenwood of "the uncalled-up amounts of £4 per share on 5,000 shares of the company," and to be by way of indemnity to McIlwraith and Gotto against all loss and damage by reason of their giving the guarantees mentioned in the recitals. The Pyle Works (Limited) had gone into liquidation, by an order made the 16th of February, 1889, and McIlwraith and Gotto had been called upon to make, and had made, payments to the British Linen Co.'s Bank of £5,000, and to the railway companies, in respect of the promissory notes and of the guarantees, of £1,943, and they now, by their summons, claimed the benefit of their security.

Mr. McIlwraith, who had been chairman of the board, and was largely interested, having been settled on the list of contributories for 583 shares, had, since the decision of Stirling, J., in January, 1890 (see 38 W. R. 282, 44 Ch. D. 234) deposed that he was willing to assist in procuring the overdraft or loan to be made if he was assured that he could be secured against loss, that he consulted Mr. Lane, the solicitor to the company, as to what security could be given to the directors who should join in the guarantee, and that the solicitor suggested a mortgage over the uncalled capital, that he explained to Mr. Gotto that such a security could be given, and that he agreed to join in guaranteeing the overdraft or loan upon the terms of a mortgage of the uncalled capital being given them; that at a meeting of the board of directors on the 12th of April, 1882, it was resolved that an overdraft should be obtained on the note of the company and two directors, it having been previously arranged that Mr. Gotto and himself should be the directors executing it on the terms of their being properly indemnified by the company, and having a security given to them over the uncalled capital to protect them against loss, and that on the 17th of April, 1882, Mr. Gotto and he, relying on that understanding and arrangement, executed a joint and several promissory note for £2,500 payable on demand, that being the amount required in the first instance, that the loan account of the company was at once debited with the sum and credit was given by the bank for the amount to the company in the ordinary current account. He further deposed that he discussed with the other directors the question of giving them a security for their guarantee before they consented to give such guarantee; that in particular he suggested they should have a mortgage similar to that given to prior mortgagees, but not to include the general assets; that it was unanimously agreed that they ought to be so secured in respect of the guarantees, and that it should be executed in their favour when they required it, and that it was certainly understood by him, and, he believed, by Mr. Gotto, by Mr. Lane, the solicitor of the company, and by the other directors that they were to be entitled to have such a proper and sufficient security given to them, whenever they should ask for it, to secure them against loss under their guarantees; that they only executed the promissory notes upon that footing; and that the further overdraft or advance of £2,500 was, in due course, carried through in the same manner and upon the same terms and understanding. He also deposed that he and Mr. Gotto were asked to give the guarantees to the railway companies in 1886, and that, having regard to the additional liability which they were then asked to undertake, they both agreed that they ought to press the company to execute to them the security which it had been understood they were to have to secure them against loss in respect of the guarantees given to the British Linen Co.'s Bank; that both Mr. Gotto and he insisted that a security should be given to them over the uncalled capital to secure them against liability under the guarantees to the two railway companies, and also against the liability under which they were to the British Linen Co.'s Bank in respect of the two promissory notes, and that it was only on condition of such security being given them that they consented to give the new guarantees. He further deposed that it was thoroughly intended by them, and they believed, thoroughly understood by the other members of the board, that they would only allow the guarantees to the bank to continue upon the terms of the security being given, and that, therefore, a mortgage of the uncalled capital was given them on the 3rd of May, 1886; and on the 26th of May, 1886, Mr. Gotto and he signed the guarantees to the two railway companies. Similar evidence was given by Mr. Gotto, which was confirmed by an affidavit of the two surviving directors, Messrs. Grant and Fletcher.

On the 10th of August, 1887, the company executed a mortgage to Ferdinand Gautier (who was not a shareholder), to secure a sum of £4,000, with interest at eight per cent. per annum, the property assigned as security being "all the said uncalled-up amounts of £4 per share on the said 5,000 shares," but subject to the said mortgages to Messrs. Greenwood and to McIlwraith and Gotto.

On the 28th of October, 1887, the company executed a mortgage to McIlwraith alone to secure a sum of £3,000, with interest at four per cent. per annum, the property assigned as security being "all the said uncalled-up amounts of £4 per share on the said 5,000 shares." This mortgage purported to be made subject to the mortgages to Messrs. Greenwood and to McIlwraith and Gotto, but did not refer to Gautier's mortgage of the 10th of August, 1887.

Of these four mortgages the only one registered at the office of the Registrar of Joint-Stock Companies was Gautier's, but all four were registered in the register of mortgages kept by the company.

On the 13th of January, 1890, Stirling, J., after deciding that the mortgagees under the mortgages of uncalled capital of the 3rd of January, 1882, of the 10th of August, 1887, and of the 28th of October, 1887, were entitled to have the calls applied in payment of their mortgage debts in priority to the general creditors (and which decision was affirmed by the Court of Appeal, 38 W. R. 674, 44 Ch. D. 534), said that the mortgage of the 3rd of May, 1886, appeared to go a step beyond those which had been upheld in *In re Inns of Court Hotel Co.*, L. R. 6 Eq.

82, 16 W. R. Ch. Dig. 65, and *Howard* v. *Patent Ivory Manufacturing Co.*, 36 W. R. 801, 38 Ch. D. 156, and that he would not then say that it was invalid, but that it would be desirable to know something more of the circumstances under which that mortgage was given than was contained in the affidavits then before the court, and that his decision on that part of the case would be postponed until that information had been furnished to the court. Since this last-mentioned date the further evidence above summarized had been in consequence filed.

H. B. Buckley, Q.C., and *C. A. James*, for Gotto.—At the date of the agreement to indemnify there was an agreement to give an advance, and the evidence now put in shows the transaction was the borrowing of money in compliance with a request made. The directors went to the bank under their powers (article 102); this may not all appear in the books of the company, but the directors had to be secured.

They referred to *In re Patent Ivory Manufacturing Co.*

Graham Hastings, Q.C., and *F. Whinney*, for McIlwraith.

H. A. Giffard, Q.C., and *Haldane, Q.C.*, for the liquidator.—Was there a power to borrow? It is covered by the earlier part of the clause; it is for the purposes of the company; either it is part of the business of the company, or it falls into some express clause; and, if the latter, it must be under the borrowing clause. Article 81 only refers to a general indemnity out of general assets. There is no power of giving such a preference. The directors, it should be observed, abstained until 1886 from taking this form of indemnity, and merely took a general indemnity under article 81.

Phipson Beale, Q.C., and *T. H. Carson*, for unsecured creditors.—If the general power to issue bonds and to borrow is taken, article 106 might possibly justify these transactions; but even in that article the power is only to borrow such sums as they shall deem expedient; so these mortgages have to be justified. Was this really a mortgage for money borrowed? A definite agreement is wanting. A mortgage must be something capable of being registered under section 43 of the Act of 1862. The mortgage of 1886 is not really part of the transactions of the year 1882. As to the railway companies, that is not borrowing money, it is running into debt.

They referred to *In re German Mining Co.*, 2 W. R. 543, 4 De G. M. & G., at p. 40.

Buckley, Q.C., in reply.—The powers of the directors to borrow are entirely at their own discretion.

He referred to *In re Anglo-Danubian Navigation and Steam Colliery Co.*, 23 W. R. 783, L. R. 20 Eq. 339, and *Brooks & Co.* v. *The Blackburn and District Benefit Building Society*, 33 W. R. 309, 9 App. Cas. 857.

Cur. adv. vult.

Nov. 18.—STIRLING, J. (after stating the facts and reading the resolutions and articles of association above set out).—The Pyle Works having gone into liquidation, Messrs. McIlwraith and Gotto have been called upon to make, and have made, payments to the bankers and the railway companies in respect of the promissory notes and the guarantees, and they now claim the benefit of their security. The validity of a charge on uncalled capital of the company given by way of security for money borrowed has been established by the decision of the Court of Appeal (*In re Pyle Works*, 38 W. R. 674, 44 Ch. D. 534).

In the present case no money was borrowed from McIlwraith and Gotto, and the question is whether it was within the powers of the directors to give such a security as that of the 3rd of May, 1886. First, is it valid as an indemnity against loss on the promissory notes given to the bankers? It is to be observed that the resolutions of the 28th of April, 1882, as recorded in the minutes, say nothing as to any bargains on the part of McIlwraith and Gotto for a security on the uncalled capital, or on any part of the property of the company. I apprehend, however, that evidence is admissible to show what the real agreement was between them and the company. This would clearly be so if McIlwraith and Gotto had not been directors; in that case the minute would not have been admissible against them. As they were directors, the minute is admissible against them, but none the less does other evidence appear admissible, though the existence of the minute is a circumstance to be considered in judging its weight. Now, McIlwraith gives this account of the matter: [His lordship read the evidence of Mr. McIlwraith, a summary of which is above stated.] Gotto gives similar evidence, and this is confirmed by the joint affidavit of the other surviving directors, Grant and Fletcher. None of these gentlemen have been cross-examined, and I come to the conclusion that it was a term of the agreement between the company and McIlwraith and Gotto, under which the promissory notes were given to the bankers that McIlwraith and Gotto should be indemnified by means of a charge on the uncalled capital of the company in accordance with the recital to that effect in the deed of the 3rd of May, 1886. That being so, and the overdraft being clearly a borrowing of money, it appears to me that the transaction was in substance a borrowing of money on the security of the uncalled capital of the company within the meaning of article 111. It is true that the bankers from whom the money was actually borrowed were content with the personal security of the guarantors; but the guarantors, as part of the same transaction, stipulated for a counter security in the shape of a charge on the uncalled capital; and I do not think that article 111 requires the mortgages there mentioned to be given to the persons by whom the money is lent. I think, therefore, that to this extent the mortgage is valid.

Next, how does the case stand as regards the sums paid in respect of the guarantees given to the railway companies? The company did not, on the security of these guarantees, borrow money from the railway companies, but by means of them obtained on credit the services of the companies as carriers of goods. No authority has been cited to show that this can be treated as a borrowing of money, and on principle I have difficulty in seeing that it is. If, then, the validity of the mortgage depended on the applicability of article 111, I should feel great doubt whether it could be supported. I think, however, that clause 3 (L) of the memorandum of association empowers the company to "issue transferable and other bonds, and mortgage and debenture and any other securities founded or based upon all or any of the real and personal assets or on the credit of the company," not merely to secure the repayment of borrowed money, but generally for the purposes of the company. I think, further, that the term "assets" in this clause is intended by article 111 to include unpaid capital, and, accordingly, that the clause authorizes the issue by the company of securities founded or based upon the uncalled capital of the company. By article 102 the directors may exercise all the powers of the company, subject to any regulations prescribed by the company in general meeting. There are no such regulations which affect the issue of securities; and I think, therefore, that the directors might issue securities founded or based upon uncalled capital for

any legitimate business purpose of the company. The indemnifying of a director seems to me, both under article 81 and under article 116, to be such a purpose, and I therefore come to the conclusion that the mortgage is valid, and that the claim under it ought to be admitted.

Solicitors, *Drake, Son, & Parton; Maples, Teesdale, & Co.; Lane, Monro, Soutter, & Slack; G. M. Clements.*

Chan. Div. }
Kekewich, J. } Dec. 5.

WILLIAMSON *v.* HINE BROTHERS. (*a.*)

Shipping—Managing owners—Principal and agent—Secret profits—Brokerage—Commission.

It is the duty of a managing owner of a ship to procure charters and freights, and therefore, in the absence of any special bargain, a managing owner who is also a shipbroker is not entitled to make a profit for himself by commission or brokerage for procuring charters and freights.

Adjourned summons.

This action had been brought by one of the co-owners of certain ships against the managing owners, who were a firm of ship and insurance brokers, for a declaration that the defendants were not entitled to retain for their own benefit certain secret profits, alleged to have been made by them, consisting of brokerage on freights and charters, commissions on insurance premiums, and other commissions, and an account of such alleged secret profits and payment accordingly. The defendants received as their remuneration for management a fixed sum for each ship.

Upon the action coming on for trial, judgment was given, dismissing the greater part of the plaintiff's claim, but an inquiry was directed whether it was within the duties of the defendants, as managing owners of the ships, or otherwise as agents of the plaintiff and the other owners, to procure freights and charters; and, if so, an account of the sums received by them by way of commission or brokerage in respect of such chartering or freightage. This judgment was affirmed on appeal. The chief clerk, by his certificate, answered the inquiry in the affirmative.

This was a summons by the defendants to vary this certificate.

Gorell Barnes, Q.C., and *Farwell*, for the summons.

Warmington, Q.C., and *Ashton Cross*, for the plaintiff.

KEKEWICH, J.—The principle upon which this inquiry is based is abundantly clear. A paid agent—I am not now concerned with an unpaid agent—is bound to discharge for a reasonable remuneration all those duties, multifarious or otherwise and onerous or otherwise, in his personal contemplation, which the terms of the agency cover. He must make his own bargain with his principal, and it is his duty to do all that that bargain entails, and to be content with his wages. If he is called upon to do anything outside the terms of his agency, he is entitled to make a special bargain, or he can decline to do it unless he is remunerated on a special footing. Or he may do the work, and, provided everything is fair and above board, he probably would be allowed some fair remuneration according to some known measurement of the value. But if he does anything within the terms of his agency, however uncompensated it may seem to him personally, he can neither charge for it in his account, nor can he secretly take any commission for it. Take such a case, by way of illustration, as that of an estate agent. An estate agent's duties might be extremely difficult to define, but if the landowner requires him to see after the building of a cottage which involves the purchase of timber, it would be, I apprehend, the duty of the estate agent to purchase the timber on the best terms obtainable; and if he happens to be a timber merchant he cannot supply the timber at a profit. If he deals with another timber merchant, who is disposed to give him a commission for the introduction of the business, he must either resign that commission, or, accepting it, give his employer the benefit of it. If, on the other hand, the landowner requires a carriage for his own use, and he asks the estate agent to get it for him, the estate agent certainly can employ himself, or somebody else, or, provided it is all fair and above board, he can, if he happens to be a carriage builder, sell a carriage to his employer. That is outside the limits of his agency, and, as long as it is all done fairly, no one could complain of a man making a profit in his own trade which was not within the terms of his agency.

Nobody ever doubted that managing owners were at liberty to employ brokers. Nor was it, as far as I remember, at all doubted, nor do I doubt now, that if the managing owner is also, as frequently happens, a ship broker, he can, so to speak, employ himself, if it is fair and above board; but there must be no secret arrangement and no secret profit. If he employs another broker, of course he can pay, on behalf of the shipowner, the moneys necessary to pay that broker. If he employs himself he, of course, can pay what is necessarily expended in making a bargain; but, unless it is outside his duty as managing owner, he cannot make a profit if he employs himself, and he cannot receive a commission for his own benefit from the outside broker. [His lordship then dealt with the evidence before the chief clerk, and continued:—] I have not before me satisfactory evidence that, in the absence of a special bargain, there is a right on the part of the managing owner to charge this extra payment for procuring freights and charters against the ship. On the other hand, I have a considerable amount of evidence on behalf of the plaintiff to show that it is not part of the duty of managing owners to make any such charge against the ship. I think, therefore, that I must hold that it is one of the duties of the managers to procure charters, and that it is such a duty as comes within the terms of their duties as managing owners, in respect of which they are not entitled to make a charge, and in respect of which they are not entitled to debit the ship with a commission. If they receive a commission I think it belongs to the shipowner as the principal, and cannot properly be received by them for their own benefit. That being so, I think the chief clerk has come to a proper conclusion, and the certificate must stand.

Summons dismissed.

Solicitors, *J. R. Hobson*, for *Tyson & Hobson*, Maryport; *H. N. Paisley*, for *Paisley & Falcon*, Workington.

(*a.*) Reported by JAMES H. BAKEWELL, Esq., Barrister-at-Law.

Q. B. D. (Hawkins and Stephen, JJ.) Oct. 28.

PAYNE (*Appellant*) *v.* THOMAS (*Respondent*). (*a.*)

Licensed house—Intoxicating liquor—Sale of beer in measure not marked as an imperial measure—Conviction—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 8.

A publican supplied to a customer, at the request of the customer, what was known as a "blue" of beer, which was a quantity of beer in a blue jug, more than half a pint and about one-third of a quart. At the time of the sale there were conspicuously posted up in the room notices that the vessel called a "blue" was not represented as containing any amount of imperial measure, or as being a measure of imperial standard, and in fact the vessel was not an imperial measure or marked as such.

Held, that the publican had, under section 8 *of the Licensing Act*, 1872, *committed the offence of selling intoxicating liquor, not being a quantity less than half a pint, in a measure not marked according to the imperial standards, and that he was properly convicted of the same.*

Case stated by justices.

An inspector of weights and measures preferred an information against the appellant, Henry Payne, a licensed person, for having, on the 11th of October, 1889, at his licensed premises called the Golden Lion, in the parish of Llanelly, and county of Carmarthen, unlawfully sold in a certain measure not marked according to the imperial standards, certain intoxicating liquor, to wit, beer, which was then sold by retail, and not in cask or bottle, and was not then sold in a quantity less than half a pint.

The justices convicted the appellant, and fined him in the sum of five shillings, including costs, but stated a case from which the following facts appeared:—

The prosecutor, an inspector, visited the house of the defendant for the purpose of testing the measures used by him in his business; a customer came in and asked for a "blue" of beer (that is, a blue jug of beer), and the defendant handed him a blue vessel of beer, called a "blue" of beer, saying, "That's twopennyworth"; and the customer paid twopence for the same. At the time of such sale there were conspicuously displayed in the room in which the sale took place cards on which the following notice was printed—*videlicet*, "Notice, the vessel called blue is not represented either as containing any amount of imperial measure, or as being a measure of imperial standard, or secondary imperial measure of capacity." The prosecutor seized the measure or "blue," tried it and found it contained more than half a pint, to wit, one-third of a quart, and then proceedings were taken against the defendant under section 8 of the Intoxicating Liquors Licensing Act, 1872, for selling intoxicating liquor in a larger quantity than half a pint in a measure not marked according to the imperial standards. It was proved that there is no imperial measure answering to one-third of a quart. It was admitted that the blue contained more than half a pint, and that it was supposed to contain one-third of a quart, but at the same time the beer was not sold as one-third of a quart, but under the local denomination of a "blue," a "blue" being well known in the locality as being a vessel of a particular shape containing about a third of a quart.

The prosecutor contended that the fact of the defendant knowing he was selling intoxicating liquor in a vessel containing more than half a pint, rendered him liable to the penalty under section 8 of the above-mentioned Act, and that all intoxicating liquors sold in quantities exceeding half a pint must be sold in measures marked according to the imperial standards.

The defendant contended that section 8 of the Licensing Act of 1872 only applied to sales by measure, and that the section was not intended to inflict a penalty for a sale to a customer who might ask for and be supplied with a quantity of intoxicating liquor which might be more or less than an imperial measure, and that he was at liberty to sell any quantity of intoxicating liquor exceeding half a pint so long as he did not sell it in a vessel representing it as containing any amount of imperial measure, and he also relied upon sections 19 and 22 of the Weights and Measures Act, 1878.

The justices held that the defendant did sell intoxicating liquor by retail in a quantity exceeding half a pint in a measure or vessel not marked according to the imperial standards, and they convicted him accordingly.

Section 8 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), enacts:—"Every person shall sell all intoxicating liquor which is sold by retail and not in cask or bottle, and is not sold in a quantity less than half a pint, in measures marked according to the imperial standards."

Crump, Q.C., and *W. Evans*, for the appellant, referred to section 22 of the Weights and Measures Act, 1878, and to the case of *Addy* v. *Blake*, 35 W. R. 719, 19 Q. B. D. 478.

Tudor Howell, for the respondent, was not called upon.

HAWKINS, J.—Nothing can be clearer than the language of section 8 of the Licensing Act, 1872, nevertheless, it has been suggested that we ought to introduce words into the section to explain its meaning, words which, I think, would make the section absurd. The clear meaning of the section is, that a publican may sell an intoxicating liquor of a quantity less than half a pint in a measure that is not marked, but that if the quantity is half a pint or over half a pint it must be sold in a measure marked according to the imperial standards, the only exceptions being when the liquor is sold in bottle or cask. The case of *Addy* v. *Blake* is rather in favour of the prosecutor than the defendant. Then it is said that section 22 of the Weights and Measures Act, 1878, in effect repeals section 8 of the Licensing Act, 1872, but this section merely deals with measures and vessels coming under the Weights and Measures Act, and has no reference to the Licensing Act, 1872. It is clear that there was no intention of repealing section 8 of the Act of 1872, as it is not mentioned in the schedule of repealed Acts at the end of the Weights and Measures Act. Section 8, then, of the Licensing Act, 1872, being in force, we are bound to interpret it by the ordinary rules, and I cannot imagine language more apt for the purpose of compelling persons selling intoxicating liquors to do so in measures marked according to the imperial standards.

I am of opinion, therefore, that the appellant was properly convicted, and the conviction must be affirmed.

STEPHEN, J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellant, *Speechly, Mumford, & Landon*, for *Roderick*, Llanelly.

Solicitor for the respondent, *Randell*, Llanelly.

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

Court of Appeal.

From Chan. Div. Dec. 19, 20.

AYLESFORD (EARL) v. POULETT (EARL). (a.)

Solicitor—Remuneration—Mortgage—Investigating title—Separate mortgage transactions—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *s.* 7—*Solicitors' Remuneration Order,* 1882, *Schedule I., Part I., r.* 10.

The life interest of a tenant for life in the whole of the real estates comprised in a settlement made in 1871 *was subject to a mortgage of* £192,000 *created by the tenant for life. In* 1882 *the trustees of the settled estates were empowered by a private Act to raise a larger sum, on mortgage of the fee of the settled estates, for the purpose of paying off the charge on the life estate and the other debts of the tenant for life. In August,* 1883, *the trustees accordingly executed a mortgage in fee of part of the settled estates, to the same mortgagees, for a sum of* £232,000, *out of which the sum of* £192,000 *was retained by the mortgagees in repayment of their charge on the life estate, and only the balance—viz.,* £40,000—*paid in cash to the trustees. The mortgagees employed the same solicitors in respect of both mortgage transactions.*

Held, that the mortgage of 1883 *was not a further charge for* £40,000, *but an entirely new mortgage for* £232,000, *and, therefore, that the solicitors of the mortgagees were entitled to be remunerated on that footing, according to the scale fee prescribed in Schedule I., Part I., of the Solicitors' Remuneration General Order,* 1882.

Decision of North, J. (*reported* ante, *p.* 106), *reversed.*

Appeal from the decision of North, J. (reported *ante*, p. 106).

In 1882 the life estate of the then Earl of Aylesford in the whole of the Aylesford settled estates was subject to a mortgage of £192,000 which was vested in the Eagle Insurance Co. By the Aylesford Settled Estates Acts, 1882-3, the trustees of the settled estates were empowered to raise, by mortgage of the fee of the settled estates, a sum not exceeding £350,000, and to apply the same in paying off the mortgage on the life estate and the other debts of the then tenant for life.

On the 7th of August, 1883, the trustees accordingly mortgaged the fee simple of part of the settled estates to the Eagle Co. for a sum of £232,000, out of which sum, the sum of £192,000 was applied in paying off the mortgage on the life estate and was accordingly retained by the Eagle Co., so that the sum actually paid in cash by the Eagle Co. to the trustees of the settled estates was only £40,000.

The Eagle Co. (the mortgagees) had employed the same solicitors in respect of both mortgage transactions, and the question raised by the appeal was whether the remuneration to which the mortgagees' solicitors were entitled was the sum of £450, that being the amount of the full scale item prescribed by Schedule I., Part I., of the Solicitors' Remuneration Order, 1882, on a mortgage for £232,000, or whether the solicitors were only—at the utmost—entitled to receive for their remuneration the sum of £145, that being the amount of the scale fee on the sum of £40,000.

The trustees (the defendants in the present action) claimed in passing their accounts to get credit for the payment to the mortgagees' solicitors of the larger sum, while the plaintiff (the present tenant for life) contended that only the smaller sum should be allowed.

The taxing master disallowed the charge for £450, and expressed his opinion that the mortgagees' solicitors were only entitled to remuneration according to Schedule II., the transaction being a further charge of £40,000 on property the title to which had been already investigated; but with the assent of the plaintiff he allowed the charge for £145, being the scale fee on the sum of £40,000.

North, J., on a summons by the defendants to review taxation, held that the view taken by the taxing master was right, and dismissed the summons (see the report *ante*, p. 106).

The defendants appealed.

Napier Higgins, Q.C., and *Dauney,* for the appellants.

Cozens-Hardy, Q.C., and *W. C. Druce,* for the plaintiff.

LINDLEY, L.J.—This is a question of some importance to solicitors. [The Lord Justice then stated the facts, and proceeded:—] The question before us is whether the trustees are to be allowed in passing their accounts to charge the estate with a sum of £450, that being the scale fee prescribed on a mortgage of £232,000, or whether they are only—at the utmost—entitled to charge the estate with the sum of £145, being the scale fee on the sum of £40,000.

The question turns on the rules under the Solicitors' Remuneration Act, 1881, Schedule I., Part I., and rule 10 in that schedule. By the first part of the schedule a mortgagee's solicitor is entitled to a scale fee "for negotiating loan," and to another scale fee "for investigating title to freehold, copyhold, or leasehold property, and preparing and completing mortgage." Then rule 10 provides that "the above scale as to mortgages is to apply to transfers of mortgages where the title is investigated, but not to transfers where the title was investigated by the same solicitor on the original mortgage or in any previous transfer, and it is not to apply to further charges where the title has been so previously investigated. As to such transfer and further charges, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto. But the scale for negotiating such loan shall be chargeable on such transfers and further charges where it is applicable."

The taxing master having allowed only the scale fee on £40,000, the defendants carried in this objection: "The item of £1,255 should have been allowed at £450, being the amount according to the scale authorized by the Solicitors' Remuneration Act, 1881, upon a mortgage for £232,000. The mortgage for the £232,000 was a new and independent transaction, and entirely distinct from the mortgage for £192,000 which previously existed on the life estate." The taxing master answered:—"The solicitors have already been once paid for investigating the title, at least on £192,000 (part of £232,000)—that is, on the life estate. On the present occasion an additional £40,000 was advanced, no doubt this time on the fee. But the transaction was between the same parties, and, as before observed, the proper fee had been already paid for investigating the title. On the present occasion the defendants are really entitled to nothing more than the proper charges under Schedule II., and I invited them to bring in such items. This they declined to do, contending that they were entitled to be allowed the full scale item on £232,000. In these circumstances I have, with the assent of the plaintiff's solicitors, allowed them £145, being the scale fee on £40,000, which is in my judg-

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

ment much more than the defendants would be allowed if items were brought in under Schedule II."

This appears to proceed on the theory that this mortgage is a further charge within rule 10. It cannot be contended that it is a transfer, but the taxing master treated it as a further charge on property the title to which had been previously investigated by the same solicitor.

Now, no doubt the title had been investigated on behalf of the Eagle Co. when they advanced the £192,000, but the real question is whether the transaction can be considered a further charge. I think that it cannot. I should be sorry to sacrifice substance to form, but it appears to me that the deed of the 7th of August, 1883, was really, and in substance, a new mortgage under the statutory power given to the trustees, and cannot be treated as a deed of further charge. It is not on the same property, being a mortgage in fee of part of the property, whereas the former mortgages were on the interest of the tenant for life in the whole of the property; and it was not made by the same parties, being made by the trustees and not by the tenant for life; it is, then, in my opinion, nothing but a new mortgage for £232,000. It is true that only £40,000 was advanced in cash, but that does not make the transaction a further charge for £40,000. It is a new mortgage in fee for £232,000, and falls within Schedule I., Part I., and the scale fees for negotiating a loan of that amount and for investigating title and preparing and completing mortgage must be allowed.

BOWEN, L.J.—In order to bring this case within rule 10 of Schedule I. the respondent must make out that the deed is only a further charge. The rule is both affirmative and negative, and if the present case is within the rule it must fall within the second part of it—viz., that the scale is not to apply to further charges where the title has been previously investigated. But to bring the present case within those words it must be made out that this is a deed of further charge, which, in my opinion, for the reasons given by Lindley, L.J., it is not.

FRY, L.J.—If we had a discretion as to the taxation of costs I am not sure that I should not agree with the taxing master and North, J. But the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 7, enacts that so long as any general order under the Act is in operation the taxation of solicitors' bills of costs shall be regulated thereby. We have, therefore, no discretion to depart from the terms of the order. It seems to me that the remuneration in this case does come strictly within the charge which the mortgagees' solicitor is entitled to make as on a new mortgage. The present instrument cannot fall within rule 10 unless it is a transfer or a further charge. It cannot be contended that it is a transfer, and I am of opinion that it is not a further charge. The statutory trustees were bound to raise money by mortgage of the estate and apply the money in paying off the subsisting charges on the life interest. The instrument by which they raised the money is a new mortgage, and cannot be held a further charge because only a part of the sum raised was actually advanced in cash. I am of opinion, therefore, that the appeal succeeds.

Solicitors, *Kaye & Guedalla; Bennett, Dawson, & Bennett.*

From Chan. Div. Dec. 10.

JENKINS v. JACKSON. (a.)

Costs—Taxation—Plaintiff successful on some issues and failing on others—General costs of action, how apportioned—Form of order.

A plaintiff in the Chancery Division succeeded on the substantial part of his claim and failed on a subordinate part, but the form of order adopted referred it to the taxing master to tax the defendants' costs of so much of the action as related to the issue on which the plaintiff failed, and to tax the plaintiff's costs of the rest of the action, and directed the said costs of the defendants to be set off against the said costs of the plaintiff, and the balance to be certified, and ordered the defendants to pay such certified balance to the plaintiff. It appeared that in the taxing master's office in the Chancery Division it was the established practice, where the order was in the above form, to apportion the general costs of the action between the plaintiff and defendant according to the number of issues on which they had respectively succeeded, without regard to the relative importance of such issues, but that, where the plaintiff was intended to have such general costs, the form of order is adopted which gives him "the costs of the action, except so far as they have been increased by the issue" on which he has been unsuccessful. The general costs of this action having, in accordance with the above rule, been apportioned between the plaintiff and defendants in moieties, the plaintiff took out a summons to review the taxation.

Held (affirming the decision of Kekewich, J.), *that, though the plaintiff got less than he was fairly entitled to, that was owing to the adoption of the wrong form of order (a mistake which could not now be rectified), and that it would be wrong to disturb the settled practice of the chancery taxing office, in accordance with which the taxation under the form of order here adopted had been correctly worked out.*

Semble, *having regard to the case of* Sparrow *v.* Hill, 29 *W. R.* 490, 705, 7 *Q. B. D.* 362, 8 *Ibid.* 479, *the practice in the Queen's Bench Division differs in this respect from that of the Chancery Division.*

Bowen, L.J., *called attention to the importance of the proper authority making methodical inquiry into the diversity, both of opinion and practice, existing in this respect on the chancery and common law sides of the court, with a view to their assimilation.*

Knight *v.* Pursell, 28 *W. R.* 90, *and* Harley *v.* Hunt, 32 *S. J.* 8, *W. N.*, 1887, *p.* 184, *followed.*

Appeal from Kekewich, J.

This was an appeal by the plaintiff from a decision of Kekewich, J., dismissing a summons for the review of taxation in an action for nuisance. The plaintiff had in his pleadings alleged that a dancing-room belonging to the defendants over his office caused a nuisance, owing to the noise and vibration when dancing was going on. He had also alleged unmannerly and offensive conduct upon the staircase and in the lobby of the house on the part of disorderly persons assembled there for the purpose of the dancing.

At the trial (reported 37 W. R. 253, 40 Ch. D. 71) Kekewich, J., found in favour of the plaintiff as to the noise and vibration alleged to be caused by the dancing, and ordered the defendants to pay him £20 damages on that issue. But as to the alleged unmannerly and offensive conduct on the staircase and in the passages, he found that the defendants were not liable for it. The judge referred it to the taxing master to tax the costs of the defendants of so much of the action as

(a.) Reported by R. H. DEANE, Esq., Barrister-at-Law.

related to the unmannerly and offensive conduct, and to tax the plaintiff's costs of the rest of the action, and directed the taxing master to set off the defendants' costs against the plaintiff's costs, and certify the balance, and ordered the defendants to pay such balance to the plaintiff.

Proceeding under this order, the taxing master apportioned the general costs of the action in moieties between the plaintiff and defendants, treating the case on the footing of the plaintiff having succeeded on one issue, and the defendants on the other. The plaintiff was dissatisfied with this apportionment, as he considered that the issue on which he had failed was a minor one, and that regard ought to have been had to the relative importance of the issues, which could have been gathered from the pleadings and evidence. He accordingly took out a summons to review the taxation.

After the summons had been argued, Kekewich, J., sent a memorandum to the taxing master desiring his assistance and that of his colleagues in ascertaining the principle on which the costs ought to be taxed in such a case, and he mentioned that the judgment was intentionally not in the form of directing "the defendant to pay the costs of the action, except so far as they had been increased by the" complaint of disorderly conduct, and directing the plaintiff to pay the costs so excepted, but in the form of giving each party the costs of the issue on which he had succeeded. He also explained the grounds of the plaintiff's dissatisfaction with which he (the judge) was disposed to sympathize, and added that if there was a settled practice to tax the costs on such an order in the way the taxing master had done, he (the judge) was unwilling to interfere with it, though it did not give effect to his intention in the present case.

To this memorandum a reply was received to the effect that the practice as to costs when a party was partially successful and partially failed was well settled in the chancery taxing master's office in accordance with the decision of *Knight* v. *Purssell*, 28 W. R. 90, referred to in the memorandum, that where the form of order was that adopted in the present case, the plaintiff got his costs of the issue or the part of his claim on which he had succeeded, and the defendant the costs of the other issue or part; that there was nothing in the order to show the relative importance of the issues, and the master could not go behind that order. It was the practice, therefore, in such a case, to divide the general costs in moieties, but to give each party the costs of such part of every affidavit or document as related to that part of the claim on which he had succeeded, disallowing the rest. Where the judge considered the plaintiff entitled to more than this, the other form of order was adopted, which gives him "the costs of the action except so far as they have been increased by the unsuccessful issue." The effect of the latter form was to give the plaintiff all the general costs, eliminating everything on which he had failed. The reply further called the judge's attention to the case of *Harley* v. *Hunt*, 32 SOLICITORS' JOURNAL, 8, W. N., 1887, p. 184, and stated that the taxing master was bound by the form of the order.

Kekewich, J. (after receiving this reply), gave judgment dismissing the summons to review the taxation. He held that he was bound by *Harley* v. *Hunt*, which had not been cited to him in the argument. That case was a decision of the Court of Appeal upon an order substantially the same in form as that in the present case, and the effect of that was that the principle on which the general costs had been apportioned here was correct. Though he did not think the plaintiff had got all he ought to have got by way of costs, he thought it more important that the practice should be certain than that it should be right. The same order as to costs would, probably, have been differently worked out in the Queen's Bench Division, and he thought that was an anomaly which it was desirable to get rid of, if possible, by bringing the conflicting practices in the two divisions into harmony.

The plaintiff appealed.

Warmington, Q.C., and *R. J. Parker*, for the appellant.—In *Harley* v. *Hunt* there were two distinct issues and causes of action, which was not the case here. In *Knight* v. *Purssell*, also, the several issues on which the plaintiff succeeded and failed were entirely distinct from each other. The plaintiff here was successful in the substantial and important part of the action, and only failed in a minor and subordinate part. In *Sparrow* v. *Hill*, 29 W. R. 490, 705, 7 Q. B. D. 362, 8 Q. B. D. 479, in which case the plaintiff succeeded on one issue and failed on two, the Court of Appeal held that the order was rightly interpreted by the taxing master, who gave the plaintiff the general costs of the cause, disallowing only those which applied exclusively to the parts of his claim on which he had failed, and allowed the defendants such costs only as were incurred by them by reason of the two items of claim which they successfully resisted. The order in that case was that the plaintiff was "to be allowed such costs as one of the masters may find he has rightly incurred in recovering" the amount for which he had got judgment, and that the defendants were "to be allowed such costs as they have rightly incurred in defending themselves on those points on which they have succeeded." We deny that the taxing master has no power to discriminate between the relative importance of the different issues. It will be observed that the order here is that the defendants shall pay the certified balance of the costs to the plaintiff, which shows that the judge did not intend the general costs to be equally divided. There is no such hard-and-fast rule as to the principle of taxing according to the form of order, as the taxing master's reply asserts. A witness might be in the box all day on one point, and be asked only one question on another, which is what actually occurred here. The taxing master has exercised no discretion at all, as he considered himself bound by an arbitrary rule.

They also referred to *Heighington* v. *Grant*, 1 Beav. 228.

Neville, Q.C., and *Prance*, for the respondents, were not called upon.

LINDLEY, L.J.—I regret to say I think there has been something wrong here, and that the plaintiff will not get all it was intended he should get; but it does not follow that we can put that right now. Judging from the observations made by Kekewich, J., I should come to the conclusion that the wrong form of order has been put in. If it was intended, as I am inclined to think it was, that the plaintiff should have the general costs of the action, *minus* a certain portion of them, there is a well-known form of order for giving him that advantage. It is in the power of the judge to make such an order as to costs as he thinks proper, and I suppose in the Chancery Division, as in the Queen's Bench Division, if the plaintiff succeeds *primâ facie* he gets his general costs of the action, although he may fail upon some minor point. At the same time it is for the judge to say whether that is to be so. It is perfectly competent to the judge to depart from that and to apportion the costs of the action between the plaintiff and the defendant. The question is, which has the judge done? I think what

he intended to do, I am bound to say, having regard to his own observations, was to give the plaintiff the general costs of the action. But unfortunately the order has been drawn up in such a way that, consistently with the established practice, which I do not think we ought to disturb, it does not give him the costs of the cause.

Now the form of the order is this. It says, "It is ordered that the defendants pay the plaintiff £20"—that is, damages for the nuisance occasioned by the wrongful use, by dancing, of a room over the plaintiff's room—"and on so much of the statement of claim as relates" to what I call bad behaviour and disorderly behaviour on the stairs, the court gives judgment for the defendants; "and it is ordered that it be referred to the taxing master to tax the costs of the defendants of so much of this action as relates to" such disorderly conduct, I will call it, "and also to tax the plaintiff's costs of the rest of this action, including in the plaintiff's costs the costs of" a certain motion, and then to set off the defendant's costs against the plaintiff's costs and to certify the balance, and then the defendants are to pay the balance of the plaintiff's costs so certified. I think there are two methods of reading that. I am not at all sure that a judge in the Queen's Bench Division would not say that that should give the plaintiff the general costs of the action—I rather think that it would be so construed there. But then in the Queen's Bench Division there are not those two forms of order which are in constant use in the Chancery Division, and when this is taken to a chancery taxing master, he says: "This is not the form which would have been adopted if you had been intended to have the general costs—it is the other form, and under it you cannot get the general costs." That appears to me to be the established rule. It was established long before *Knight* v. *Purssell*; it has been followed ever since *Knight* v. *Purssell*, and it was reconsidered only in 1887 by the Court of Appeal in the case (to which we have been referred) of *Harley* v. *Hunt*. It appears to me it is quite impossible to put the matter right by forcing upon this order a construction which would not be put upon it by those who are in the habit of dealing with it. I regret to say I think there has been an injustice done to the plaintiff. I attribute it, not to any error of the taxing master, but to the fact that the wrong form of order was adopted. I am afraid it is too late to clear that up, and I think, therefore, the appeal should be dismissed.

BOWEN, L.J.—I am of the same opinion. I think, exactly as Lindley, L.J., does, that here the wrong form of order has been adopted. It seems to me that the judge really intended to give the plaintiff the general costs of the action. That is the form to which on my side we are most accustomed. Of course the Chancery Division has its own forms, which are more appropriate to the business brought in that division. Again, I also think that on the common law side of the court we should probably have construed this order as giving the plaintiff the general costs of the action; but it seems to me that in chancery it has been construed in a different way, and that the case of *Knight* v. *Purssell* cannot be overruled or set aside and treated as of no effect. It really settles the practice.

I will only add one word, and the word I am about to add shows the reason why I add anything to what the Lord Justice has said. It is this, that I have been constantly pressed for the last twelve years since I have been a judge with the diversity of opinion and practice, as to taxations, that exists in the Chancery Division and the Queen's Bench Division, and it seems to me really that nothing could be more important than that the Lord Chancellor, or some authority at the head of the law, should methodically inquire into the differences that do exist both in the opinion and in the practice as to taxation on the different sides of the court.

FRY, L.J.—I concur.

Appeal dismissed.

Solicitors, *Fielder & Sumner; Riddell, Vaizey, & Co.*

From Q. B. Div. Jan. 26.

CUSACK v. LONDON AND NORTH-WESTERN RAILWAY CO. (*a.*)

Practice—County court—Appeal—Extension of time for appealing—Discretion of court—Ord. 59, *rr.* 12, 16.

Under ord. 59, *r.* 16, *the court has a discretion, which it will exercise on the particular circumstances of each case, to extend the time for appealing from the judgment of a county court.*

Collins *v.* Paddington Vestry, 28 *W. R.* 588, 5 *Q. B. D.* 368, *explained.*

Appeal from the decision of a divisional court (Pollock, B., and Charles, J.) refusing to extend the time for appealing from the judgment of a county court.

On December 12, 1890, the action was tried in the county court of Bloomsbury, and judgment was given for the defendants. The plaintiff, being desirous of appealing, applied to the county court judge for his notes, and asked the defendants to supply him with a document which had been put in at the trial. On December 29, not having received either of these, he served notice of appeal, but waited, hoping to receive the notes and documents, until January 3, when he tried to enter the appeal, but was told that he was too late, since, by ord. 59, r. 12, such appeal must be entered within twenty-one days from the date of the judgment.

The Divisional Court refused to extend the time for entering the appeal, holding themselves bound by the decisions in *Collins* v. *Vestry of Paddington*, 28 W. R. 588, 5 Q. B. D. 368, and *Reg.* v. *Kettle*, 17 Q. B. D. 761, 34 W. R. Dig. 50.

The plaintiff appealed.

Cavanagh, for the plaintiff.

Shearman, for the defendant.

Lord ESHER, M.R.—I think that we must say that we do not think that the decision in *Reg.* v. *Kettle* fetters the discretion of the court to grant an extension of the time for appealing under ord. 59, r. 16. No doubt that was the tendency of the case of *Collins* v. *Paddington Vestry*, but that case was decided at a time when the court took much stricter views of the rules, and nearly every judge of the Court of Appeal has withdrawn from that case in its strictness. I think the court has a discretion, which it will not exercise loosely, but which must be exercised on the circumstances of each particular case.

In the present case, considering all the circumstances, I think that the extension of time should be granted.

BOWEN and FRY, L.JJ., concurred.

Appeal allowed.

Solicitor for the plaintiff, *T. Bore.*

Solicitor for the defendants, *C. H. Mason.*

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

From Q. B. Div. Aug. 8; Dec. 19.

WESTERN NATIONAL BANK OF THE CITY OF NEW YORK v. PEREZ TRIANA & CO.

KOPPEL'S APPEAL. (a.)

Practice—Writ—Service—Foreign firm—Partners all resident out of jurisdiction—Service on alleged partner temporarily within jurisdiction—R. S. C., 1883, *ord.* 9, *r.* 6; *ord.* 11.

In an action against a foreign firm having no place of business in England, all the partners of which were resident and domiciled abroad, service of the writ was effected on the appellant (who was alleged to be a partner) while temporarily in England. He entered an appearance and applied to have the service set aside, on the ground that he was not a partner.

Held, by Lord Esher, M.R., *that the foreign firm was properly served under ord.* 9, *r.* 6, *by service on the appellant, and that the service could not be set aside.*

Held, by Lindley *and* Bowen, L.JJ., *upon the authority of* Russell *v.* Cambefort, 37 *W. R.* 701, 23 *Q. B. D.* 526, *that ord.* 9, *r.* 6, *did not apply to the case of foreign firms, and that the service was bad as against the firm; but, further, that, if the plaintiff should elect to amend the writ so as to state that the appellant was sued together with the other partners (naming them), the service should stand as against the appellant, the appellant having by appearing waived the irregularity in the nomenclature of the writ.*

Pollexfen *v.* Sibson, 34 *W. R.* 534, 16 *Q. B. D.* 792; O'Neil *v.* Clason, 46 *L. J. Q. B.* 191, 25 *W. R. Dig.* 208; *and* Shepperd *v.* Hirsch, Pritchard, & Co., 38 *W. R.* 745, 45 *Ch. D.* 231, *not followed.*

Appeal from a refusal of a divisional court (Pollock, B., and Day, J.), to set aside the service of the writ in this action upon a person named Koppel. The action was brought against the defendant firm (in the firm name) as acceptors of certain bills of exchange. The defendant firm carried on business abroad and had no place of business in England; all the partners were resident and domiciled abroad. In June, 1890, the plaintiff served the writ upon Koppel (who was temporarily in England), alleging that he was one of the partners in the firm. On July 3 an appearance was entered on behalf of Koppel, the words "but who denies that he is a partner" being added to the ordinary form of appearance. At the same time Koppel took out a summons to set aside the service. On July 4 he took out a summons asking for security for costs. On July 21 the Divisional Court made an order refusing to set aside the service of the writ, striking out the appearance as being "conditional" (see *Davies* v. *André*, 38 W. R. 437, 24 Q. B. D. 598); and giving Koppel forty-eight hours in which to enter an unconditional appearance—which he accordingly did on July 23. Koppel now presented this appeal on behalf of himself alone against so much of the order as refused to set aside the service.

French, Q.C., and *Danckwerts*, for Koppel.—The court below decided upon the preliminary objection that after service of the writ Koppel entered an appearance. But he appeared denying that he was a partner, and that is no appearance at all: *Davies* v. *André*. He was in a position of difficulty, as service upon him might affect other persons (the partners in the firm) with whom he had no time to communicate; he had no intention to submit to the jurisdiction. His action in the matter was a nullity: *Hewitson* v. *Fabre*, 36 W. R. 717, 21 Q. B. D. 6. There is no power under ord. 9, r. 6, to serve a foreign firm, the members of which are resident abroad, by serving one partner within the jurisdiction, *Russell* v. *Cambefort*, 37 W. R. 701, 23 Q. B. D. 526. That rule does not apply "to firms consisting of foreigners who have in no way become subject to the English Parliament," *per* Cotton, L.J., at p. 528 of 23 Q. B. D. If the plaintiff were to succeed, judgment would go against the firm, who had never been properly before the court: *Jackson* v. *Litchfield*, 30 W. R. 531, 8 Q. B. D. 474; *Adam* v. *Townend*, 14 Q. B. D. 103, 33 W. R. Dig. 165.

Bigham, Q.C., and *R. M. Bray*, for the plaintiffs.—The service is good against the firm; Koppel comes within the description "one or more of the partners" in ord. 9, r. 6. The service is good also against Koppel individually. *Adam* v. *Townend* does not decide that judgment cannot be signed against the individual partner who is served. Besides the consequences of service are not under consideration now; the sole question is as to the validity of the service.

Cur. adv. vult.

Dec. 19.—Lord ESHER, M.R., after stating the facts, continued:—The question raised in the action being one of the liability on a contract, is a question of personal liability ambulatory with the person, and is therefore a question, although it arises abroad between foreigners, which the English court must entertain if the defendants are personally brought according to the English law before the court. The writ is, on the face of it, one which the English court must entertain if it has been duly served. The question, therefore, is whether there has been such a service as, according to English law, brings the defendant in the action legally before the court as a defendant, the defendant in the action being the firm—that is to say, all the partners in the firm. The question cannot be satisfactorily determined without a close examination of the English procedure as to service of English writs. That the question is one of procedure is determined by this, that the writ is an English writ in respect of a matter over which the English court has jurisdiction if the writ is duly served. The service of the writ of the court is therefore a part of the procedure of the court. The procedure of the court as to service of its writ is contained in the rules and orders made under the Judicature Acts. In order to determine whether they can be applied to, and if "yes" their effect on, the particular case in question, it seems valuable to consider their bearing on other cases which are beyond question within them and governed by them.

First, then, I will take the case of a writ issued against a defendant, an English subject found in England. The writ must be served, or that done which is equivalent to service (order 9). If the person attempted to be served desires to submit that there was no proper service he must move to set aside the alleged service. But he must do so before he appears, because if he has appeared, any irregularity in the service is waived by his appearance (ord. 12, r. 30). If the service is not impeached, the person served, the defendant, may appear or not. If he appears he may defend by alleging he never was liable—that is, that he never ought to have been made a defendant; if that turns out to be so, the defendant succeeds. If the person served does not appear, the plaintiff files an affidavit of service of the writ on the defendant named in it and verifies the writ indorsed according to ord. 9, r. 15, the affidavit of service alleging a service on A. B. as defendant according to ord. 13, r. 2. Upon such affidavit, judgment is entered against the alleged defendant for default of appearance.

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

It is obvious from this statement that a judgment for default of appearance is procured solely upon assertions of the plaintiff. He asserts a service on the defendant against whom he obtains such judgment. If there has been a service, however irregular, the defendant is bound by the judgment, unless the court sets aside the service for particular reasons. It may be, however, that the affidavit of service, either by mistake or fraud, is erroneous, and that in truth the defendant was not served at all. Nevertheless the judgment is good against the defendant named in it until it is set aside; the defendant must move to set it aside (ord. 27, r. 15); of course, in the suggested case, it will be set aside with costs.

I will next consider a case equally beyond question governed by the rules and orders, the case of an action against the partners of an English firm in England, where this court has general jurisdiction over the cause of action. The mode and manner in which the court will exercise the jurisdiction is matter of procedure regulated by the rules and orders. By them the partners may be sued in the name of their firm (ord. 16, r. 14); the partners, therefore, are sued, although the firm is, as it were, defendant on the face of the writ. The service of the writ is regulated by ord. 9, r. 6. If the writ is against the firm it shall be served "on one or more of the partners, or at the place within the jurisdiction of business of the partnership upon any person having at the time of service the control or management of the partnership business there, and such service shall be deemed good service on the firm." The last word "firm" in the rule obviously includes all the partners in the firm. All the partners, therefore, shall be deemed to have been served. This is made, if possible, more clear by the rule as to appearance in such case. In case of such a writ and such service each and every partner shall appear individually in his own name (ord. 12, r. 15). This rule could not have been made except on the assumption that each and every partner is to be deemed to have been served. If a person specifically served as a partner desires to allege that the service is wrong, he must, before appearing, move under ord. 12, r. 30. But the only question then is whether the service was regularly made in the prescribed manner. If it was, the person served must appear absolutely, or will not appear. If he appears he will defend, and his defence will be entertained; he can plead that he was not a partner, or that the firm was not liable. If he does not appear, the plaintiff will proceed to obtain judgment for default of appearance, as in the case of a single defendant. The plaintiff will verify the writ and make an affidavit of service. The writ will disclose an action against the firm. The affidavit will assert service on the firm by means of service on A. B. as partner. Such service being deemed to be service on the firm, the judgment following the writ will be judgment against the firm for default of appearance; execution will without more be against the property of the firm, and against the person who has, according to the affidavit of service, been actually served as a partner. But other persons alleged to be partners must be brought in according to ord. 42, r. 10. In the same way as in the case of an individual defendant, if the affidavit of service is, by mistake or fraud, erroneous to this extent, that in truth the person alleged to have been served as a partner of the firm has not been served at all, the court will, on the application of the firm or of the person alleged to have been actually served, set aside the judgment and all proceedings.

If the writ is against the firm it may be served otherwise than on a partner—if there be a place of business within England and a manager there, then the writ may be served there on such manager. If the writ is so served, it is deemed to be service on the firm. There is no rule which says that the person so served, and served in that character, can appear in his own name. Ord. 12, r. 15, excludes him; he is not a partner, and, therefore, not a defendant. Partners who have left their business to be managed by such a person must accept the consequences of his omitting to inform them of the service of the writ on him. In case of such a service, and no appearance by a partner, the plaintiff could, upon proper affidavits, obtain judgment as for default of appearance against the firm.

I will next consider the more delicate case of a writ issued against a foreigner not domiciled or resident in England, but found in England. In certain cases the English court will entertain and determine a cause against a foreigner neither resident nor domiciled in England. Whether the cause of action is one which the English court can entertain as a cause of action will appear by the writ. If the writ is unobjectionable, the court has the general jurisdiction over it. How is the court to exercise such jurisdiction? It must proceed in it according to its own laws of procedure. The writ must be served, or that done which is equivalent to service. If the writ can be served in England it can, according to the rules and orders, be served without leave. If the foreigner is in England the service can be on him without leave. Then it must be served according to the rules and orders, and with all the effects of such service as regulated by the rules and orders. The whole procedure and all its results will correspond exactly with all the steps and their results which have been described in the first case of a writ issued against an English subject served on him in England. This is not denied. If follows from it that the English procedure can be exercised against a foreigner temporarily in England, although neither resident nor domiciled in England. His case is governed by the procedure of the English court.

If the foreigner thus sued is not found in England, or, indeed, if an English subject sued in England is not in England, the English laws of procedure could not be exercised outside the territorial jurisdiction of England by an English court, unless the court were authorized to do so by an English Act of Parliament which it was bound to obey. The writ must be one with regard to a cause of action which the English court can entertain. Can the English court serve such a writ abroad, first, on an English subject, secondly, on a foreigner. Ord. 11, r. 1, is a direct enactment that the court can give leave to serve its writ abroad. The cases in which it can are exhaustively included in order 11. But in those cases it can. It is only by virtue of that rule being equivalent to an enactment that the court can give such leave. Whether such enactment is strictly within international comity is a question which no English court can entertain. The order binds the court.

The order is conclusive that, to the extent to which it goes, the court must exercise its jurisdiction over a foreigner neither resident nor domiciled in England. The forms 5 and 6 in appendix A. and the N.B. to form 5 support, if necessary, the view that by English Act of Parliament a foreigner sued by a writ issued from an English court is, in certain cases enumerated in order 11, liable to be proceeded against in enforcement of that writ by the English enacted rules and orders, it being true, however, that only enacted rules and orders could be used against him. But if the order 11 is effective against him, it seems absurd to say that the enacted rules made for the purpose of giving effect to the service of a writ served under that order do not bind him. Otherwise, the leave given under order 11 would be futile. If, there-

fore, the leave is given under order 11, and the service is effected, then all the effects enacted by the other rules and orders must have the same force against the defendant so served as against a defendant served in England. The plaintiff may on proper affidavits obtain judgment for default with all its consequences. In case of mistake or fraud, and in all respects, the court would deal with such judgment precisely in the same manner as with any other judgment signed for default of appearance.

We now come to the case of foreign partners of a foreign firm, sued in an English court, the partners being all abroad, none of them resident or domiciled in England. If the partners were each and all sued by name, it is difficult, I think impossible, to say otherwise than that each of them would be subject to the procedure and rules and orders just previously described. Each of them would be within order 11, and, therefore, within the consequent or consequential rules. If their case is within some of the rules, they must, I think, be within all the rules. There is no distinction made between the rules. They are all rules made for the same ultimate purpose—namely, for the purpose of enforcing the writ of the court. They are all rules of procedure adapted to different cicumstances, but with one ultimate purpose. If so, the rules as to the form of the writ and as to its service must have the same effect in the case of foreign partners as in the case of a foreign individual. Then the foreign partners, in the case in which an English writ can issue, may in such writ be sued by their firm name. The court may, under order 11, give leave that the writ may be served abroad. If the writ may be served abroad, the reasoning which led to the conclusion that all the rules subsequent to the service must apply to an individual who might by leave be served abroad, will lead to the same conclusion with regard to a firm which by such leave may be served abroad. It follows that service on one partner abroad is service on the firm and on all the partners of the firm. If one partner is served and he appears, his appearance is that of the firm. If he does not appear, judgment for default of appearance will be entered against the firm. In case of mistake, or fraud, or other circumstances, the same relief or indulgence will be given as in all other cases of judgment for default of appearance. And if one of the foreign partners be found in England, service may be effected on him without leave. Order 11 is not then called into play. But the other orders and rules apply, and service on that partner is service on the firm and on all the other partners, with all the consequent results. As to this last case, the case of *Pollexfen* v. *Sibson*, 34 W. R. 534, 16 Q. B. D. 792, is absolutely in point. The reasoning of the judges in that case seems to me to be the same as the reasoning more elaborately set forth in this judgment. *Davies* v. *André* is, I think, an authority that service in England on a foreign partner found in England is a good service on the foreign firm. The question directly decided was, that a conditional appearance was no appearance at all. That the service was good service was not disputed. The case of *Russell* v. *Cambefort* is hardly consistent with all the reasoning of this judgment. But in it the case of *Pollexfen* v. *Sibson* was not overruled. *Russell* v. *Cambefort* raises for the present, in my opinion, an exception as to the application of the second part of ord. 9, r. 6, to the service of a sufficient writ in the prescribed manner on a foreign firm where all the partners in it are foreigners abroad.

I have gone elaborately into all the cases to which the rules and orders are applicable in order to show how I construe those rules. If my view is right, the present case is simple. The service on the person alleged by the plaintiffs to be a partner could not at any time have been set aside. It certainly cannot be set aside now that he has appeared unconditionally. He can proceed to make his defence. What that defence may be, what questions may arise with regard to it, I think it unnecessary now to suggest.

Again, it has been said that no foreign court would enforce in its own country a judgment obtained in this country under the rules and orders in the manner above described. That may be so as to the partners not actually served and as to their share in the partnership property. It hardly seems that it would be so as to the property or share of the partner who has actually been served. All these questions do not seem to me to arise yet in the present case. But, supposing that the judgment would be ineffectual abroad, it may well stand as a valid judgment in this country effectual against any partnership or personal property which may hereafter come into this country.

I have the strongest opinion that the rules and orders as to the service of writs abroad should be at once revised.

The appeal, in my opinion, should be dismissed.

LINDLEY, L.J.—I have had the advantage of reading the judgment which is about to be read by Bowen, L.J., and in which I concur. I only, therefore, add a few words on my own account. When a firm's name is used it is only a convenient method for denoting those persons who compose the firm at the time when the name is used; and a plaintiff, who sues partners in the name of their firm, in truth sues them individually just as much as if he had set out all their names. Now, if one of those partners is out of the jurisdiction, the mode of proceeding against him is under order 11, and the necessity for proceeding against him under order 11 exists whether he is sued by name or as one of the firm under order 9. That is the *ratio decidendi* of the Court of Appeal in *Russell* v. *Cambefort*, and is, in my judgment, right. That case is inconsistent with some other decisions which will be alluded to presently by Bowen, L.J. Practically it comes to this, as I understand it, that if a member of a firm is resident abroad, the prudent way is to proceed against all the partners by name, or against all who are in this country, and not to attempt to proceed under order 9, and sue them in the name of the firm, which will lead to trouble in getting judgment and future execution, and had better be avoided. The order appealed from should be varied, as the Lord Justice will state.

BOWEN, L.J.—The contracts here sued upon are foreign contracts made and to be performed abroad, the contracting parties on both sides are wholly resident and domiciled abroad, having no place of business, and so far as appears no joint assets, in this country. But a person who is alleged to be one of the partners of the firm being temporarily and accidentally in England has been served with a writ issued against the firm in the firm name, and served upon himself "as partner." This person, to whom I hereafter allude as the defendant, has appeared, but objects to the writ and asks us to set it aside altogether as null and void, and not warranted by the rules.

The first question which arises is whether such service is good service as against the "firm" within the meaning of ord. 9, r. 6. The second question will be whether, assuming the writ as against the firm to be misexpressed, it is not (after the defendant's appearance) to be held good as against himself, the case of the plaintiffs being that the defendant is a partner in the firm, without proof of which fact they cannot succeed. If the writ in its present form, and the service of it, are to be held valid as against the firm,

the judgment entered, if the plaintiffs were to prove successful in the action, would be in form a judgment against the firm (ord. 12, r. 15), a judgment which in such a shape would not be recognized by any other country, since the firm are not within the English jurisdiction. It is contrary to the doctrines of international law that a judgment should have any validity except against such persons as are or as have been brought within the jurisdiction of the court that gives it, and as the other members of the foreign firm do not come within this category, a judgment against the entire foreign firm's property would be useless abroad, and unjust both abroad and here.

Upon such a ground it has been urged before us that it was never intended by ord. 9, r. 6, to deal with actions against foreign firms, the members of which are wholly resident abroad, but that the procedure which governs such actions is indicated by order 11 so far as concerns service of writs out of the jurisdiction. In opposition to this view the plaintiff's counsel have contended before us that ord. 9, r. 6, applies to actions against all firms, foreign and English alike, whether the members of such firms are or are not resident abroad—that the rules are not necessarily intended to be confined within doctrines of international law, and are competent to prescribe how actions should be tried against all persons outside or inside the jurisdiction—and, lastly, that ord. 9, r. 6, has, in effect, prescribed what procedure should be adopted both as respects foreign firms and English.

I do not think that the field is open to me to discuss the broad and important subject upon principle, apart from authority. The case of *Russell* v. *Cambefort* was a case which arose under the same rule and order, although the service in that case was effected not on a partner, but on a manager of the partnership business. The judgment of the Court of Appeal was, however, based expressly on the view that ord. 9, r. 6, was not intended to govern writs directed against foreign firms, none of whose partners were resident or domiciled in England, and I do not think we should be carrying out the real view of the law so laid down if we were to seek to distinguish the case of service effected on a partner under one portion of the rule from that of service effected on a manager under the other portion of it. We are, therefore, I think, bound to apply the same reasoning to both cases, and, this being so, we ought to hold, on the authority of *Russell* v. *Cambefort*, that the present writ is incorrectly issued against the firm, and cannot be justified as against the firm by ord. 9, r. 6. It follows that *O'Neil* v. *Clason*, 46 L. J. Q. B. 191, *Pollexfen* v. *Sibson*, and *Shepherd* v. *Hirsch, Pritchard, & Co.*, if really inconsistent with that decision, must not be followed. It must not be supposed that our decision implies that no remedy can be had against foreign firms or such of their members as happen to come within the jurisdiction. The law as to suing and serving them will remain what it always has hitherto been, though the writs cannot, under ord. 9, r. 6, be addressed against them in the foreign firm's name. The old course will be still pursued—namely, to insert in the writ the names of the partners whom it is desired to sue, and such writ so framed may be served on any of the partners who are found within the jurisdiction. For service out of the jurisdiction recourse must be had to order 11 if the case is one which can be brought within the rules of that order.

The law as to actions against foreign firms being thus, according to the effect of our present decision, wholly unaltered and unaffected by ord. 9, r. 6, it becomes necessary to apply ourselves to the second question in this case—viz., whether, as against the defendant who has appeared, the writ should be set aside on the ground of its being directed against his firm, and it appears to me that as against the defendant the service of the writ must, under the circumstances, be upheld. The defendant is not the less intended to be sued because he is intended to be sued with others who, with him, are misnamed, and who, together with him, are intended to be comprehended (though, as we have seen, irregularly) in one firm name. The writ is no doubt irregular in that it uses a single firm name to describe the defendant and others who are beyond the jurisdiction. This irregularity as regards the firm must be set right. What has been writ short must be writ large, for the plaintiff is not entitled to the benefit of ord. 9, r. 6, nor to the advantage of proceeding further as against the firm in the firm name. But the defendant is really himself sued together with others, since the plaintiff intends to include him, and to show at the trial that he is properly included, among the members of the firm, and the irregularity of the nomenclature in the writ the defendant has waived as against himself by appearance, since he might, if he had chosen, have moved under ord. 12, r. 30, to set aside the service upon himself, and was not obliged to appear to enable himself to move.

The service, therefore, must stand as against himself, if the plaintiffs elect to amend the writ in ten days, so as to state that the defendant is sued together with the other alleged members of the firm, who should be named separately, and when this amendment has been made the parties will be left to take such further steps, if any, in respect of the progress of the action as they may be advised, if any steps can be lawfully taken against the remaining defendants beyond the jurisdiction, as to which I offer no opinion at present. The defendant will be entitled in his defence, if the action proceeds, to avail himself of any defence open at law or equity to a defendant who is sued, together with other persons beyond the jurisdiction, on an alleged liability which he disputes.

The costs here and below will, in such a case, be costs in the cause.

If the plaintiffs do not so elect in ten days, the writ must be set aside, and the plaintiffs must pay all costs down to and including the costs of the appeal.

In conclusion, in addition to what has been said by the Master of the Rolls, I desire to express an opinion, formed after some experience and observation, of the necessity of re-drafting the rules under the Judicature Act so far as they affect partnerships.

Solicitors for the appellant, *Travers-Smith, Braithwaite, & Robinson.*

Solicitors for the plaintiffs, *John W. Sykes.*

High Court of Justice.

Chan. Div. } Dec. 12, 13, 16, 17.
Kekewich, J. }

In re WHITELEY AND ROBERTS' ARBITRATION. (a.)

Arbitration—Setting aside award—Misconduct—Admission—Evidence—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 11 (2).

On a motion to set aside an award, on the ground of the misconduct of the arbitrator, it was alleged that he

(a.) Reported by H. C. ROPER, Esq., Barrister-at-Law.

had been bribed. The only evidence of the truth of this allegation adduced at the hearing was that of witnesses who had heard the arbitrator himself admit the fact in a conversation, at which R. (the other party to the arbitration) was not present.

Held, that the admission was not sufficiently proved to enable the court to set aside the award as against R.

Motion.

The question was whether misconduct on the part of an arbitrator could be proved by evidence of admissions made by him after the award without calling him as a witness.

The motion asked that an award might be set aside upon the ground that the arbitrator had misconducted himself by acting in collusion with the defendant Roberts (the other party to the arbitration), and by accepting, or agreeing to accept, money from Roberts, or some other person in his behalf, as an inducement to fraudulently make his award in favour of Roberts; and that the award had been improperly procured through such fraudulent conduct.

The evidence at the hearing was taken *vivâ voce*, and the plaintiff's witnesses alleged that in a conversation, which took place after the award, and in the absence of Roberts, the arbitrator Clough had said that he had made enough out of the arbitration to keep him for a twelvemonth. There was no other evidence of misconduct.

Before calling any witnesses the defendant Roberts took the objection that no evidence of misconduct on the part of the arbitrator had been adduced except his admission in the alleged conversation, and that that admission was not evidence against Roberts, as it was not made in his presence.

Renshaw, Q.C., and *Waggett*, for the motion.—The arbitrator has misconducted himself, and the award has been improperly obtained within the Act of 1889, s. 11 (2). It ought to be set aside.

Warmington, Q.C., and *Dare*, for Roberts.—There is no evidence against Roberts of any misconduct on the part of the arbitrator. He has not been called as a witness. In fact he has made an affidavit denying it.

Renshaw, Q.C., and *Waggett*.—If the arbitrator has gone so far wrong as to justify the court in setting aside the award, the court will act upon any admission by him: *Mills* v. *The Society of Bowyers*, 3 K. & J. 66; *Earl* v. *Stocker*, 2 Vern. 251; *Morgan* v. *Mather*, 2 Ves. Jun. 15.

Warmington, Q.C., in reply on the authorities.—The admission must be made to the court. In all those cases it was on the record.

KEKEWICH, J.—It is somewhat strange that, notwithstanding the industry of counsel, no case has been found bearing directly on this point, which is of some importance and must have occurred before. It is desirable to show how the question arises. The applicant says that the arbitrator arrived at an unjust conclusion because he was bribed by Roberts. In support of that he brings forward a variety of circumstances intended to show a probability that such a thing took place, or, at any rate, that it would be consistent with those facts that it took place, but his only piece of direct evidence is this. He called several witnesses to prove that on the 23rd of October the arbitrator himself expressed himself in language which can be interpreted fairly enough to mean that he had been bribed by Roberts. I have not heard the argument on the part of Roberts or Clough on the meaning of those words, and need not express any opinion on their meaning, nor would it be convenient now to criticize the conduct of the witnesses who swore to them. So I assume that they are stating what occurred, and that what occurred was an admission by Clough from which the conclusion would follow that the award was corrupt. The question is, Is that admission by Clough sufficient to call upon Roberts to answer Whiteley's charge? Is there any evidence to go to a jury. As a rule, an admission by any one party, though it can be adduced as evidence against himself, cannot be adduced as evidence against any other party, and that rule stands on common sense and legal principles. There are well known exceptions to the rule, which may be classed under two heads. The first is when the party against whom the admission is sought to be read has a joint interest with the party whose admission is sought to be read. That is on the principle that persons seised jointly are each seised of the whole of the subject-matter, so that an admission by one joint-owner is an admission by the owner of the whole. That is an application of a rule of real property law to other matters. The other exception is where the party against whom the admission is sought to be used, derives title to what he claims in the subject-matter from the person who made the admission—as, for instance, where it is sought to read against the heir an admission by his ancestor. He stands in the shoes of the person who made the admission, and derives his title through him, so it is only fair that he should be bound by the admissions of the person through whom he claims. With these two exceptions the rule, so far as I am aware, is absolute. Why should admissions by an arbitrator form any exception to the rule? Apart from authority, it is put rather on the necessities of life. It would be, to use the term of Lord Commissioner Wilson, a "melancholy" thing if this could not be done, but one must have regard to the great danger of introducing such an exception. If the argument of Whiteley were admitted any arbitrator might, not only immediately after the award, but at any time afterwards, say, perhaps for insufficient reasons, that he had been bribed, and the person against whom the award was made could apply to set it aside. Of course, there are rules as to the time within which an application can be made for that purpose, but the court has power to extend the time for doing so, and it might be very difficult to resist such an application where the allegation was of gross misconduct. It would introduce uncertainty into the law.

Is there any authority for the exception? Two or three cases were cited, but none go exactly to the point, and it is difficult to extract any principle from them. The most direct authority is the case of *Mills* v. *The Society of Bowyers*. There, no doubt, Wood, V.C., attributed great importance to an admission by the arbitrator. The admission in that case was of a mistake, and he pointed out that the admission was absolutely necessary. He referred to two cases, and stated that there the arbitrators admitted by affidavit the mistake they had made. The Vice-Chancellor further said that in the case before him he thought he had an admission on the part of the arbitrators that they had made a mistake, and he seems to have thought, by reference to those cases and on general principles, that he must have such an admission.

But I am bound, under that judgment, to turn to the special facts of the case, and see the meaning of his judgment. There was a contest between the parties whether the award had proceeded on a proper basis. Affidavits were filed on both sides showing the principle on which the award was made, and it was alleged that the umpire had improperly held communication with the agents of the company. Then I understand that the umpire himself made an

affidavit, and there was a conflict of evidence. The Vice-Chancellor referred to the arbitrator's affidavit as containing admissions of mistake, and relied on that; so that I cannot necessarily consider that the Vice-Chancellor said, "I can set aside the award on the admission of the arbitrator," but, "even though the impropriety is proved by other evidence, I cannot set aside the award without the evidence of the arbitrator." There were only two other cases cited, and in the paucity of authority I ought to notice them. There was the old case of *Earl* v. *Stocker*, which there is some little difficulty in understanding, because one has not the ordinary facts, but I must take it that the admission of the arbitrators was in some way a matter of record, so that it was an admission made to the court. They had confessed it by their answer. Without more, that could only be read against the arbitrators themselves, but it was read against other parties as well. No other case has been cited which lays down that if arbitrators confess, even by answer, to improper motives, that that should operate against the award and enable the parties to set it aside.

The only other case referred to is *Morgan* v. *Mather*, where, at p. 18, Lord Commissioner Wilson says:—"The only grounds for setting aside awards are, first, that the arbitrators have awarded what was out of their power; secondly, corruption, or that they have proceeded contrary to the principles of natural justice, though there is no corruption, as if, without reason, they will not hear a witness." Those are matters which would have to be proved; and, thirdly, the case which Wood, V.C., dealt with in *Mills* v. *Society of Bowyers*, "that they have proceeded upon mere mistake, which they themselves admit."

That entirely agrees with what the Vice-Chancellor says. Where you are dealing with a mistake you must not be contented with conflicting evidence, but must have the admission of the arbitrator. Here was a case where it could not possibly be proved to the satisfaction of the court, as regards the domestic tribunal, so as to enable the court to adjudicate on the validity of the award without the admission of the arbitrator. The mistake is in his own mind, and if he does not himself confess it the court must hold that there was no mistake at all. The case shows what the value of admissions is, and why the admission of the arbitrator is of such value.

It was argued that he could not give evidence of his own misconduct. But that was argued in the case of *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418, and the matter was gone into fully. Lord Cairns says:—"It appears to me that upon every point which may be considered to be a matter of fact with reference to the making of the award the evidence of the arbitrator or umpire was properly admissible. He was properly asked what had been the course which the argument before him had taken, what claims were made, and what claims were admitted, so that we might be put in possession of the history of the litigation before the umpire up to the time when he proceeded to make his award. But there, it appears to me, the right of asking questions of the umpire ceased." If you desire to prove a mistake you may call the umpire to show what circumstances were brought before the umpire which ought not to have been brought before him, and you must call him and get his evidence, he being the person best qualified to give it. Beyond that you must not ask him as to the award itself, but that does not exclude his evidence in a case like this. It does not exclude questions as to what occurred before the umpire, or the circumstances on which the award is founded. This question is outside the award, whether or not the arbitrator was bribed. You can call him to prove that, and no objection can be taken to his evidence. That shows that, although there may be difficulty in proving such a fact, there is no legal difficulty in doing so; and that is a reason why one should rely on the ordinary rule, and say, if a man comes here to establish a case of fraud, he must prove that fraud, or otherwise his case fails.

The point is new, and there seems to be no direct authority upon it; but, on principle and such authority as there is, I think the objection is good, and a mere admission such as is stated will not suffice to prove fraud on the part of the arbitrator, and that the motion fails as against Roberts.

[The plaintiffs declined to go on with the case against the arbitrator alone, and the motion was refused, with costs.]

Solicitors, *Van Sandau*, for *E. F. Brook*, Huddersfield; *Torr & Co.*, for *Douthwaite & Waddington*, Cleckheaton; *Yewdall, Son, & Marriott*, for *J. V. Curry*, Bradford.

Chan. Div.
Romer, J. } Jan. 12.

HARRISON, AINSLIE, & CO. v. CORPORATION OF BARROW-IN-FURNESS. (*a*.)

Lease—Covenant not to assign—Manufacturing purposes—Corporation—Person of responsibility and respectability.

A lease of land, with an iron furnace and mill and certain water rights for the purpose of working the same, contained a covenant on the part of the lessees not to assign or underlet without the consent in writing of the lessors, "such consent not to be unreasonably refused, or refused to a person of responsibility and respectability." The lessees agreed with the Corporation of Barrow-in-Furness to assign to them, and the corporation agreed with the lessees not to use the water rights for manufacturing iron or steel. The lessors refused to consent to the assignment, on the ground that the corporation could not use the premises for the purposes they were intended.

Held, that the corporation was not, under the terms of the lease, "a person of responsibility and respectability" within the meaning of the covenant therein, and that the consent had not been unreasonably withheld.

By a lease dated January 6, 1886, the plaintiffs, Harrison, Ainslie, & Co., who were iron manufacturers, leased from the trustees, under the will of William Laurey Rawlinson, certain premises with an iron furnace and bobbin mill thereon, situate at Duddon Bridge, in the county of Cumberland, together with the dams, sluices, and water courses connected therewith, for fourteen years from May 12, 1885, at an annual rent of £25. In the lease was contained a covenant by the lessees not to assign or underlet the premises or any part (except the mill and other buildings) without the previous consent in writing of the lessors. The covenant then proceeded "but such consent shall not be unreasonably refused or refused to a person of responsibility and respectability." The lease also contained a covenant by the lessees to repair and yield up the premises in substantial and tenantable repair at the expiration of the term.

For a period of more than twenty years before the grant of the lease the furnace and mill had not been worked. The plaintiffs themselves had no intention of working them. On June 3, 1889, Harrison, Ainslie, & Co. agreed with the defendants, the

(*a*.) Reported by J. W. GREIG, Esq., Barrister-at-Law.

mayor, aldermen, and burgesses of Barrow-in-Furness, to assign to them the lease in consideration of a premium of £570, and they also agreed to withdraw their opposition to a Bill then before Parliament by which the corporation sought power to impound the waters of the River Duddon, and to obtain all necessary licences for the assignment of the lease. The corporation, on their side, agreed not to use the waters of the River Duddon for or in connection with the manufacture of iron or steel at any place without the water limits of the corporation. The Bill was in fact not passed.

On June 5 an application was made by the plaintiffs to the solicitors of the lessors for the requisite consent to the assignment, and on October 7 the lessors definitely declined to give it, on the ground that the proposed assignees were a corporation who were not taking the lease for the purposes it was granted, and might use it prejudicially to the lessors. By their claim the plaintiffs averred that the consent was unreasonably withheld, and that consequently they were entitled to assign it without licence, and claimed a declaration to that effect, and specific performance by the corporation of the agreement to take the lease. The defendants (*inter alia*) pleaded that it was *ultrà vires* of the corporation to take the lease.

Haldane, Q.C., and *Fellows*, for the plaintiffs.—The reasons given for withholding consent are insufficient, as they contemplate future injury. The lessors will be amply protected under the covenants in the lease. "Person" in that lease includes corporation (Conveyancing Act, 1881, s. 2, xvii.), and it cannot be suggested that this corporation is not a responsible one. The consent has, therefore, been unreasonably withheld: *Treloar* v. *Bigge*, 22 W. R. 843, L. R. 9 Ex. 151; *Sear* v. *The House Property and Investment Co. (Limited)*, 29 W. R. 192, 16 Ch. D. 387. There is nothing *ultrà vires* in the corporation taking the lease: *Riche* v. *The Ashbury Railway Carriage and Iron Co. (Limited)*, 23 W. R. 7, L. R. 9 Ex. 224; *Jesus College* v. *Gibbs*, 1 Y. & C. Ex. 145; *Vigers* v. *Dean of St. Paul's*, 18 L. J. Q. B. 97.

Wilkinson and *Attwater*, for the corporation.

Neville, Q.C., and *Morshead*, for the lessors.—The corporation is not "a person of responsibility and respectability" within the meaning of the covenant, as such a corporation cannot work an iron furnace or a mill, and the consent has therefore not been unreasonably withheld. The corporation has taken the lease to get rid of the opposition, not to use the premises as contemplated by the lease; indeed, there is a covenant by them not to use the water rights for manufacturing iron. Hence it was not unreasonable to withhold consent. It was not mere caprice which caused the lessors to refuse consent: *Lechmann* v. *McArthur*, 16 W. R. 877, L. R. 3 Ch. 496.

Haldane, Q.C., replied.

ROMER, J.—This is an action for specific performance of an agreement for the sale and purchase of leasehold premises. The parties to the action are the vendors, who are the plaintiffs, the Corporation of Barrow-in-Furness, who are the purchasers, and the remaining defendants are the lessors. The premises in question are granted by a lease of the 6th of January, 1886, for a short term of years of an iron furnace and other premises, and certain rights to use the waters of the River Duddon, which flows close to the demised premises, for the iron works. Such being the lease, the agreement in this action was entered into under the following circumstances:—The defendant corporation were promoting a Bill in Parliament to enable them to take the waters of this river for the purposes of the borough. The lessees and lessors opposed the Bill, on the ground that, should the corporation acquire the powers which they sought by their Bill, the lessees and lessors would both be considerably injured. The corporation thereupon enters into an agreement of the 3rd of June, 1889, to buy the leasehold property belonging to the plaintiffs. There can be no doubt that the sole object was to buy off the plaintiffs' opposition to the Bill, an object apparent on the agreement and the admitted facts. Under that agreement the corporation purported to buy all the leasehold rights of the plaintiffs, and it contains a very important clause, the short effect of which is that the corporation were to bind themselves never to use any of the waters of the River Duddon for the purposes of using in connection with the manufacture of iron or steel at any place or places outside the water limits of the corporation. The result of that would be that the corporation could not use all the rights given to them as lessees, though the lease clearly contemplates the use of the waters by the lessee for the purpose of the manufacture of iron and steel. It is quite true that for a period prior to the date of the agreement the original lessees did not work the furnaces, but they could have resumed work at any moment if they had chosen, and they had never abandoned the idea of so doing, and the lessors could always look forward to that, whereas if the corporation became lessees that could never take place. Under these circumstances it struck the lessors that it was undesirable that they should give the licence to assign which was asked for. The provision in the lease is this. There is a covenant by the lessees with the lessors that the lessees will not, without the consent in writing of the lessors, assign or underlet the premises, "but such consent shall not be unreasonably refused, or refused to a person of responsibility and respectability." The reason given as a refusal was the circumstances I have stated. The defence, as amended, states that the defendants were entitled to refuse to give the licence to assign because the corporation were not able to become the assignees, as it was *ultrà vires* on their part to have entered into the agreement to purchase.

Now I have to decide, first, whether the corporation can be considered "a person of responsibility and respectability." No doubt, for many purposes, the word "person" includes corporation as, for example, for the purposes of the Conveyancing Act, 1881. But, looking at the particular lease, I have to decide whether the Corporation of Barrow-in-Furness falls within the definition of "a person of responsibility and respectability." I think not. The corporation cannot, under the terms of the lease, and in view of the facts, be said to come within the fair meaning of these words. Has, then, the consent of the lessors been unreasonably withheld. I think, on this point, that the plaintiffs have not shown or established that the lessors refused their consent unreasonably. I come to this conclusion because the lessors were fairly entitled to say that the corporation could not be a good tenant or assignee, because they could not use these water rights for working the furnace. The action will, therefore, be dismissed, with costs.

Solicitors for the plaintiffs, *Dawson, Ainslie, & Martineau.*

Solicitors for the defendants, *Iliffe, Henley, & Sweet*, for *C. F. Preston*, Barrow-in-Furness; *Harrison & Powell*, for *Harrison & Milne*, Kendal.

Chan. Div. } Romer, J. } Dec. 2.

ANGUS v. CLIFFORD. (a.)

Company—Misrepresentation—Prospectus—Materialty of statements.

Directors of a gold mining company issued a prospectus containing a statement that "full reports on the property have been prepared for the directors by eminent engineers" (naming them). None of the reports in question, however, had, in fact, been prepared on the instructions of the directors, or on their behalf, and one of the reports had, in fact, been prepared on the instructions of the agent of a vendor of the property. The value of the shares had greatly decreased.

In an action for damages brought against the directors by a person who had taken shares in the belief, induced by the prospectus, that the reports had been prepared on behalf of the directors,

Held, that the statement as to the reports in the prospectus was a material misstatement, and none the less material because the plaintiff adduced no evidence to show that the reports were in themselves inaccurate or exaggerated, and, consequently, that the defendants were liable in damages.

Trial of action.

This was an action claiming a declaration that the plaintiff was induced to take 2,000 shares of £1 each in the Valley Gold Co. (Limited), by alleged misrepresentations in a prospectus issued on the 27th of October, 1886, by the defendants as directors of that company, and for damages thereby incurred.

The company was registered in August, 1886, with the object of purchasing and working certain gold-bearing land in California.

After the plaintiff had taken shares, for which he paid £2,000, the company was reconstructed, the £1 shares being divided into 5s. shares, which had greatly decreased in value.

The prospectus stated that full reports (therein set forth) on the property had been "prepared for the directors" by four eminent engineers therein named.

It further stated that the engineers had personally inspected the property, that one of them had advised the board as to the means to be adopted for working and developing it to the best advantage, that the reports had convinced the directors that the estate was a rich one, and that the directors had no hesitation in recommending the shares to the public as a genuine investment.

The reports of the engineers had, in fact, been made before the defendants became directors, and had not been made for them, but on the instructions and on behalf of the London agent of the vendors to the company.

Sir Horace Davey, Q.C., and *T. R. Hughes*, for the plaintiff.—The plain meaning of the words in the prospectus is that the directors had themselves employed the engineers to make the reports. This allegation is untrue and a material misstatement, and the defendants are therefore liable.

Rigby, Q.C., *Asquith, Q.C.*, and *Grosvenor Woods*, for the defendants.

ROMER, J.—The plaintiff in this case is Mr. John Henry Angus. The defendants are four—Sir Charles Clifford, Mr. Thomas Meates, Mr. Nelson, and Mr. Lloyd. They were the directors, and the only directors, of a company called the Valley Gold Co. (Limited). The action is one for damages caused to the plaintiff, as he alleges, by his being induced to take shares in the company by a certain alleged untrue statement contained in a prospectus inviting subscriptions for shares in the company issued by, or by the authority of, the defendants. Now there is no question in this case that the defendants are responsible for the prospectus in question, and that, if the prospectus makes those who issued it liable for the statements contained in it, the defendants are liable accordingly. There is no question here that the plaintiff applied for shares in this company on the faith of the prospectus, and was allotted shares accordingly. Upon the evidence before me I think it is clear there has been some loss, at any rate, accruing to the plaintiff by reason of his having been induced to take those shares. The real question in issue in this action is as to whether certain statements, to which I will refer in a moment, were or were not, in fact, made and inserted under such circumstances in the prospectus, that the defendants are liable for the statements so contained. Now those statements are these:—"Full reports on the property have been prepared for the directors by the following eminent engineers." I may mention here that there is no question as to who the directors are; they are referred to by that statement because their names appear in the earlier portion of that prospectus, and they are the four defendants to this action. Then the prospectus proceeds by giving the names of the four eminent engineers—Messrs. Jackson, Pearson, Rodda, and Del Mar. Then follow these statements:—"These gentlemen have personally inspected the property, and Mr. Del Mar has advised the board as to the means to be adopted for working and developing the same to the best advantage. These reports have convinced the directors that the estate is a rich one, and they have no hesitation in recommending the shares to the public as a genuine investment."

Now the first question which arises is, What meaning would naturally be attributed to these statements by the ordinary reader? I think any ordinary reader would come to the conclusion that the mining engineers referred to had been instructed by the directors to report to them in the interest of the company as to the property to be purchased, so that they might see whether it was one that the company could be advised to purchase. That is how I, at least, should read these statements, and the impression which they would convey to me. But whether that be or be not their undoubted meaning, it clearly is a meaning which could be attributed to them.

Then the question arises, Did the plaintiff himself attribute such a meaning to the statements in question? The plaintiff has given his evidence in the box, and has been cross-examined. The result is he has established before me that he did attribute the meaning that I have given to these statements, and, acting in the belief that those statements had that meaning, he applied for the shares in question, and so had them allotted to him. He was not in any way shaken by cross-examination; he was a good witness, and I trust what he has said.

The next question which arises under the circumstances is this, Assuming these statements to have had the meaning attributed to them, were the statements true? Now I think, beyond any question, the statements were not true as to the reports of Messrs. Jackson, Pearson, and Rodda. Mr. Grosvenor Woods said, and said truly, that what the plaintiff chiefly relied upon were the statements so far as they referred to Mr. Del Mar's reports; and it is said on behalf of the defendants that, as applied to Mr. Del Mar's reports the statements were, at any rate, in some sense true, and evidence has been given by the defendants for that purpose. Upon the evidence I come to the conclusion

(a.) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

that these statements, even as applied to Mr. Del Mar's report, are not true in any fair sense. When the defendants, who were all called and cross-examined, were asked to explain what meaning they attributed to these statements with regard to these reports, they were not able, to my satisfaction, to explain what meaning in fact they attributed to them themselves. One of them—the defendant, Mr. Lloyd—said, in effect, that the meaning to be attributed to the statements in question was that the reports of those engineers had been adopted on behalf of the directors, or by the directors. Another defendant, Sir Charles Clifford, after stating that he attached no meaning whatever to these words used so far as concerned the report of Messrs. Jackson, Pearson, and Rodda, said that, with regard to the first report of Mr. Del Mar he attributed the meaning to it that Mr. Del Mar had been instructed by the promoters to make that report, so as to give information to the proposed directors. I also listened to the evidence of the other two defendants, and the result I have come to is this—that I do not think that the defendants themselves, as I have said, can give any satisfactory explanation of what they did mean by the statements in question as applied to these two reports. But one thing I think is clear. Mr. Del Mar's reports were not prepared on the instructions of the defendants, nor on their behalf, nor in the interest of the company as purchasers. In fact, there is no evidence of any kind against that, except, possibly, some few observations of the defendant, Mr. Meates, in the witness-box.

Having regard to what Mr. Meates said in his answers to interrogatories, and to his demeanour in the box, I am bound to say I do not rely on Mr. Meates' statement that I am referring to. I wish to deal with Mr. Meates as gently as I can, and I would only say that in the witness box he was somewhat too anxious to defend himself. Bearing the whole evidence in mind, I think it is clear beyond any question that the first report of Mr. Del Mar was not prepared, as I have said, on the instructions of the defendants, or on their behalf, or in the interests of the company, and I also think that, with regard to the second report, although there is a little more evidence with regard to it, that report also was in no true sense made at the suggestion of the defendants, or at their request, or on their behalf, or, in other words, that that second report stands on any different footing from the first report. The only evidence which would tend to show that that second report stood on a different footing from Mr. Del Mar's first report was the evidence of Mr. Nelson and Mr. Meates, which, when examined, only came to this, that they deposed to certain conversations which they had had with Mr. Del Mar with regard to the property. In fact, with regard to most of the defendants, it is clear that they did not finally resolve even to become directors until after both the reports of Mr. Del Mar had been sent in.

Now Mr. Del Mar has not been called on behalf of the defendants in this case; but I gather that, in making these reports, he was acting, to a certain extent at any rate, in the interests of the vendor. I gather that from the whole evidence, and also—because it is clear from the evidence that certainly he was so far assisting those interested with the vendors, and in the promotion of the company—that he was trying in their behalf to procure directors for this company. It also appears by the evidence that he was instructed to make his reports to the vendors' agents in this country, Messrs. Beachcroft & Gordon, and was to be paid by them. They, and not the directors, were his employers. It is true that the reports purported to be addressed to the directors of the company, which by this time was not formed. At the time these reports were made there were no directors of the company, in fact, constituted or even finally agreed upon; and I have come to the conclusion that they were addressed in that way because undoubtedly Mr. Del Mar thought of submitting these reports to certain persons with a view of inducing them to become directors of the company. These reports of Mr. Del Mar, in my judgment, were not prepared for the directors of this company in any true sense—in any fair sense—perhaps I may say in any sense except that in which any vendor's expert making a report for the benefit of his employer may contemplate the fact that his reports may be used for the purpose of inducing persons to become shareholders in a company to be formed by the vendor to purchase the property. In that sense and no other could Mr. Del Mar's reports be considered to be prepared for the directors. In my judgment also it is not, on the evidence, true that Mr. Del Mar advised the board as to the means to be adopted for working and developing the property to the best advantage.

The result is that, in my opinion, these statements which have been relied upon by the plaintiff in this case are not true, and I think the defendants were not justified in allowing them to be inserted in the prospectus. In fact, looking at the circumstances stated by some of the defendants in the box under which the prospectus was allowed to go out, I think it is clear that no proper care was taken by the defendants with regard to the statements contained in that prospectus.

The next question that I have to consider is, whether the statements are material. In my judgment, they are material. I think that any person who is considering the statements in a prospectus given by experts as to the nature of the property to be acquired by the company and worked by the company, would be very much influenced by considering in whose interest and by whose instructions the reports were prepared. Looking at the question as men of business, there is no one who knows the affairs of life, I think, who would not say that, either as to the reports on the value and the nature of a property by experts or as to the valuation of a property by experts, it is material to know on whose behalf they were acting in considering a question as between vendor and purchaser. I suppose, theoretically, it ought not to make any difference on whose behalf an expert is employed to report on or value a property. If experts were perfect men, and could be relied on to make reports as if they were calculating machines, of course it would be immaterial; but in the practical affairs of life it does make a very considerable difference by whom an expert is employed. For example, could anyone say that it made no difference in considering the price to be paid for a property whether that price was fixed by a valuer for the vendor or by a valuer for the purchaser? Of course it does. In the ordinary course, would any prudent purchaser choose to buy a property at the valuation of a valuer instructed by the vendor and acting for the vendor. I think not, and *vice versa*. Therefore it appears to me that it was a very material thing for the plaintiff to know, in a case like the present, when he applied for shares, whether the reports to which his attention was called by the prospectus, putting it substantially, were reports given by experts employed by the vendor or experts employed by the purchaser. In my judgment, therefore, the statements in question were material, and did influence the plaintiff, as appears by his testimony in the box.

But then it was said that the statements ceased to be material because the plaintiff had not taken upon

from the general district rate account. No part of this sum of £8,404 was a receipt in respect of water rates, rents, or charges, or of a rate in aid, nor was any part of the sum supplied towards the working expenses, but it was applied partly to the payment of interest on capital borrowed for the construction of the works, and partly to the payment of instalments on loans.

The first item in the valuation prepared for the respondents—viz., that of £8,424—was arrived at by subtracting from the said sum of £8,404, the amount expended in respect of instalment of loan—viz., the sum of £5,680—and adding the balance of £2,724 to the said £5,700, thereby making the total £8,424, the amount which is alleged by the respondents to be necessary to pay working expenditure and interest on capital for the year. The question for the opinion of the court is, Which is the correct figure to adopt as the basis of the calculation for estimating the rateable value of the works—whether the said sum of £5,700 only, as the appellants say, or that amount increased by the said sum of £2,724, as the respondents say.

The appellants submit that the water rates and charges alone which are received by them form the proper basis for estimating the rateable value of the undertaking, that they have no power to make up any deficiency in the receipts to meet the expenses, outgoings, and liabilities of the works by a rate in aid, or to levy a public water rate; and if they have such power they have had no necessity to put it in force, nor have they done so. They also contend that the respondents are not entitled to bring any part of the district rate into account in estimating the net rateable value of the works, inasmuch as a hypothetical tenant could not draw upon the general district rate, or levy a rate in aid, and, therefore, could not have the benefit of such assistance.

The respondents contend that the water rates and charges alone do not represent the value of the water supplied to the district, and do not therefore, by themselves, form a proper basis for estimating the rateable value; that a local board or municipal corporation is on a different footing from a private company, inasmuch as such a company, in obtaining parliamentary powers for supplying water, will take care that their scale of charges is such as to secure a fair return for capital invested, while a local board may, for the purpose of giving the public a cheap suppy of water, be compelled to adopt a scale of water rate which is insufficient to meet current outgoings and rent, any deficiency being made up by a rate in aid, or by contributions out of the general district rates, and that a hypothetical tenant would be entitled to the same advantages, amongst them being that of raising loans, and paying the interest thereon out of the district rate.

If the court is of opinion that the contention of the appellants is right, then the rate is to be amended, and the rateable value of the undertaking is to stand at £2,624, as the rateable value thereof, being the amount at which the same is valued for rating purposes by the appellants; otherwise the present rateable value is to stand.

Balfour Browne, Q.C. (*W. Evans* with him), for the appellants.

F. Marshall (*Poland, Q.C.*, with him), for the respondents.

The following cases were referred to during the argument:—*The Corporation of Worcester* v. *Droitwich Assessment Committee*, 25 W. R. 336, 2 Ex. D. 49; *West Bromwich School Board* v. *Overseers of West Bromwich*, 32 W. R. 866, 13 Q. B. D. 929; *Dewsbury Waterworks Board* v. *Assessment Committee of Penistone Union*, 34 W. R. 622, 16 Q. B. D. 585, 17 Q. B. D. 384; *The Mayor, &c., of Peterborough* v. *Stamford Union*, 31 W. R. 949; *The Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union*, 38 W. R. 181, 24 Q. B. D. 197; *Tyne Coal Co.* v. *Overseers of Wallsend Parish*, 46 L. J. M. C. 185, 25 W. R. Dig. 237; *Jones* v. *Mersey Docks and Harbour Board*, 13 W. R. 1069, 11 H. L. Cas. 443; *The Queen* v. *Birstall Local Board*, 1 Times L. R. 541; *The Queen* v. *School Board for London*, 34 W. R. 583, 17 Q. B. D. 738.

Cur. adv. vult.

Nov. 25.—WILLIAMS, J., read the written judgment of the COURT, as follows:—The question in this case is whether or not a sum of £2,724 ought to be included in the receipts of the appellants for the purpose of calculating the net rateable value of the property. The answer to questions of this sort as to the rateable value of land occupied by corporations and companies for purposes of large undertakings for the service of the public is hardly ever of satisfactory character, having regard to the object of ascertaining the rateable value. It could hardly be expected to be so, seeing that the question, in effect, generally is, What is the proper conclusion to draw from given impossible hypothetical premises.

The sum of £2,724 is a portion of a sum of £8,404 6s. 8d. received by the appellants by transfer from the general district rate. Of the said sum of £8,404 6s. 8d., £5,680 was expended in respect of instalment of loan, and the £2,724 is the balance of the £8,404, which was received by the appellants and expended by them for purposes other than the instalment of loan. Now if this sum of £2,724 is to be treated as part of the money received by the appellants for the supply of water, then it would seem properly included in the receipts for the purpose of calculation of rateable value: see *Dewsbury Waterworks Board* v. *Assessment Committee of Penistone Union*; for if the £2,724 is received in payment for water supply it is equally a receipt of money available as an item of gross profit in arriving at the profit or debit balance.

Whether the money is received from the hands of the consumer, or by means of a rate in aid, or by means of an unconditional transfer of money from the general district rate, the only essential is that the money so received should be money potentially available to the hypothetical tenant as an item of gross profits. It is because the £5,680 was not so available to the hypothetical tenant, being appropriated to the repayment of capital expenditure, and, therefore, received by the appellants, not as hypothetical tenants, but as landlords, that this sum is properly, by common consent, not included in the receipts of the hypothetical tenant for the purpose of arriving at the annual value.

But although it may be conceded that when once money has been received, or is receivable, by the hypothetical tenant as such tenant, it must be included in the receipts for the purposes of the calculation of his anticipated profit, even though the profits when earned may be appropriated in the hands of the tenant to the liquidation of debts which are not his as hypothetical tenant, as was held in the *Dewsbury case*, yet the money must have been received by the tenant under conditions that make it potentially available to him as an item of gross profit. It is so available if the money is received as the price of water supplied, or as an unconditional aid augmenting the receipts of the tenant; but it is not so received if the tenant received the money on terms that he shall repay it—if he receives it, in short, by way of loan.

Now do the appellants receive this money as they would money raised by a rate in aid, as an unconditional aid, or do they receive it by way of loan, or otherwise on terms which render it not an item of gross profit? We are of opinion that, having regard to the terms of the 63rd section and the 71st section of the special Act of 1858, the money is received by the appellants by way of loan, and that it is not the less so received—or, at all events, on terms which prevent it being an item of gross profit—because the repayment is deferred and conditional on the happening of a contingency which may never happen—namely, the contingency of a balance standing to the credit of the waterworks account available for the repayment of moneys advanced out of the general district rates in accordance with the 6th appropriation of section 71.

We think, therefore, that the contention of the appellants is right, and that the £2,724 should not be included as a receipt of the tenant for the purpose of arriving at the rateable value.

Appeal allowed.

Solicitors for the appellants, *Schultz & Son*, for *G. & C. James*, Merthyr Tydfil.

Solicitors for the respondents, *Wrentmore & Son*, for *Frank James & Sons*, Merthyr Tydfil.

Court of Appeal.

From Chan. Div. Jan. 15, 16.

BELLAMY v. DEBENHAM. (a.)

Vendor and purchaser—Specific performance—Contract contained in letters—Subsequent negotiation—Contract to sell freehold—Minerals found not to belong to vendor—Right of purchaser to rescind before time for completion—Rights of vendor to specific performance or damages on acquisition of minerals prior to time for completion—Damages.

D. offered by letter to purchase from B. (assuming the title to be satisfactory) the freehold of a house, with about a quarter of an acre of land, with possession at a fixed date (beyond which nothing was said about the time for completion), and B. accepted that offer by letter. B.'s solicitor subsequently attempted to introduce into the contract some additional terms, which, however, he ultimately abandoned. In the meantime, D.'s solicitor, having discovered that the minerals under the property, which was enfranchised copyhold, belonged to the lord of the manor, and not to the vendor, wrote that he could not advise his client to go on with the matter. D. adopted this advice of his solicitor, and neither of them ever receded from that position. Before the day fixed for delivery of possession, the lord had agreed to convey the minerals to the vendor, but they were not actually conveyed till more than two months after that day. The vendor had in the meantime commenced an action for specific performance and (alternatively) for damages for breach of contract.

Held, first, that, assuming (without deciding the question) that there was a concluded agreement, the purchaser was not bound to wait till the day fixed for delivery of possession, which, in the circumstances of this case, was the end of a reasonable time, for the completion of the contract, but was entitled to rescind the contract as soon as he found that the vendor had not got what he had contracted to sell; and held, that the contract was in fact so rescinded by the conduct of the defendant and his solicitor.

Held, secondly, that, as the plaintiff was not in a position to carry out his contract on the said day fixed for delivery of possession, he could not maintain an action for damages for breach of contract.

Whether he could have done so if he had been in a position to carry out his contract on that day, quære.

Hoggart *v.* Scott, 1 *Russ. & My.* 293; Forrer *v.* Nash, 14 *W. R.* 8, 35 *Beav.* 167; In re Head's Trustees, 38 *W. R.* 657, 45 *Ch. D.* 310; *and* Weston *v.* Savage, 27 *W. R.* 654, 10 *Ch. D.* 736, *followed.*

Decision of North, J. (45 *Ch. D.* 481, 34 *S. J.* 638), *affirmed.*

Appeal from North, J.

This was an appeal by the plaintiff from a judgment of North, J., dismissing an action for specific performance of a contract to purchase a freehold house and land known as "Effingham-place," and situate at Cheshunt.

Early in April, 1889, the defendant, Mr. Debenham, was negotiating by letter with Mr. Sanders, an agent of the plaintiff, as to a proposal for the purchase by the defendant of "Effingham-place," on behalf of the committee of a hospital.

On April 17, 1889, Mr. Debenham wrote to a Mr. Bridgman, an agent of the plaintiff, as follows:—

"Effingham-place.

"I am prepared myself to offer you £800 for the freehold, with possession at Midsummer, and run the risk of inducing the committee to take it off my hands. I am assuming, of course, that the title is satisfactory, and that all the ground now occupied with the house is included."

To this Mr. Bridgman replied on April 18:—"I am obliged by your letter of the 17th inst., and am instructed by Mr. Sanders to accept your offer of £800 for the freehold therein contained, subject to the owner's ratification, of which he entertains no doubt, and for which he will at once apply."

On April 25 the defendant wrote to Sanders:—"I have no wish to press you unduly, but I cannot allow my offer to stand over indefinitely, and as we have a committee meeting to-morrow evening, if I do not hear that the owners accept it before 5 p.m. to-morrow, I must consider myself at liberty to withdraw it."

Sanders replied the same day in a letter headed, "Effingham-place": "I am pleased to inform you the owner confirms the sale of above to you for £800. Possession to be given at Midsummer next. Kindly let me know if the contract shall be prepared in your name or that of the committee."

The defendant replied on April 29:—"The committee have decided not to buy the property, so that the contract must be made out in my name, and can be sent to my solicitor, Mr. T. G. Bullen."

On May 3 the plaintiff's solicitors wrote to Mr. T. G. Bullen:—"We are instructed by Mr. Bellamy to send you the enclosed draft contract for sale of Effingham-place to your client, Mr. F. G. Debenham, for approval on his behalf. On receipt of the draft approved, we will lose no time in exchanging contracts, and we will then send you abstract of title."

The draft contract which accompanied the last letter contained several special conditions as to evidence of identity and verification of title, and providing that the abstract of title should commence with the will of a testator who died in 1863, that as to such testator's seisin or ownership no proof should be required, and that the property was to be sold subject to the existing tenancy. All the special conditions were struck out by the defendant's solicitor, who returned the draft as altered to the plaintiff's

(a.) Reported by R. H. DEANE, Esq., Barrister-at-Law.

solicitors, with a letter, dated May 7th, informing them that he returned the draft agreement "settled on behalf of the proposed purchaser," and that he could not accept the special conditions. On the 14th of May the plaintiff's solicitors wrote to the defendant's solicitor: "We return draft agreement. We cannot consent to all your alterations, which, in fact, make the contract almost an open one. We submit that none of the conditions are special. You will observe that our client does not insist upon the payment of any deposit, and will allow the fixtures belonging to the landlord to pass with the house."

The defendant's solicitor replied on the 17th of May: "In reference to your letter of the 14th inst., returning the draft agreement, I am sorry I cannot advise Mr. Debenham to go on with the negotiation. Two points were of the greatest importance—that there should be clear possession on the 24th of June, and a title that trustees could accept. I return your draft." On the 18th of May the plaintiff's solicitors wrote: "We cannot understand the objections which you raise to the draft contract. We appreciate the importance of the facts you mention. With reference to the title, we propose to commence the abstract with the will of an ancestor of the present owner who died twenty-four years ago. We could, of course, go further back, but we do not know what would be gained by doing so. The property has been in the hands of the Bellamy family for several generations. We inclose without prejudice the abstract of title, that you may judge for yourself as to its sufficiency. We may mention that, when the present owner disentailed the property, we were advised by counsel on the title. With regard to possession at Midsummer, we hear from the land agent that he has agreed with the tenant to give us possession; but we have written to him again to make this quite clear. We return the draft contract, in which we have made a further alteration with reference to possession, and we hope that all difficulty will now be removed, as we are not aware of anything in the form which is unusual." On the 20th of May the defendant's solicitor wrote: "I have your letter of the 18th inst., with the draft contract and abstract of title. I have read the abstract. I daresay you could carry the title back, and show that the property was part of the estate of Anna Maria Bellamy; and who Cayley Shadwell was; but I see there is this fatal objection—that your client has not the mines and minerals. The minerals are very valuable in Cheshunt. I am very sorry not to do business; but I cannot possibly advise my client to go on with the matter. I return the draft contract and abstract." On the 25th of May the plaintiff's solicitors replied: "We received your letter of the 20th inst., and confess that we were much surprised at its contents. The rights of the lord of the manor are, we understand, worthless; but to avoid any question with your client, Mr. Bellamy has agreed to purchase them, so that we shall be able to convey the fee simple on the 24th of June, as agreed. Please return the contract (inclosed) approved, at your early convenience. The tenant is moving out of the house, so as to give possession at Midsummer."

On May 27 the defendant's solicitor wrote:—"I have received your letter of the 25th inst., with the draft agreement. I take leave to remind you that I wrote to you on the 17th inst. that I could not advise my client to go on with the negotiation, and I so informed him, and he has given up all idea of the purchase. He is away from home and I really cannot reopen the matter. I return the draft."

On June 8 the plaintiff's solicitors replied that they were advised by counsel that there was a good contract upon the letters, and added: "The question raised by you about the minerals is one which we are prepared to remove before the time of completion. There was a binding contract by letter, which in our case left no further terms to be arranged. It is true we sought to introduce further details as to title, &c., in our draft contract, but we are willing, if there is to be a formal contract, that it should be in the form approved by you on 7th May last."

Having received no reply, the plaintiff's solicitors on June 22 commenced this action. The plaintiff claimed specific performance of the agreement embodied in the four letters of April 17, 18, and 25.

The defendant by his defence did not admit any contract, craved leave to refer to the whole correspondence, and said, if there ever was a contract, it was put an end to by his solicitor's letter of May 17, or, if not then, at any rate, by the subsequent letters, and that the plaintiff had previously refused to carry it out. He also pleaded section 4 of the Statute of Frauds.

It was proved that prior to May 27 the agent of the lord of the manor had promised verbally that the lord would convey his rights in the mines and minerals under the property to the plaintiff, and that on June 18 the lord had authorized his agent to convey such rights, together with similar rights under some other land larger in quantity, for ten guineas in all.

The action was heard before North, J., on July 15, 1890.

North, J., held that there was a complete contract in the letters of April 17 and 18, and though the whole correspondence ought to be looked at, yet a definite offer having been once made, and accepted without qualification, and all the terms agreed on by the parties being contained in the two letters above mentioned, the contract thus arrived at could not be affected by subsequent negotiation; but he came to the conclusion, that as the plaintiff, through his solicitors, had caused the whole difficulty by insisting in the subsequent letters upon terms to which he was not entitled, it would not be equitable at that distance of time to enforce specific performance of the contract. The judge accordingly dismissed the action, but gave no costs to either party.

From that judgment the plaintiff now appealed.

Napier Higgins, Q.C., and *C. S. Medd*, for the appellant.—What the learned judge meant by "at this distance of time" is not apparent. The correspondence ended on the 8th of June, 1889, and the writ was issued on the 22nd of the same month. The question of the minerals was a very unimportant one, in view of their trifling value, and we were ready to convey them by the date fixed for completion. [KAY, L.J.—Has not a purchaser a right to rescind even before that time if he finds the vendor is not in a position at once to make a title to a material part of the subject-matter of the contract: *Forrer* v. *Nash*, 14 W. R. 8, 35 Beav. 167, 171?] In *In re Bryant and Barningham's Contract*, 38 W. R. 469, 44 Ch. D. 218, at p. 223, Cotton, L.J., said, "I do not doubt that if the vendor is able to make a good title before the day fixed for the completion of the contract, the contract can be enforced." Moreover, the minerals here were not a "material part" of the property. The learned judge himself held that there was a complete and concluded contract. In *Hussey* v. *Horne-Payne*, 27 W. R, 585, 4 App. Cas. 311, it was found as a fact that the two letters did not contain the whole contract, but here the judge has found that there was a complete contract in the two letters of the 17th and 18th of April. The decision of Kay, J., in the case of *Bristol, &c., Bread Co.* v. *Maggs*, 38 W. R. 393, 44 Ch. D. 616, was avowedly based solely on *Hussey* v. *Horne-Payne*, and is distinguishable on similar grounds.

[LINDLEY, L.J.—The letter of the 14th of May seems the most against you, as showing that the writer did not consider there was a binding contract.] *Chamberlain* v. *Lee*, 10 Sim. 444, at p. 450, shows our right to acquire the minerals within a reasonable time after the conclusion of the contract. [*Cozens-Hardy, Q.C.*, referred to *Wylson* v. *Dunn*, 35 W. R. 405, 34 Ch. D. 569, as showing the purchaser's right to rescind up to the date of the vendor's acquiring the minerals. KAY, L.J., referred to *Brewer* v. *Broadwood*, 31 W. R. 115, 22 Ch. D. 105, as supporting the same view.] *Brewer* v. *Broadwood* is inconsistent with *Chamberlain* v. *Lee*. There is a wide distinction between a case where there is a defect of no importance, which can be cured at any time, and where there has been no intentional misrepresentation, and a case where there is no title to a material part of the property; and in the former class of cases the vendor is allowed time to make his title complete, Fry on Specific Performance, 2nd ed., pp. 321, 576. [KAY, L.J., referred to *In re Head's Trustees and Macdonald*, 38 W. R. 657, 45 Ch. D. 310.] In *Forrer* v. *Nash* the plaintiff had agreed to let the property for twenty-one years, but found he had only twenty years and no right to underlet. Time, moreover, was essential there, and he failed to remedy the defect for months after the time of the contract. In *Weston* v. *Savage*, 27 W. R. 654, 10 Ch. D. 736, the property was a leasehold public-house, and the vendor's lessors had an option to determine the lease before its expiration. If a man sells what he has not got he has till the date of completion to get it; at any rate, unless the purchaser previously rescinds. The letter of May 20 did not amount to rescission, nor was there, at that time, any right to rescind, as the plaintiff had given no ground for it. The value of the minerals here was not much over a pound. The lord sold us the minerals under this property and a great deal more for ten guineas. This case is within the reasoning of Kay, J., in *Hatten* v. *Russell*, 36 W. R. 317, 320, 38 Ch. D. 334, at p. 347. In *Hoggart* v. *Scott*, 1 Russ. & My. 293, the vendors filed their bill before they had cured the defect in their title. In no case has the purchaser been allowed to rescind where the vendor has cured his defect before the time for completion. [*Cozens-Hardy, Q.C.*—It was done in *Weston* v. *Savage*, 27 W. R. 654, 10 Ch. D., at p. 741. The purchaser was there absolved from waiting till the day of completion.] That was the case of a public-house sold as a going concern, where every day was valuable, and time, therefore, was of the essence of the contract. A mere letter, as in this case, from the vendor's solicitor, endeavouring to settle something more, could not reopen a concluded contract. The mere fact that a formal contract is contemplated does not prevent an agreement from being complete: *Rossiter* v. *Miller*, 26 W. R. 865, 3 App. Cas. 1124; *Bolton Partners* v. *Lambert*, 37 W. R. 236, 434, 41 Ch. D. 295. [KAY, L.J., referred to *May* v. *Thomson*, 20 Ch. D. 705, 31 W. R. Dig. 187.]

Cozens-Hardy, Q.C., and *McSwinney*, for the respondent, referred to *Upperton* v. *Nickolson*, 19 W. R. 733, L. R. 10 Eq. 228, L. R. 6 Ch. App. 436, where, as in the present case, the land had been sold as freehold, but, having been formerly copyhold, the minerals belonged to the lord of the manor, and the objection was held fatal. [They were stopped.]

Napier-Higgins, Q.C., in reply.—In *Upperton* v. *Nickolson* it does not appear that the vendor ever remedied or offered to remedy the defect in his title. That case, therefore, has no relevancy to the present one. If we cannot have specific performance, we are entitled to damages for breach of contract. There are circumstances in which damages may be awarded, though specific performance is refused. The subject is discussed in *Falcke* v. *Gray*, 7 W. R. 535, 4 Drew. 651.

They also referred to *Murrell* v. *Goodyear*, 8 W. R. 398, 1 De G. F. & J. 432, and *Halsey* v. *Grant*, 13 Ves. 73.

LINDLEY, L.J.—This is an appeal by a vendor in an action against a purchaser, in which the vendor seeks to enforce specific performance of an agreement for the sale of a house at Cheshunt, and asks, in the alternative, for damages, if he cannot have specific performance. The contract is to be found (if at all) in a series of letters which have been carefully considered by us all. It is not necessary, I think, in view of the point to which I will allude presently, to spell through those letters to see whether or not they amount to a concluded agreement, though I confess I feel very considerable doubt whether they do so. But I shall assume that they do amount to a concluded agreement for the sale and purchase of this house and land, and I will then consider whether the plaintiff is entitled to specific performace of such agreement, and, secondly, whether, if not, he is entitled to damages. The contract, if there was one, as I shall assume, was for the sale of this house as freehold. There was in terms no day fixed for completion, but the contract was entered into in April, 1889, and the time fixed for delivery of possession was the 24th of June following, and, that being so, and having regard to the nature of the property and the time which had elapsed, it does seem to me, I confess, that that day was at the end of a reasonable time for the completion of the contract. The real truth was that this was not an ordinary freehold house, but it was a house built upon land which had formerly been copyhold land, and had been enfranchised. There was a quarter of an acre of land, and under the Copyhold Acts the mines, minerals, clay, gravel, &c., did not belong to the vendor.

It was argued that the purchaser (an auctioneer of long standing, whose name is familiar to us all) must have known that he was buying land which had been enfranchised. That may be, but it does not necessarily follow, that he would know that the minerals had not been acquired by the vendor. The vendor had not got that which he had contracted to sell. That is perfectly obvious. The purchaser sees that, as soon as the abstract is sent in; he does not see it before, and he immediately says, "I shall not complete." The letter of the 28th of May (written by the defendant's solicitor) says, in effect, "You cannot give me the mines and minerals, and, therefore, I cannot advise my client to complete the contract." The client adopts that advice, and, therefore, it seems to me there was a plain repudiation by the defendant of all liability to complete the contract on that day, and he has never flinched from that position—he has always stood by it from that day to this.

Now, what effect has that on the plaintiff's right to specific performance? I will not go through the authorities, but I shall merely say that, having regard to the cases of *Hoggart* v. *Scott*, *Forrer* v. *Nash*, *In re Head's Trustees and Macdonald*, and *Weston* v. *Savage*, I think the purchaser was justified in refusing to complete.

Now as to damages, the plaintiff had, if I am right in the assumption I have made, until the 24th of June to tender a conveyance, and if he had been ready and willing on that day to complete his contract and give the defendant such a conveyance as he was entitled to, I am not prepared to say that the defendant would not have been liable in damages in an action for non-completion. I rather think he would.

But the facts are that on the 24th of June the plaintiff had no more got the property than he had in April. He had begun to negotiate for it, but he did not get it till September. Mr. Higgins says he has an answer to that—he says the purchaser prevented him from getting it. He did nothing of the sort—he merely refused to complete. There was no prevention. If you look at it, therefore, as an action by the vendor for damages for non-completion, the purchaser's defence is complete; he says, "You were not in a position at the time for completion to give me what I had bargained for." That is a complete defence to any action at law.

It appears to me, therefore, that both the equitable remedy and the legal remedy fail, and that the appeal ought to be dismissed.

LOPES, L.J.—As to whether there was a concluded agreement here I express no opinion, but I have, like Lindley, L.J., considerable doubts upon the subject; and I shall assume for the purposes of this decision that there was a concluded agreement. The question then arises, Was there repudiation of that agreement?

It has been contended that the letters relied on as supporting repudiation are insufficient to support it. I think, looking at the letters of the 17th and 20th of May, that the defendant did repudiate the contract. Then the question arises whether he had power to do so. At that time the vendor had not a freehold title to the property which the defendant had agreed to purchase. The mines and minerals under the house and land did not belong to the vendor, but were vested in the lord of the manor. There was, therefore, no title at all to a material part of the subject-matter of the purchase. That being so, had the defendant a right to repudiate the contract? I think the authorities on the subject are clear, and I will read the end of the judgment in *Forrer* v. *Nash*, which seems to be very much in point. The learned judge says (35 Beav., on p. 171): "I am of opinion that when a person sells property which he is neither able to convey himself, nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, 'I will have nothing to do with it.' The purchaser is not bound to wait to see whether the vendor can induce some third person (who has the power) to join in making a good title to property sold."

It appears to me that that entirely covers this case. There are other decisions to the same effect—*Hoggart* v. *Scott*, *Head's Trustees and Macdonald*, *Weston* v. *Savage*, and other cases referred to in the argument. It appears to me, therefore, that there is a complete answer to the action for specific performance.

But then it is said by Mr. Higgins that there is a right to damages for breach of contract—that he was entitled to sue the defendant for not completing the contract on the 24th of June. Without expressing any opinion whether such an action would be maintainable for other reasons—and I have very grave doubts whether it would—there is a perfectly clear answer to Mr. Higgins' contention. He would be nonsuited. In order to maintain such an action he would have to prove that he was, on the 24th of June, in a position to make a good and valid conveyance of this property; whereas in fact we know from the evidence that it was not till a much later period that he acquired those mines and minerals which alone would enable him to fulfil his contract, and convey that which he had contracted to convey to the defendant.

On all grounds, therefore, I think the decision of the learned judge was right, although I am not prepared to say that I come to that conclusion on the same grounds as he did, or that I altogether follow many of his observations.

KAY, L.J.—I entirely agree with the other Lords Justices. I have followed closely what Lindley, L.J., said in his judgment; I am not able to add to it, and I agree with every word of it. I content myself, therefore, with saying I am not satisfied that there was a valid concluded contract in this case; but, assuming that there was, I think it was validly rescinded, and that no claim is sustainable either for specific performance or damages. We are resting our judgment on rather different grounds from those relied on by the learned judge below, but I suppose that will make no difference as to the costs. The appeal must be dismissed, with costs.

Appeal dismissed.

Solicitors for the appellant, *Childs, Batten, & Harling*, for *Venning & Goldsmith*, Devonport.

Solicitor for the respondent, *T. G. Bullen*.

From Chan. Div. Oct. 28, 29; Dec. 17.

In re JOHANNESBURG HOTEL CO.
Ex parte ZOUTPANSBERG PROSPECTING CO. (a.)

Company—Shares—Payment in cash—Contributory—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

Shares which have been allotted to, and accepted by, a creditor of a company as fully paid up, in consideration of the extinguishment of the company's debt, cannot, in the liquidation of the company, be treated as having been paid for "in cash" within the meaning of section 25 *of the Companies Act*, 1867, *as expounded by* Spargo's case, 21 *W. R.* 306, *L. R.* 8 *Ch. App.* 407, *because a contract to take fully paid-up shares creates no liability to pay money, and consequently the transaction cannot amount to an extinguishment of existing cross-debts of the company and the allottee.*

Appeal from Chitty, J.

The Zoutpansberg Prospecting Co. was incorporated in April, 1889, one of its objects being the promotion and formation of other companies. Two of its directors, Durnford and Stephenson, carried out the promotion of the Johannesburg Hotel Co., which was registered on September 25, 1889, with a nominal capital of £75,000 divided into £1 shares. One of the objects specified in the memorandum of association of the Hotel Co. was to adopt and carry into effect an agreement, dated September 25, 1889, between Charles Tyler of the one part and E. B. Phelps of the other part. Tyler was the nominee of the Prospecting Co., and Phelps, who was its secretary, entered into the agreement as trustee for the Hotel Co. The agreement provided that Tyler was to complete the registration of the Hotel Co., pay all expenses of promotion up to the date of the first allotment of shares, and indemnify Phelps against all liability for such expenses, and Phelps, as trustee, thereby agreed with Tyler that the directors should as soon as possible proceed to allot such shares as should have been applied for by the public, and that, immediately after such allotment, the Hotel Co. should pay in cash to Tyler the sum of £3,750, being £5 per cent. on the nominal capital of the company. The memorandum and articles of association of the Hotel Co. were signed by Durnford,

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

Stephenson, and Phelps (among others), and on September 26, the day after the registration of the company, Durnford, Stephenson, and two others, alleged to be nominees of theirs, met as signatories of the memorandum and purported to approve the prospectus and to adopt the agreement of September 25, 1889.

On October 1 the same four persons again met and purported to adopt and confirm the agreement to allot the shares applied for to date—viz., 4,718; to appoint four gentlemen named in the prospectus and Durnford and Stephenson directors; and to resolve that £1,250 be paid to Tyler on account.

On October 2 Durnford and Stephenson and another director formed a board meeting of the Hotel Co., at which a cheque for £150 was drawn in favour of Tyler.

At a board meeting held on the 8th of October a further cheque for £500 and certain bills were drawn in Tyler's favour (which, with the cheque of £150, altogether amounted to the sum of £1,250), and it was resolved that 2,500 fully paid ordinary shares be allotted to the Prospecting Co. in terms of the agreement. In pursuance of this resolution 2,500 shares were, on the same day (October 8) allotted to the Prospecting Co., and on the same day a letter of allotment was sent to the Prospecting Co.

There was no evidence from the books of the Prospecting Co. that this resolution was communicated to or accepted by the Prospecting Co., and, although there was evidence to show that the cheques and bills given to Tyler were indorsed by him to the Prospecting Co., there was no evidence as to the date when they found their way into the possession of the Prospecting Co.—whether before or after the 8th of October. The Prospecting Co. were, however, on the 8th of October, registered as the holders of 2,500 fully paid shares in the Hotel Co. No certificate of the shares had been issued. No contract relating to the 2,500 shares had been registered under section 25 of the Companies Act, 1867.

On October 21 the Prospecting Co. declared a dividend.

On November 23, 1889, the Hotel Co. was ordered to be wound up by the court upon its own petition. The official liquidator, finding the Prospecting Co. entered in the share register as the holder of 2,500 shares, and that no contract respecting them had been registered pursuant to section 25 of the Companies Act, 1867, put the Prospecting Co. in the list of contributories of the Hotel Co. in respect of these shares.

On a summons taken out by the Prospecting Co., Chitty, J., held that there was no agreement binding on the Hotel Co. to pay Tyler the £3,750, but that there was an agreement by the Prospecting Co. to take the 2,500 shares, and that, having regard to section 25 of the Companies Act, 1867, the shares had not been paid for.

From this decision the Prospecting Co. now appealed.

Dunham, for the appellant company.—Durnford and Stephenson were directors of the Prospecting Co. as well as directors of the Hotel Co. The Hotel Co. was incorporated on the 25th of September, and the fact that Durnford and Stephenson, after the incorporation of the Hotel Co., were parties to the resolutions passed at the meetings of that company held on the 26th of September and the 1st and 8th of October, coupled with the other facts as to the way in which the allotments and the payments in cash were made, is evidence from which a new contract between the two companies, made after the incorporation of the Hotel Co., must be inferred. This new contract was that the Hotel Co. should pay to the Prospecting Co. for work and labour done in promoting the Hotel Co. the sum of £3,750, of which £1,250 was to be paid in cash, and the balance—viz., £2,500 was to be paid by allotting 2,500 fully paid shares in the Hotel Co. to the Prospecting Co. It was intended to register this new contract under section 25 of the Act of 1867, but by mistake the preliminary contract was registered instead. However, what was done in this case amounted to a "payment in cash" so as to satisfy section 25. The Hotel Co. being indebted to the Prospecting Co. to the extent of £2,500, allot to the Prospecting Co. fully paid shares to the amount of £2,500, on the terms that the liability for calls should be set off against the debt. That is equivalent to a payment in cash within section 25: *Spargo's case*, 21 W. R. 306, L. R. 8 Ch. App. 407; and the fact that calls had not been made in respect of the shares so allotted does not prevent the transaction being treated as payment in cash: *In re Jones, Lloyd, & Co.*, 37 W. R. 615, 41 Ch. D. 159; *Ferrao's case*, 22 W. R. 386, L. R. 9 Ch. App. 355. In the present case there was at the time of allotment a present debt due by the Hotel Co. to the Prospecting Co., and *Kent's case*, 36 W. R. 818, 39 Ch. D. 259, is therefore distinguishable, for that case does not establish that there must be a present debt due on both sides.

Romer, Q.C., and *Borthwick*, for the liquidator, the respondent.—At the date of the allotment of the shares there was not, in fact, a debt due to the Prospecting Co. by the Hotel Co., and *Spargo's case* is not applicable: *Andress' case*, 26 W. R. 567, 8 Ch. D. 126. No such new contract as is suggested by the appellant can be inferred. There was no consideration given to the Hotel Co. for the supposed debt, no property was transferred by the Prospecting Co. to the Hotel Co. The real agreement was that these shares should be issued to the Prospecting Co. as fully paid up, and they were allotted to and received by the Prospecting Co. on that footing; there was, no doubt, a common mistake in thinking that a proper contract had been registered before the issue of the shares, so as to satisfy section 25, but now that the Hotel Co. is in liquidation, the Prospecting Co. cannot be relieved from the liability of paying cash for the shares they hold. The Prospecting Co., by their conduct, showed that they accepted the allotment, as they declared a dividend after the allotment, and as they carried on no business except the promotion of the Hotel Co., the dividend must have been declared on the ground that these shares belonged to them. [Lord HALSBURY, C., referred to *Arnot's case*, 36 Ch. D. 702, 36 W. R. Dig. 34, and *In re Railway Time Tables Publishing Co., Ex parte Sandys*, 37 W. R. 531, 42 Ch. D. 98.] There must be a present debt existing on both sides in order to constitute an equivalent to payment in cash: *White's case*, 27 W. R. 895, 12 Ch. D. 511; *Kent's case*.

Dunham, in reply, cited *In re Empress Engineering Co.*, 29 W. R. 342, 16 Ch. D. 125, and *Ex parte Bentley*, 28 W. R. 165, 12 Ch. D. 850.

Cur. adv. vult.

Dec. 17.—Lord HALSBURY, C.—The policy of the Act of 1867 appears to have been that the capital of the companies to which that Act applies should be real, and that such arrangements as had occupied the attention of the courts in that same year, by which payments from the shareholders were to form the capital, should not be satisfied by agreements like that in *Pellat's case* or *Elkington's case* (15 W. R. 613, 665, L. R. 2 Ch. 511, 527), decided in the earlier part of that same year (1867). The language of the statute is simple enough—"Every share in

any company shall be deemed and taken to have been issued, and to be held subject to the payment of the whole amount thereof in cash," unless a written contract to be filed before the issue of the shares shall otherwise determine. The policy and language are equally clear. The shares are to be paid for, and paid for in cash, so that, I think, the Legislature contemplated that the money should actually be received on behalf of the company, and those who received it should be accountable to the incorporated body for the money so received. It is obvious, I think, what security that was intended to give both to shareholders and creditors, and if it were honestly acted on, security would be given that the capital of the new trading concern should really and truly be subscribed. Experience had shown what indirect and dangerous arrangements might be made whereby a person might appear to be a shareholder and yet have never contributed one farthing to the concern. The statute, as it seems to me, intended by express language to render impossible any such indirect settlements of the right of the incorporated body to have the money, and provided that the shares should not only be paid, but added the words "in cash." Had the course of decisions always followed the language of the statute, no difficulty would have arisen. But a case to which I will presently refer has, I think, unfortunately established that payment in cash need not be what the words literally signify; but that if there is something which the parties choose to call payment, and if there is that which the court can consider equivalent to cash, the language of the statute is satisfied.

In this case it is difficult to speak of the adventures which are in question as real companies. Two gentlemen appear to have got up both companies in different characters, and, having gone through the legal forms to establish two companies, and themselves acting as directors of both companies, proceeded to enter into contracts binding each of the companies in a way which would be ludicrous if it did not involve loss and damage to persons who knew little or nothing of the real nature of the machinery by which these companies were being established. The Prospecting Co. promote the Hotel Co., and the Hotel Co. agree to pay £3,750 for the work of promotion and for an agreement of indemnity against all liability in respect of the formation of the company up to the date of the allotment. Before the existence of the Hotel Co. two persons named Tyler and Phelps executed a written contract which, upon the formation of the Hotel Co., was adopted and confirmed by the two gentlemen (Durnford and Stephenson) who really were the only active persons in either company, but in the name of all the persons who signed the memorandum of association of the Hotel Co., and it may be assumed that, if in the name of the Prospecting Co. these persons did in fact agree to the alleged contract thus adopted by the Hotel Co., that contract, whatever its results may be, bound the Prospecting Co. But I am unable to see any evidence of any such agreement. It was boldly argued that the identity of the two gentlemen in question was sufficient to establish the contractual assent of the Prospecting Co. It may be (indeed, it certainly is so) that the companies were but nominees—puppets—only intended to move as their manufacturers intended they should move, and had they passed resolutions under such circumstances as to bind the company for which they were then professing to act, I do not deny that the abstraction would be bound by formal acts, however unreal might be the separate identity of each company. But persons who engage in such transactions must at least make their puppets move in a legal manner. The knowledge and intention of the individual persons is nothing to the purpose. It is the abstraction, the ideal legal personage, which is sought to be bound. Its whole nature is artificial, and it can only be bound by such acts as it, in its abstract form, consents to be bound by. I cannot affirm that the Prospecting Co. ever accepted the terms of the contract which the Hotel Co. adopted and were willing to agree to. Neither resolution nor minute purporting to be that of the Prospecting Co. can be found which, as against the Prospecting Co., could be relied on as agreeing to the proffered terms.

Now, what was intended to be done by what I have described as the puppets, was to get rid of the payment of the shares allotted to the Prospecting Co. by registering a contract in writing within the 25th section. Either from a blunder or for some reason which at present I am not able to follow, the contract which might or might not have effected that object was not registered, and the result was that 2,500 shares in the Hotel Co. were alloted to the Prospecting Co. without the protection from payment for the shares which the parties probably intended. That the Prospecting Co., therefore, are shareholders, that they are not protected by any agreement within the 25th section, are facts about which there can be no dispute and the only mode by which the Prospecting Co. can effectually relieve themselves from the obligation for the payment on these 2,500 shares is by showing that they have paid for the shares of which they are the registered holders. This is an issue which lies on the Prospecting Co. to prove, and although James, L.J., and Mellish, L.J., have both held in *Spargo's case* (an authority by which sitting in this court I am bound, whatever I might be elsewhere), that what would be proof of payment as distinguished from set-off, or accord and satisfaction, would satisfy the language of the statute, I am unable to see, upon the facts I have pointed out, that there would be any evidence to go to a jury of payment, as distinguished from accord and satisfaction, in this case. I venture to doubt whether what is described by those eminent judges as the absurdity of handing money backwards and forwards when two people have cross demands is so great as the absurdity of construing the words "in cash" as payment without cash. However, as I have said, I am bound by the decision in this court. But I am of opinion that it was for the appellant company to satisfy us that there were in the present case such cross demands of each company upon the other, and at the date when each had an actual demand upon the other for present payment, as to bring it within the decision in *Spargo's case*. I am of opinion that they have wholly failed to establish that proposition, and I think, therefore, that this appeal should be dismissed with costs.

BOWEN, L.J.—I am of the same opinion.

FRY, L.J.—The judgment I am about to read was written before I had the opportunity of reading that just delivered by the Lord Chancellor, and I read it now, not as differing in any way from what has been said by the Lord Chancellor, but only because it deals more in detail with certain parts of the case.

In this case 2,500 shares in the Hotel Co. were allotted to the Prospecting Co., and it has not been denied by the appellants that they agreed to take these shares, if not as fully paid up, then as ordinary shares. The appellants contend that these shares have been fully paid up in cash within the meaning of section 25 of the Companies Act, 1867, as expounded by *Spargo's case*, and other cases by which the words "in cash" have in effect been struck out of the statute. The respondents deny that any such payment has been made.

In order that the appellant company should succeed they must show the existence, on the 8th of October, 1889, the day when the payment is alleged to have been made, of two contracts each creating a debt, and of an agreement between the two companies to extinguish one debt by the satisfaction of the other. The first contract which the appellants assert to have existed on that day is an agreement by the Hotel Co. to pay £3,750 to the Prospecting Co. in consideration of work and labour done by the Prospecting Co. in promoting the Hotel Co., and in consideration of an agreement by the Prospecting Co. to indemnify the Hotel Co. against all liability in respect of the promotion of the company up to the date of the allotment. On the 25th of September, 1889, a written contract to a like effect had been entered into between Tyler and Phelps (described as a trustee for the Hotel Co.) in which Tyler and Phelps contracted as individuals. This contract was made before the Hotel Co. was in existence; but after it came into existence—viz., on the 1st of October—a resolution was passed by the signatories of the memorandum of association adopting and confirming this agreement.

It was argued that this resolution amounted to the proposal by the Hotel Co. to enter into a new contract with the Prospecting Co. on terms similar to those of the contract between Tyler and Phelps. Assuming this to be correct, it remains to inquire whether this proposal was accepted by the Prospecting Co. before the 8th of October. There is nothing to show that this resolution was communicated to the Prospecting Co. or that they in any way accepted the obligation to indemnify the Hotel Co., which Phelps had entered into in his own name and, in terms, on his own behalf. Certain sums of money and bills were on and after the 1st of October paid by the Hotel Co. to Tyler, and these are proved to have found their way to the Prospecting Co., but whether before or after the 8th of October is not shown. The receipt of these payments cannot therefore be relied on as evidence of the Prospecting Co. having entered into the contract at the crucial date. The minute book of the Prospecting Co. contains no minute with reference to this contract, and I think that the true result of the evidence is that this contract was never even discussed or considered at any meeting of the Prospecting Co.

The second contract on which the appellant's rely as existing on the 8th of October is an agreement by the Prospecting Co. to take 2,500 shares in the Hotel Co. No resolution of the Prospecting Co. agreeing to apply for or to take these shares exists; no application for them was made in the name of the company, and though what took place after the 8th of October seems sufficiently to justify the proposition (which was not disputed by the appellants' counsel) that the Prospecting Co. agreed to take, or ratified the taking of, these shares, yet there is nothing, in my judgment, to show the existence of the agreement on the 8th of October.

Unless the contract by the Hotel Co. to pay £3,750 to the Prospecting Co., and the contract by the Prospecting Co. to take 2,500 shares in the Hotel Co., were both subsisting contracts and binding on the two companies on the 8th of October, there were not debts on each side which could be extinguished by cross-payments. It was for the appellants to establish these contracts beyond reasonable doubt; that they have failed to do, and the appeal must, therefore, fail.

But, even if the two contracts were established in point of fact, there appears a conclusive reason why no payment in the manner contended for could have been made. A contract to take shares not paid up creates a liability to pay money, and, under some circumstances, a debt. A contract to take fully paid-up shares creates a liability to take the shares, but no liability to pay money and no debt under any circumstances. From which it follows that there never can be any cross debts between the company and its allottee under a contract to take fully paid-up shares, and consequently no payment can be effected by accepting the extinction of one debt as the satisfaction of the other.

I agree that the appeal must be dismissed, with costs.

Solicitors for the appellant company, *Watson & Watson.*

Solicitors for the liquidator, the respondent, *Blunt & Lawford.*

From Q. B. Div. Dec. 19.

PULLMAN v. HILL & CO. (a.)

Libel—Action against company—Publication Privileged occasion—Letter dictated by manager of company to clerk—Type-writer—Press copy—Letter sent to plaintiff's place of business.

The manager of a company, in the course of business, dictated to a type-writer employed in the office of the company a letter to be sent from the company to the plaintiffs. The letter having been written in type, a press copy was made by an office boy. It was then directed to the office of the plaintiffs' firm, where it was opened and seen by three clerks.

Held, in an action of libel against the company, that, assuming the letter to be libellous, there was a publication both at the defendants' office and at the plaintiffs' office, and that neither publication took place on a privileged occasion.

Application for a new trial.

The plaintiffs, John and Henry Pullman, sued the defendants for libel under the following circumstances. The defendants, who were a limited company carrying on business as advertising agents, by agreement with the plaintiffs hired of them at a certain rent a hoarding which was erected on a piece of land in the Borough-road in the possession of the plaintiffs. A dispute arose subsequently between the plaintiffs and a third party, who was building on the land, as to who was entitled to the rent. The defendants having paid rent to the plaintiffs, payment of the same rent was demanded of them by the third party. A correspondence took place, in the course of which the following letter was written on behalf of the defendant company:—

"Messrs. Pullman & Co., 17, Greek-street, Soho.

"*Re* Boro'-road.

"Dear Sirs,—We must call your serious attention to this matter. The builders state distinctly that you had no right to this money whatever, consequently it has been obtained from us under false pretences. We await your reply by return of post.

"Yours faithfully,

"Walter Hill & Co. (Limited)."

The signature was in the handwriting of the managing director of the company. The rest of the letter was written in type by means of a type-writing machine, having been dictated by the managing director to a confidential type-writer. A press copy having been made by an office boy, the letter was addressed to Messrs. Pullman & Co., 17, Greek-street, Soho. The members of that firm were the two plaintiffs and three other persons. The letter was

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

opened by a clerk of the firm and was seen by two other clerks.

Day, J., before whom and a jury the case was tried, nonsuited the plaintiffs, being of opinion that, if there was any publication, the occasion was privileged, and that there was no evidence of malice.

The plaintiffs applied for a new trial.

Lockwood, Q.C., and *Oswald*, for the plaintiffs.—The learned judge was wrong in withdrawing the case from the jury. There was a publication to the typewriter, and to the office boy who took the press copy, and to the clerks of the plaintiffs. And none of these publications took place on a privileged occasion.

Murphy, Q.C., and *R. M. Bray*, for the defendants.—The defendants, being a company, cannot act otherwise than through their agents. The dictating of this letter by the manager to a confidential typewriter and the making of a press copy were ordinary incidents in the conduct of the defendants' business, and did not amount to a publication at all. And the sending of the letter, which was properly addressed to the plaintiffs' firm, and intended for the plaintiffs themselves, did not constitute a publication. Secondly, if there was any publication, it was on a privileged occasion. The case comes within the definition given in *Toogood* v. *Spyring*, 1 C. M. & R. 181, where it was laid down that an injurious statement is privileged if it is "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned." It was there held that where the statement is made to the plaintiff himself, the mere fact of a third person being present does not make the communication unauthorized. *Jones* v. *Thomas*, 34 W. R. 104, is also an authority to show that where a communication is otherwise privileged, the mere presence of strangers does not take away the privilege. *A fortiori*, the privilege is not taken away where the third person, in whose presence or hearing the communication is made, is a clerk of the defendant, such as he must of necessity employ in the conduct of his business.

Lord ESHER, M.R.—Two points have been taken on the part of the defendants. It is said, firstly, there was no publication; and, secondly, if there was, the occasion was privileged. First, then, assuming this letter to be a defamatory writing, was there a publication? Publication of a defamatory writing is the making it known, after it is written, to some person other than the person of whom it is written. If such a writing is sent direct to the person of whom it is written, and not shown to anybody else, there is no publication. Neither is there a publication if the writer puts it into his drawer and it is afterwards stolen. Now is showing it to a clerk of the writer a publication? Why should it not be a publicarion? for the clerk is thereby enabled to repeat it to whomsoever he pleases. It is making it known to a person other than the person of whom it is written, and, therefore, comes within our definition.

Secondly, as to the occasion being privileged, that question only arises when publication has been proved. A privileged occasion is an occasion where the person who publishes the defamatory matter by making it known to a third person is privileged to make such publication; and that is the case where he has a moral duty to make it known to that third person, and that third person has an interest in knowing it. In the case of the character of a servant, the former master has a duty to tell what he believes to be the truth about the servant, and the new master has an interest in hearing it. Now, these two elements being necessary to constitute a privileged occasion, did the making known the defamatory matter in this case to the type-writer come within our definition? It is clear that it did not, as it is impossible to say that the typewriter had any interest in hearing it.

We have also to consider the question of publication at the place where the letter was addressed. It was directed to the address of a firm, where it was opened in the ordinary way of business and seen by three clerks. No doubt the writer did not intend that it should be seen by any one but the plaintiffs, but he had put it out of his own possession, and had put it into such a position that it might be opened. I think there was a publication to these clerks. I agree on this point with the judgment of Fitzgerald, B., in the Irish case of *Fox* v. *Broderick*, 14 Ir. C. L. Rep. 453. Therefore there were two publications of this letter, and neither of them was privileged.

I think that the learned judge was misled by statements as to the necessity imposed on men of business in the present day of employing typewriters. No such necessities of business can be allowed to alter the law of England. If a man wants to write a letter which may be libellous, he ought to write it himself, and if he wants to have a copy, he ought to make the copy himself. And although a company cannot act except by its agents, yet a manager of a company, who has authority to write business letters for the company, ought in this respect to act as if he were the principal. A manager who had to write such a letter as this ought to have written it himself, and taken care that no clerk saw it.

Therefore I think the learned judge was wrong in withdrawing the case from the jury, and there must be a new trial.

LOPES and KAY, L.JJ., concurred.

Order for new trial.

Solicitors for the plaintiffs, *Emanuel, Round, & Nathan.*

Solicitors for the defendants, *Watney, Tilleard, & Freeman.*

High Court of Justice.

Chan. Div. North, J. — Nov. 20.

In re SCOTT.
SCOTT *v.* HANBURY. (*a.*)

Infant—Settlement—Absolute appointment—Failure of limitations of settlement—Resulting trust—Death of appointor under twenty-one—Infants' Settlement Act, 1855 (18 & 19 *Vict. c.* 43), *ss.* 1, 2.

A testatrix gave property to trustees upon trust to pay the income to her illegitimate daughter for life for her separate use without power of anticipation, and after the daughter's decease upon trust for such persons as the daughter should appoint, and, on default of appointment, in trust for the daughter's children.

After the death of the testatrix, the daughter, while still an infant, upon her marriage, made, with the sanction of the court under the Infants' Settlement Act, a settlement, by which, in exercise of the power of appointment given her by the testatrix, she appointed the property to trustees, who were not the same persons as the trustees of the testatrix's will, upon trust to pay the income to herself during the joint lives of her husband

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

and herself, and to the survivor of them for his or her life, and after the death of the survivor upon trust for the children of the marriage, as the husband and wife should jointly appoint, and, in default, as the survivor should appoint, and, in default of children, for such persons as the wife should appoint, and, in default of such appointment, if the wife should survive the husband, in trust for the wife absolutely, and if she should not survive him, in trust for such persons as, under the Statutes of Distribution, would have become entitled thereto upon the death of the wife, had she died possessed thereof intestate and without having been married.

The wife died while still an infant and intestate, without having exercised the general power of appointment reserved to her by the settlement, and the husband took out letters of administration to her estate. There were no children of the marriage.

Held, that the power conferred on an infant by section 1 of the Infants' Marriage Settlement Act enables an infant to make an appointment which, on failure of the limitations of the settlement, will take effect in favour of the infant, and that section 2 of the Act, which invalidates a settlement by an infant on the subsequent death of the infant before attaining twenty-one, only applies to an infant tenant in tail, and, therefore, that the appointment made by the illegitimate daughter by her marriage settlement, being absolute in terms, operated, on failure of the limitations of the settlement because of the fact that the daughter, being illegitimate, could have no next of kin, to make the property her own absolutely; and that, consequently, her husband was entitled to it as her administrator, and not the next of kin of her mother.

Originating summons.

By her will, dated the 15th of May, 1880, Eliza Maurice gave her residuary, real, and personal estate to her two executors upon trust for sale and conversion and investment as therein mentioned, and upon trust after setting apart a fund to pay certain annuities bequeathed by her will, to stand possessed of the residue, and also of the fund set apart subject to the annuities in trust during the life of her illegitimate daughter, Edwina Lizzie, to pay the income to the daughter for her separate use without power of anticipation, and from and after her decease in trust for such person or persons, and in such manner, as the daughter should from time to time (whether covert or sole) by deed or will appoint, and in default of any such appointment in trust for the children of the daughter as therein mentioned.

The testatrix died on the 23rd of July, 1888, leaving her daughter, Edwina Lizzie, who was then eighteen years of age, her surviving.

By a settlement dated the 7th of November, 1888, made with the sanction of the court under the provisions of the Infants' Settlement Act in consideration of the marriage then intended, and shortly afterwards solemnized on the 1st of December, 1888, between Edwina Lizzie and J. R. Scott, the former, in exercise of the power given her by the will of the testatrix, appointed that the testatrix's residuary estate should, after the solemnization of the marriage, become vested in trustees (other than the trustees of the testatrix's will), upon trust to pay the income to the wife during the joint lives of the husband and wife for her separate use without power of anticipation, and after the death of either of them to pay the income to the survivor for his or her life, and after the death of the survivor to hold the trust funds in trust for the children of the marriage as the husband and wife should by deed jointly appoint, and, in default of such appointment, as the survivor should appoint, and, in default of such appointment, in trust for the children of the marriage in equal shares as therein mentioned. And, in default of children to take under the aforesaid trusts, to hold the trust funds in trust for such person or persons as the wife should, during coverture, by will, or, when discovert, by deed or will, appoint, and, in default of such appointment, if the wife should survive the husband, in trust for her absolutely; but if she should not survive him, in trust for such person or persons as, under the statutes for the distribution of intestates' estates, would have become entitled thereto upon the death of the wife had she died possessed thereof intestate and without having been married, such persons, if more than one, to take as tenants in common.

On the 25th of April, 1889, Mrs. Scott died, an infant and intestate, without having exercised the power of appointment given her by the settlement. There were no children of the marriage.

On the 19th of June, 1889, J. R. Scott took out letters of administration to the estate of his deceased wife.

This was an originating summons taken out by J. R. Scott asking for a declaration that he, in his own right, and as the legal personal representative of his wife, was entitled to the property comprised in the marriage settlement; the other claimants to the property being the next of kin of the testatrix, Eliza Maurice, the mother of Mrs. Scott. The defendants to the summons were the executors of the will of Eliza Maurice, the next of kin of Eliza Maurice, and the trustees of the marriage settlement.

Vernon R. Smith, for the summons.—By exercising in her marriage settlement the power of appointment given to her by her mother's will Mrs. Scott made her mother's residuary estate her own absolute property, and that estate ceased to be subject to the will of her mother. As Mrs. Scott was illegitimate she has no next of kin, and therefore the ultimate trusts in their favour contained in the settlement cannot take effect, and her husband is entitled to the settled property as her administrator: *In re Van Hagan*, 29 W. R. 84, 16 Ch. D. 18; *In re D'Angibau, Andrew* v. *Andrew*, 28 W. R. 311, 930, 15 Ch. D. 228. Section 2 of the Infants' Settlement Act, which makes an appointment or disentailing assurance executed by an infant tenant in tail under the Act void in the event of the death of the infant under age, refers only to an infant tenant in tail, and does not affect the settlement by Mrs. Scott.

P. B. Lambert, for the executors of Eliza Maurice, and for two of her next of kin, who, in consequence of an arrangement with J. R. Scott, desired that he should succeed in obtaining the fund.—The settlement must be regarded as if there had been first an appointment of the fund to Mrs. Scott and then a settlement of the fund by her. It is a case of a resulting trust of the fund in favour of Mrs. Scott: Sugden on Powers, 8th ed., p. 467.

Upjohn, for the next of kin of Eliza Maurice.—Section 2 of the Infants' Settlement Act applies to the marriage settlement made by Mrs. Scott under that Act, and renders it void by reason of the death of Mrs. Scott under twenty-one. The wording of that section is obscure, but it could not be intended to make a settlement by an infant under the Act void by reason of the death of the infant under twenty-one only in the case of an infant tenant in tail, but not of any other infant. There is no ground for such a distinction. The section should be read either as if it was worded "executed by any infant or infant tenant in tail," or as if the words "tenant in tail" had been omitted. [NORTH, J.—I cannot either strike the words "tenant in tail" out of the Act or neutralize those words by putting other words in.] The appointment by the infant was only an appoint-

ment for the purpose of making the settlement, and the Act gives effect to the appointment only to the extent of the limitations of the settlement. Subject to those limitations the property is still bound by the provisions of the will of Eliza Maurice. The cases cited differ from the present case, where the whole beneficial interest has not been disposed of by the appointment, since, in consequence of the illegitimacy of Mrs. Scott, the provisions in favour of her next of kin cannot take effect. The question is one of intention: *In re Van Hagan; In re De Lusi's Trusts*, 3 L. R. Ir. 232; *In re Thurston, Thurston* v. *Evans*, 34 W. R. 528, 32 Ch. D. 508. The court will not imply an intention on the part of the infant to exercise her power to a greater extent than she has actually exercised it by the provisions of the settlement made by her. At any rate, the *onus* of proof is on those who assert an intention absolutely to free the property from the trusts of the will; and they have not proved such an intention. This is especially the case where the power exercised by the infant is one given her by statute.

NORTH, J.—In my opinion the case is clear. The first point relied on by Mr. Upjohn is section 2 of the Infants' Settlement Act, which provides that "in case any appointment under a power of appointment or any disentailing assurance shall have been executed by any infant tenant in tail under the provisions of this Act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void." It is said in the present case that, by reason of the wife dying before twenty-one, section 2 invalidates the settlement which she made under the power conferred by section 1. I do not think that section 2 has that effect. It may be that it would invalidate a settlement by an infant tenant in tail if he died under twenty-one. But Mrs. Scott was not an infant tenant in tail, and what I am asked to do is to alter the language of section 2, either by striking out the words "tenant in tail," or by adding the words "infant or" before the words "infant tenant in tail," so that every infant may be included in the section. I do not feel at liberty to do so. I think the Act means what it says, and that section 2 does not apply to every infant, but only to an infant who is tenant in tail.

Then, as to the second point raised by Mr. Upjohn. The lady had, under the will of her mother, an absolute power of appointment, subject to her own life interest, which she exercised by appointing the fund to the trustees of her marriage settlement. The appointment is an out and out appointment to the trustees of the settlement, who are not the same persons as the trustees of the will which created the power. [His lordship then read the provisions of the settlement, and continued:—] A more complete and exhaustive disposition on the face of the settlement one could not well expect to find. But the lady, being, in point of fact, illegitimate, had no next of kin to take under the ultimate limitation in case of her death before her husband and without issue. Probably neither the lady herself, nor her legal advisers, nor the court, knew anything about her illegitimacy; but if they did it makes no difference, because it is settled by authority that if an appointment is made in favour of a person absolutely which fails on account of the death of the appointee before the date on which the appointment would take effect, the court still sees an intention on the part of the appointor to dispose of the fund absolutely and make it his own, notwithstanding the failure of the appointment. I can find in section 1 of the Infants' Settlement Act no limitation, of the power given to the infant, to make a settlement for the benefit of the husband, or wife, or issue of the marriage. The power given by section 1 is an absolute power, and enables the infant to make an appointment which, on failure of the limitations of the settlement, will take effect in favour of the infant himself.

But it is said that the question is one of intention. As to that, what the Master of the Rolls said in *In re Van Hagan* is: "Then the only question remaining is, what is to become of the property in case the intention, that the beneficial legatee or devisee shall take, cannot have effect? That is a mere question of resulting trust. Resulting trust for whom? As already pointed out by James, L.J., when Vice-Chancellor, it must either be for the original settlor or for the appointor, and, considering that a general power is for almost all purposes equivalent to property, and is so dealt with by the Legislature in the Wills Act as regards testamentary appointments, the fair and proper result, in my opinion, is to treat the trust as resulting to the appointor, so as to carry the property to the person or persons who would take his real or personal estate, as the case may be, or, to put it in the words of Wickens, V.C., in the case of *In re Davies' Trusts*, 20 W. R. 165, L. R. 13 Eq. 163: 'It seems settled by the cases of *Chamberlain* v. *Hutchin son*, 22 Beav. 444, and *Wilkinson* v. *Schneider*, L. R. 9 Eq. 423, 18 W. R. Dig. 94, 96, authorities which are binding on me, that a testamentary appointment under a general power to A. in trust for B., which lapses as to the beneficial interest by B.'s death before the appointor, operates as a good appointment in favour of A., who holds on the same trusts as if it had been the appointor's own property.' There is this also to be said, that the gift to trustees is rational, if the testator knew that it would make the property part of his assets and liable to the payment of his debts. But there does not seem to be any sufficient motive for interposing a trustee when the beneficiary takes absolutely in the case of real estate." The judgments of James and Cotton, L.JJ., were to the same effect.

There is this further indication in the present case. I do not say it is very strong, but it has some weight. The property is taken entirely away from the trustees of the original will, who would have been the proper persons to administer the fund if the appointment had not been intended to be an absolute one. The appointment to the trustees of the settlement is clearly absolute as regards the trustees. As the appointment to the trustees is absolute, and as the beneficial limitations are complete and absolute on the face of the settlement, I hold, following the reasons of the Court of Appeal in *In re Van Hagan*, that the appointment was also absolute in the one event for which the settlement did not in fact provide—the possible contingency of all the limitations of the settlement failing to take effect.

Solicitors, *Pritchard & Sons; Harwood & Stephenson; C. A. Clulow.*

Chan. Div. North, J. } July 24; Aug. 2, 1890.

BELCHER v. WILLIAMS. (*a.*)

Costs — Partition action — Mortgagees of shares—Discretionary power of court — Share — Partition Act, 1868 (31 & 32 *Vict. c.* 40), *s.* 10.

The rule in administration actions, that only one set of costs will be allowed in respect of each share, does not

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

apply in the case of partition actions, in which the court, by virtue of section 10 of the Partition Act, 1868, has an absolute discretion as to costs, and will, as a general rule, order the costs of all parties, including the mortgagees of any share, to be borne by the whole estate, a share being "the share of a person found to be entitled to a share by the chief clerk's certificate."

The defendants in a partition action were found to be entitled to an unincumbered moiety of the estate, and the plaintiffs were found to be entitled to the other moiety, upon which there were several mortgages. The estate was sold and the proceeds paid into court.

Held, that the costs of all parties, including the mortgagees of the plaintiffs' moiety, were payable out of the whole fund.

Further consideration.

Elizabeth Roche died on the 14th of December, 1857, having made a will by which she gave all her real and personal estate to her three children, Elizabeth, Isabella, and Alexander in equal shares, and directed that, if a sale should be necessary for the purpose of division, her real and leasehold estates should be sold by her trustees, and that the net proceeds should be invested in their names, and also that they should hold the shares of her daughters in trust for their separate use. And the testatrix empowered her two daughters to appoint their respective shares to any person or persons, and in any manner they respectively might think fit, by any writings, whether testamentary or otherwise.

After the death of the testatrix her daughter Elizabeth married H. Froom, and by a deed poll dated the 12th of June, 1867, appointed her share to her husband absolutely. The daughter Isabella married A. H. Williams.

In July, 1877, the testatrix's son Alexander died, having made a will by which he gave all his property to Elizabeth Froom and Isabella Williams in equal shares.

The action was brought in 1886, for partition or sale of the testatrix's estate, and the usual judgment was given in 1887.

By the chief clerk's certificate, made in 1889, it was found that the following persons were entitled to the property, in the following shares: Isabella Williams, who was a defendant in the action, was absolutely entitled to two-sixths, her husband, A. H. Williams, who was the other defendant in the action, was entitled to one-sixth in her right, and the plaintiffs in the action were entitled to one-sixth absolutely, and also to the remaining two-sixths subject (1) to a charge in favour of themselves, and (2) to a charge of £2,000, of which sum one-half was due to Henry Wilkinson, as the legal personal representative of Alfred Froom, deceased, and the other half was sub-mortgaged to M. Simpson, and subject thereto belonged to Frederick Froom.

Under these circumstances Henry Wilkinson, M. Simpson, and Frederick Froom were necessary parties to the action, and had been served with notice of the judgment.

This was the further consideration of the action, the only question remaining for decision being whether each party to the action, including those served with notice of the judgment, was entitled to costs out of the fund in court, or whether only one set of costs should be allowed in respect of each share, to be shared, in the case of an incumbered share, between the owner and the mortgagees thereof, according to the rule as to costs in administration actions in the case of an incumbered share.

Cozens-Hardy, Q.C., and *Oswald*, for the plaintiffs.—The costs of all parties should come out of the fund in court, as the practice in a partition action differs from that followed with respect to the costs of administration actions.

Stewart Smith, for Mr. and Mrs. Williams, the defendants in the action.—One set of costs should be allowed in respect of each share, and the shares of the plaintiffs should bear the costs of the incumbrancers on such shares.

He referred to *Jennings* v. *Foster*, W. N., 1884, p. 200.

Yate Lee, for Henry Wilkinson, M. Simpson, and Frederick Froom.

Pochin, for the trustee of the testator's will.

Cozens-Hardy, Q.C., in reply.—No case has been cited in which the rule as to costs in administration actions has been applied to partition actions. It is for the benefit of the defendants that the title to the property should be made out.

Cur. adv. vult.

Aug. 2.—NORTH, J., stated the facts and proceeded:—The rule as to costs in partition suits in the Court of Chancery was well settled. No costs were given up to the hearing; then the costs of effecting the partition (*i.e.*, the costs of the commission, according to the practice at that time) were borne by the parties in proportion to their respective interests, which is the same as saying that if the estate were sold the costs were to be paid out of the proceeds of sale in the first place. No costs were given of any proceedings subsequent to the commission. By the Partition Act of 1868 the practice was changed. Section 10 of that Act provides that "in a suit for partition the court may make such order as it thinks just as to costs up to the time of the hearing"; and there are many cases showing that, under that Act, the court has now a general discretion as to the costs, as it probably has also under the general orders.

With respect to the way in which that discretion has been exercised, the usual practice seems, beyond all dispute, to have been to give the costs of all parties out of the estate. This was done shortly after the Act was passed by Malins, V.C., in *Osborn* v. *Osborn*, L. R. 6 Eq. 338, 16 W. R. Ch. Dig. 95; by Lord Romilly, M.R., in *Miller* v. *Marriott*, 17 W. R. 41, L. R. 7 Eq. 1; by Malins, V.C., in *Leach* v. *Westall*, 17 W. R. 313; by Lord Romilly, M.R., in *Cannon* v. *Johnson*, 19 W. R. 175, L. R. 11 Eq. 90; by Lord Selborne, C., in *Simpson* v. *Ritchie*, 21 W. R. 666, L. R. 16 Eq. 103; and by Sir George Jessel, M.R., in *Ball* v. *Kemp-Welch*, 14 Ch. D. 512, 28 W. R. Dig. 66. I have not attempted to trace the practice any further, and I am not sure that I could have done so. The practice appears to have become settled, and probably the point was not brought before the court afterwards. In *Simpson* v. *Ritchie* Lord Selborne, C., who was then sitting for the Master of the Rolls, said:—"Having regard to the 10th section of the Partition Act, 1868, it cannot be said that the court is bound by the old rule as to the costs of partition suits. It is impossible to lay down a general rule on the subject, and there may be cases in which the court, in the exercise of its discretion, will follow the old practice; but in this case I think the costs ought to be paid out of the estate." That is, I think, the general rule, though there are certain exceptions to it. In *Landell* v. Baker, L. R. 6 Eq. 268, 17 W. R. Ch. Dig. 114, Lord Romilly, M.R., required each of the parties to pay his own costs up to the hearing, thus following the old practice. That was soon after the Act was passed, but in the later case of *Miller* v. *Marriott* he preferred to

follow the decision of Malins, V.C., in *Osborn* v. *Osborn*. In two other cases, *Wilkinson* v. *Joberns*, 21 W. R. 644, L. R. 16 Eq. 14, before Lord Selborne, C., and *Porter* v. *Lopes*, 7 Ch. D. 358, 26 W. R. Dig. 157, before Sir George Jessel, M.R., no costs were given up to the trial; but both those cases depended upon special circumstances, and in each the general rule was recognized to be that which I have stated.

To this rule there is, I think, one clearly established exception. Whenever, with respect to any share, there are costs of adverse litigation between the parties interested in that share—adverse claimants to the share, for instance—those costs are, at any rate to some extent, to be borne by that share, and not by the estate generally; and I think this is only fair. In *Jennings* v. *Foster*, before Pearson, J., there was a dispute as to the title to one share. The question was raised by a summons; and the note (W. N., 1884, p. 200) says that Pearson, J., directed the costs of that application to be paid out of the moiety of the purchase-money which represented that share. I am not quite satisfied whether the report is to be fully relied on. That the learned judge directed some costs to be borne by the particular share I have not the least doubt; but I doubt whether he directed all the costs of both parties to be borne by that share. In all probability what he really did was, to direct that the costs, so far as they had been increased by the adverse litigation, should come out of that particular share. And that is exactly what Sir George Jessel, M.R., did in *Mildmay* v. *Quicke*, 25 W. R. 788, 46 L. J. Ch. 667. In that case one share had belonged to a married lady, Mrs. Quicke, and there was a contest as to who was entitled to her share. She and her husband had appeared separately. She died pending the action, leaving two infant daughters. The question was, whether the proceeds of the share were personalty which went to the husband, or realty which went to the co-heiresses, and the Master of the Rolls said:—"The costs occasioned by the order for revivor, and by bringing the infant defendants before the court, and of their appearance, will be part of the defendants' costs in the cause; but, as against the plaintiff, the costs occasioned by the severance in the defence of Mr. and Mrs. Quicke must, of course, be borne by her share." I think that was strictly right, meaning by "the costs occasioned by the severance," not the costs of both parties so far as related to that question, but the extra costs occasioned by the severance of two defendants who, otherwise, would have been acting together, but who had to appear separately because the dispute was raised. These are two illustrations of the above-mentioned exception to the general rule.

Again, I do not doubt that, if trustees severed, the court would not allow them two sets of costs. But, subject to these exceptions, it appears to me that the costs of each party, by which I mean the costs of each share, ought to be borne by the estate as a general rule.

The question then arises, what is a "share"? Suppose a testator died fifty years ago, leaving his property to A. and B. in equal moieties, and that during that time one of the moieties had remained in the hands of one person, while the other had become subdivided into a great many shares—a very common case in a partition action. In such a case I think the shares ought to be taken to be as they are ascertained when the chief clerk's certificate is made, finding who are the persons interested in the property. I can see no reason why, simply because fifty years ago the property happened to go in moieties, all the costs in connection with the shares afterwards coming into existence should be measured by the original devolution. I think, therefore, that a "share" means the share of a person found to be entitled to a share by the certificate. I have looked into the cases, and I have asked two of the registrars whether they could throw any light upon the matter from their books, but I have been unable to find any case, and have not heard of any case, inconsistent with this view. And there seems to be a strong reason in its favour, which is this—in a partition suit, the Act gives to the owners of a moiety of the estate the right to say whether it shall be changed from land into money by a sale. For that purpose it is settled that all the persons interested must be before the court. The court cannot get on without them. Before the passing of the Partition Act of 1876 several partition actions had been tied up, because there was no power to proceed without all the parties interested being served, and some parties were missing who could not be served. Under the Act of 1876 the court has power to dispense in particular cases with service of notice of the judgment on any person or class of persons interested. But it seems to me a reason for giving each person interested costs, that you cannot get on without him; and it does not appear fair that persons who are brought before the court for the purpose of giving other parties interested their legal rights, should have to bear the costs so occasioned. And I find in *Mildmay* v. *Quicke* not exactly a decision to that effect, but an observation strongly tending that way. In that case Messrs. Torr & Co., Mrs. Quicke's solicitors, had obtained a charging order for their costs upon the fund, and a stop order; and they asked to have their costs out of the fund. Sir G. Jessel, M.R., said: "As to the appearance of Messrs. Torr & Co., their having a charging order does not make them parties to the cause or entitle them to appear, except at their own expense. They must bear their own costs of obtaining the stop order, and of appearance by counsel." By virtue of their charging order they were incumbrancers on the fund, but the reason assigned for not giving them costs is, that they were not parties to the cause or entitled to appear, and I gather from that, that if they had been either the one or the other, the Master of the Rolls would have held that they were entitled to their costs.

The question still remains, with regard to incumbrancers, whether there is any difference between a sub-division of a share among persons who take absolutely, and the sub-division of a share, so to say, within itself, by an incumbrance or incumbrances being created upon it, subject to which the original owner is entitled to the equity of redemption. Does the latter case stand in a different position as to costs? I think not. Of course, there may be in that case, as in the other, disputes relating only to the share itself. If, for instance, there was a dispute as to the amount due on a mortgage, or as to the priorities of mortgagees, it might well be said that the costs of such a dispute ought to come out of the particular share. But those cases would be exceptional, and not governed by the ordinary rule; and, in the absence of such special circumstances, I can see no reason why the incumbrancer should not have his costs out of the estate, as well as the person whose share is incumbered. I can see no reason why, because a man has mortgaged his share, he should fare worse as to costs than if he had not done so when partition is sought by the owner of another share. This also should be borne in mind. Suppose the owner of a share wishes to raise money by means of it. If he does so by dividing it into two, and selling half of it, the assignee of the moiety sold must, of course, be served, for he is entitled to a share, and he would get his costs; and I cannot see any reason in principle why the costs should be treated differently if the owner of a share chooses to split it by means of a mortgage into

what I may call a preferred part and a deferred part, rather than to split it into two parts, one of which he retains and the other he sells. Moreover, I have been unable to find any case, and the registrars whom I have consulted cannot find any note of a case—in which, where shares have been incumbered, one set of costs only of proceedings for partition has been allowed in respect of an incumbered share. Nor can I find any case in which a mortgagee has been ordered to add his costs to his security (which would not be exactly the same thing, but somewhat like it), except *Wilkinson* v. *Joberns*.

That is the only case in which I can find that that course was adopted. There there was a good reason for it. By reason of the special circumstances of the case Lord Selborne, C., thought it right to direct that the costs of the parties up to the hearing should not be borne by the estate, but that each party should bear his own costs; and, that being so, it followed, as between a mortgagor and the mortgagee of his share, that the mortgagee would add his costs to his security. The only difficulty is the existence of the recognized rule in administration actions, often spoken of as the rule in *Greedy* v. *Lavender*, 11 Beav. 417, that only one set of costs shall be given in respect of each share. But, in answer to that, I say that I can find no trace of that course having been adopted in partition suits, and there are very many cases in which it has not—that is, cases in which the parties have had their costs allowed, without any direction being given that they were to be limited to one set in respect of any particular share. In my opinion, also, such a limitation would work injustice.

I think, therefore, that in the present case the incumbrancers must be treated as if they were owners of a share, and must have their costs out of the fund. I am not, however, attempting to lay down any absolutely fixed general rule. It is clear that the court has a discretion as to costs, which it will exercise differently under different circumstances. In the present case I think the incumbrancers must be treated as owners of shares, and have their costs accordingly. Such a rule might, no doubt, work rather hardly in some cases, but the court is strong enough to exercise its discretion so as that the costs shall be borne in the fairest way possible, having regard to the circumstances of each particular case.

Solicitors, *J. G. Shearman; Street & Poynder; Virtue; J. G. Shearman, jun.*

Chan. Div. } Stirling, J. } Dec. 6.

LIVERPOOL AND MANCHESTER AERATED BREAD AND CAFÉ CO. *v.* FIRTH AND OTHERS. (*a.*)

Practice—Discovery—Interrogatories—Security for costs of—Action against several defendants—Separate defences—Separate deposits of £5—Ord. 31, *r.* 26.

Where a plaintiff delivers interrogatories to, and seeks discovery from, several defendants who have severed in their defence, separate sums of £5 must be paid into court in each case.

Smith *v.* Reed, 28 *S. J.* 84, *W. N.*, 1883, *p.* 196, *followed.*

Eder *v.* Attenborough, 37 *W. R.* 507, 23 *Q. B. D.* 130, *distinguished.*

This was a summons taken out in an action by a company against five defendants, claiming that certain payments and cheques which the four first defendants had, in their capacities as directors of the company, made and given in favour of the fifth defendant, and certain other payments made to the first named defendant as special remuneration, should be declared improper and void, and other relief. The defendants were all represented by separate solicitors, and had put in separate defences.

The plaintiff company took out a summons dated the 6th of November, 1890, for affidavits of documents and discovery, and for liberty to deliver interrogatories to each defendant.

Before the chief clerk the plaintiff company claimed to be entitled to this order upon payment of one sum of £5 only on the application for discovery, and one of £5 on delivery of the interrogatories. This order the chief clerk refused to make.

Ord. 31, r. 26: "Any party seeking discovery by interrogatories shall, before deliverery of interrogatories, pay into court to a separate account in the action . . . the sum of £5, and if the number of folios exceeds five, the further sum of 10s. for every additional folio. Any party seeking discovery otherwise than by interrogatories shall, before making application for discovery, pay into court, to a like account, to abide further order, the sum of £5, and may be ordered further to pay into court as aforesaid such additional sum as the court or a judge shall direct . . . ."

Chadwyck Healey, for the plaintiff company.—Only one payment is required in respect of the discovery, and one in respect of the interrogatories, before the order is made. This precise case has never occurred in all the reports' cases, only one piece of paper has really been delivered. The fact of the defendants being represented by different solicitors makes no difference. This case is within *Eder* v. *Attenborough*, 37 W. R. 507, 23 Q. B. D. 130. Why should the defendants, by severing their defences, throw upon the plaintiff the burden of these additional payments? It is really one case against all, and they would be able to answer together. [He also referred to *Smith* v. *Reed*, 28 SOLICITORS' JOURNAL, 84, W. N., 1883, p. 196; *Campbell* v. *Lord Poulett and others*, 28 SOLICITORS' JOURNAL, 301, W. N., 1884, p. 48; and *The Whickham*, 53 L. T. 236, 34 W. R. Dig. 60, and stated that it had been ascertained that the interrogatories in *Campbell* v. *Lord Poulett and others* were in different forms.]

STIRLING, J., intimated that he did not require to hear counsel for the defendants as to the interrogatories.

Grosvenor Woods and *A. Dunham*, for two of the defendants, referred to *Jubb* v. *Bibbs*, 28 SOLICITORS' JOURNAL, 102, W. N., 1883, p. 208.

Chadwyck Healey, in reply.

STIRLING, J.—In this case I am asked to put a construction upon ord. 31, r. 26. This rule was first made in 1883, and came up before Field, J., at chambers on the 22nd of November of that year. In that case, *Smith* v. *Reed*, there were seven defendants, who all appeared by different solicitors, and it was held that the prescribed deposit must be made in respect of each set of interrogatories delivered to each defendant. I have made inquiries, and am informed on good authority that this rule has been uniformly observed in the chambers of the Queen's Bench Division and of the Chancery judges, except in one case, to which I will presently refer. Now *Smith* v. *Reed* is precisely similar to the present case. The present case is one against several defendants, directors of a company, for various acts

(*a.*) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

of misconduct, and it is probable in such a case that each director may have a defence which may not apply to the other defendants. The defendants have properly severed in their defences, and it is now sought to interrogate them. Unless *Eder* v. *Attenborough*, to which reference has been made, has overruled this practice, I shall follow that general practice, which has, I believe, prevailed for seven years, and so observe the principle that it is better to establish and follow one general practice than for one judge to attempt to set up a separate practice of his own. *Eder* v. *Attenborough* was an action against several defendants, based upon several distinct causes of action, and the defendants delivered a joint defence. In that case it was sought to administer one set of interrogatories only, and it was held that *Smith* v. *Reed* did not apply, and that one sum of £5 only must be paid before delivering interrogatories. Did the learned judges intend to overrule *Smith* v. *Reed?* I think not, but that they distinguished that case. Pollock, B., in giving judgment, said:—"This is not a case of different defendants defending by separate solicitors, and each having independent rights. The right of action was common, and to a great extent common against all." And Field, J., said:—"The defendants rely on my decision on the case in which I held that payment of £5 was not enough. But in that case the party had delivered separate and distinct sets of interrogatories, one set to A., and one to B., and so on, and I thought, and still think, that I was right in holding that a deposit in respect of each set was necessary." It is plain, therefore, to my mind, that the judges did not intend to overrule *Smith* v. *Reed*, and, notwithstanding *Eder* v. *Attenborough*, *Smith* v. *Reed* has been followed down to the present time. The present case falls within it, and I ought to follow it. In *Eder* v. *Attenborough* the ground of the order for payment of the one sum of £5 was because it was considered a guarantee of *bona fides* on the part of the plaintiff; that may not be the case here, for it is obvious that the plaintiff may have a good case against one defendant, which may not be good against the others. I decide this case on the ground that it is desirable to follow the practice as observed in two divisions of the High Court, and if that is to be overruled as erroneous it must be done by a higher court. As to the documents [his lordship read the latter part of the rule], it has been urged that the rule leaves an additional sum to be paid at the discretion of the court, but my view is that, instead of prescribing an additional sum where £5 might be insufficient, with reference to a further sum as to length, that it would be impossible for the judge to specify it in the same way as in the case of interrogatories. The language of the rule is identical in other respects. I think if *Smith* v. *Reed* construes the former part of the rule rightly, the second part is to be read in like manner, and the same principle applies. I hold that a separate sum of £5 must be paid into court in each case before delivery of interrogatories to, and before application for discovery as against, each defendant. Costs of this application will be costs in the action.

Solicitors, *Marsland, Hewitt, Everett, & Urquhart; Hodgkinson & Watts; Crowders & Vizard*, for *Hockin, Raby, & Beckton*, Manchester.

Q. B. D. (Hawkins and Stephen, JJ.) Oct. 30.

MALLINSON (*Appellant*) *v.* CARR (*Respondent*). (*a.*)

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117—*Unsound meat—Possession of unsound meat for preparation for sale for food of man—Liability of person in possession of same to a penalty.*

The respondent, a butcher, had purchased and had in his possession meat for the purpose of preparation for sale, and intended for the food of man. The meat was unsound and unfit for the food of man, and the respondent was so told at the time of the purchase. The respondent had not exposed the meat for sale.

Held (*distinguishing the case of* Vinter *v.* Hind, 31 *W. R.* 198, 10 *Q. B. D.* 63), *that the respondent, in having the unsound meat in his possession for the purpose of preparation for sale for the food of man, was guilty of an offence under the* 117*th section of the Public Health Act*, 1875, *although he had not exposed the unsound meat for sale.*

Case stated by justices under 20 & 21 Vict. c. 43.

An information under sections 116 and 117 of the Public Health Act, 1875, was preferred by Thomas Mallinson, of Selby, in the county of York, inspector of nuisances, against George Carr, of the same place, butcher, for having had, on the 7th of May, 1890, in his possession certain meat, to wit, four pieces of beef, for the purpose of preparation for sale, and intended for the food of man, contrary to the statute in such case made and provided.

The justices dismissed the information, but stated this case, from which the following facts appeared:—

The defendant having appeared on summons before the said justices, it was proved that, on the 6th of May, 1890, the defendant, along with other persons, purchased from one Thomas Kettlewell a cow for thirty shillings, which a veterinary surgeon had ordered Kettlewell to get killed and dressed, and at the time of sale it was stipulated by Kettlewell that it was not to be offered for human food. The beast was slaughtered and cut up into four quarters the same day, and removed in a cart by the defendant from Kettlewell's premises. On the following day, from information that had come to Kettlewell's knowledge, he went to Selby and saw the defendant and demanded the carcase back again, stating that he had heard it was going to be offered for human food. The defendant then asked Kettlewell if he had given the beast any physic, and on Kettlewell stating that he had not, Carr replied, "Then it is good beef," and that he was going "to pickle it and cut it up," and refused to give back the carcase.

The prosecutor was then informed of the matter, and he went and saw the defendant and told him he wanted to look at a carcase of beef he had. The defendant Carr then unlocked the door of an outhouse, and the prosecutor there saw in a cart four quarters of beef. He asked the defendant what he was going to do with it, and the defendant said, "Put it in pickle and cut it up."

The prosecutor, thinking the meat was not good for human food, took possession of it, and then called in the medical officer of health, and it was taken before a justice of the peace and condemned as unsound and unfit for the food of man. The medical officer was called and proved that he had examined the four pieces of beef, and that it was unsound and unfit for the food of man.

It was stated and admitted on behalf of the prosecutor that there was no exposure of the meat for sale;

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

whereupon, on the close of the prosecutor's case, the defendant's solicitor contended that, as there was no exposure of the meat for sale, the defendant could not be convicted of the offence charged, and quoted in support of such contention the case of *Vinter* v. *Hind*, 31 W. R. 198, 10 Q. B. D. 63, whereupon the justices adjudged that, there being no evidence of exposure of the meat for sale, the case was governed by the ruling in *Vinter* v. *Hind*, and they dismissed the information.

Section 116 of the Public Health Act, 1875, enacts: "Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any animal carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk, exposed for sale or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged; and if any such animal carcase, &c., appears to such medical officer or inspector to be diseased, or unsound, or unwholesome, or unfit for the food of man, he may seize and carry away the same himself, or by an assistant, in order to have the same dealt with by a justice."

Section 117: "If it appears to the justice that any animal carcase, meat, &c., so seized is diseased, or unsound, or unwholesome, or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale, or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty," &c.

Lumley Smith, Q.C., for the appellant.

Scott Fox, for the respondent.

HAWKINS, J.—In this case I am of opinion that the justices, upon the facts before them, did not come to a right conclusion, and the case must be remitted to them with our intimation to that effect. The information was laid under sections 116 and 117 of the Public Health Act, 1875, against the respondent, for that he, on the 7th of May, 1890, had in his possession certain meat, to wit, four pieces of beef, for the purpose of preparation for sale and intended for the food of man. [The learned judge then stated the facts as they appeared from the case, and read sections 116 and 117, and continued:—] Clearer language could not, in my opinion, have been used to give the justices power to deal with persons in whose possession diseased meat is found. The words in the latter part of section 117 are clearly applicable to a person who has diseased meat in his possession in the course of preparation for the food of man. The section does not say that a man in whose possession diseased meat is found, and who is preparing the same for food, shall not be guilty of an offence unless he actually exposes the same for sale, and it could never have been intended that the section should be so construed. In my opinion exposure for sale is not necessary to constitute the offence under the section, and I think, therefore, that this case must be remitted to the justices.

STEPHEN, J.—I am of the same opinion. The justices seem to have quite misunderstood the judgment in *Vinter* v. *Hind*, a case which was essentially different from the present, and which turned on a different part of the section. In that case the charge was for exposing for sale unsound meat, and I think the court were right in saying that it was essential to complete the offence that there should be an exposure for sale. The charge in the present case is being in possession of meat that is diseased, or unsound, or unfit for the food of man, and which is intended for the food of man. That offence the respondent has committed, and it is not necessary to have the exposure for sale in order to complete the offence.

Appeal allowed; case remitted.

Solicitors for the appellant, *Williamson, Hill, & Co.*, for *Bantoft*, Selby.

Solicitors for the respondent, *Ridsdale & Son*, for *Burton*, Selby.

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) Jan. 13.

Ex parte RAISON.
In re RAISON. (*a.*)

Bankruptcy—Discharge—Application under Act of 1883 *—Effect of Bankruptcy Act*, 1890—*Interpretation Act*, 1889 (52 *&* 53 *Vict. c.* 63), *s.* 38—*Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 28 — *Bankruptcy Act*, 1890 (53 *&* 54 *Vict. c.* 71), *s.* 8—*Practice.*

In all cases in which adjudication has been made under the Bankruptcy Act, 1883, *the bankrupt has a right to have his application for an order of discharge dealt with under section* 28 *of that Act, and not under section* 8 *of the Bankruptcy Act*, 1890.

Case referred by the registrar to the bankruptcy judge on application by the bankrupt for discharge.

The case raised the very important question whether, where adjudication had taken place under the Bankruptcy Act, 1883, an application for discharge ought to be dealt with under section 28 of the Bankruptcy Act, 1883, or under section 8 of the Bankruptcy Act, 1890.

On August 23, 1890, a receiving order was made against the debtor, Thomas Raison, on which he was adjudicated bankrupt on October 13, 1890.

On December 1, 1890, the public examination was closed, and the bankrupt thereupon filed his application for discharge, the day for the hearing of the application being fixed for January 12, 1891.

On January 1, 1891, the Bankruptcy Act, 1890, came into operation, by which section 28 of the Bankruptcy Act, 1883, is repealed, and section 8 of the new Act enacted in its place, which contains certain important additions.

At the hearing of the application for discharge, the official receiver reported to the court, under section 8 of the Bankruptcy Act, 1890, to which objection was taken, and the matter being one of general importance, the question was referred by the registrar to Cave, J., for decision.

Herbert Reed, for the bankrupt.—The application of the bankrupt should be governed by the Act of 1883, and is not affected by the Act of 1890. In this latter Act additional matters wholly or partly new are inserted, which may oblige the registrar to refuse a discharge. Much of the discretion vested in the registrar by the Act of 1883 is taken away. By section 29 of the Bankruptcy Act, 1890, "The enactments mentioned in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule." In that column section 28 of the Act of 1883 is placed, and there is no clause saving existing rights. By section 169 of the Act of

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

1883, the Act of 1869 was repealed, but there was a saving clause preserving rights acquired under the repealed enactment. By section 38 of the Interpretation Act, 1889, it is provided that "where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not—(c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed." This statute says that existing rights are not to be affected, and the question is, What are the rights of a person adjudicated bankrupt under the Act of 1883, and who has commenced proceedings under that Act for his discharge? The bankrupt acquired under that Act a right to have his discharge on certain conditions, and this right is preserved to him by the Interpretation Act of 1889. The general rule is that where an Act affects rights, it is not retrospective in the absence of express words. Section 8 of the Bankruptcy Act, 1890, does affect rights, and one of the most important is the taking away the discretion of the court.

He referred to *Hough* v. *Windas*, 32 W. R. 452, 12 Q. B. D. 224; *Ex parte Salaman, In re Salaman*, 14 Q. B. D. 936, 33 W. R. Dig. 16; *Ex parte Todd, In re Ashcroft*, 35 W. R. 676, 19 Q. B. D. 186.

E. C. Willis, Q.C., for the trustee.—Section 28 of the Bankruptcy Act, 1883, was repealed on January 1, 1891, and, therefore, unless there is something to preserve it, there is no power under the Act of 1883 to grant a discharge at all. By section 169 of the Act of 1883, which repealed the Act of 1869, existing rights were preserved. No such saving clause has been inserted in the Act of 1890, and it must be taken that this was intentionally omitted by the Legislature. All that remains is section 38 of the Interpretion Act, 1889, and it cannot be said that section 28 of the Bankruptcy Act, 1883, created a right or liability within the meaning of that section.

He referred to *Ex parte Pratt, In re Pratt*, 32 W. R. 420, 12 Q. B. D. 334.

Muir Mackenzie, for the official receiver.

Herbert Reed replied.

CAVE, J.—This is a case of very considerable importance at the present moment, though only of passing importance; and, having regard to the fact that several of these applications are waiting, I think it best to give judgment at once, as I have formed a definite opinion on the subject. The question is, what construction is to be put on section 29 of the Bankruptcy Act, 1890, read along with section 38 of the Interpretation Act, 1889. When read together it is clear that section 28 of the Bankruptcy Act, 1883, is repealed, but the repeal of that section shall not "affect any right, privilege, obligation, or liability acquired, accrued, or incurred" under that section. It seems to me I do find that a right is given to a bankrupt adjudicated under section 28 of the Bankruptcy Act, 1883, to make an application for his discharge, subject to certain limitations; and certain powers, in some cases discretionary, are to be exercised by the judge who has to consider the application.

No one can doubt that the Bankruptcy Act, 1890, was intended to affect prejudicially the position of a bankrupt. It was thought that under the Act of 1883 a bankrupt obtained his discharge without sufficient punishment being awarded, and without sufficient care being taken to preserve that standard of commercial morality which it was one of the objects of the Act of 1883 to maintain; and it was intended by the Act of 1890 to make the position of a bankrupt, so far as his application for his discharge was concerned, less easy and less comfortable than formerly. His right to apply for an order of discharge is not affected in the sense that he is still able to apply for an order of discharge, but he will not get it on nearly so favourable terms as under the Act of 1883. It seems to me, therefore, that looking at the words which are used—*e.g.*, right, privilege, obligation, or liability—there was a right coupled with liabilities of a certain description, which right has been decidedly affected, because it is now a right to some extent of a similar kind, except that it is subject to liabilities of a far more onerous description than it was before the passing of the Act of 1890. Looking at the language of the Interpretation Act, 1889, it would seem that this was the very kind of thing which that section was intended to meet. There is an old and well-known saying with regard to the new laws, that you are not by a new law to affect, for the worse, the position in which a man already finds himself at the time when the law is actually passed. Under the Act of 1883 a man adjudicated bankrupt under that Act is subject to have taken into consideration, when he applies for an order of discharge, matters which he may have committed in the course of his trading before the Act of 1883 came into force; but it is going very much farther to say that after he has become a bankrupt, after his position has become fixed, so that he cannot by subsequent good conduct atone for any errors he may have made in the past, he is to have taken into consideration a state of the law which did not exist at the time when he was actually adjudicated a bankrupt. It does appear to me that if I were to hold that a man who was adjudicated bankrupt under the Act of 1883 was, nevertheless, subject to the more stringent liabilities imposed by section 8 of the Act of 1890, I should be going quite contrary to this statute, and the plain meaning of this interpretation clause of the Act of 1889.

Now it was urged that the Legislature might have effected what they had done here in another way than by repealing section 28, and, undoubtedly, that might have been so. They might have enacted that in any future application, or in any application under section 28, that certain things, such as those mentioned in section 8 of the Act of 1890, should be taken into account. The only answer is that that is not the language which we have to deal with at present. Of course, if the Legislature had chosen to effect the alteration in that way, it would have been necessary to have stated, and in all probability it would have stated or shown by clear intentment to what applications the new rule was to apply. No doubt the Legislature might have said that it should apply to any application that was heard after the coming into operation of the Act; or that the new rules should apply to any application, of which notice has been given, after the coming into operation of the new Act; or it might have said that the new rules should apply only to an application in the case of a bankrupt adjudicated bankrupt under the new Act. Therefore it is quite clear that if a different form of language was adopted, it would not at all have prevented the Legislature adopting either one or other of these methods of applying new rules. The Legislature has chosen to adopt one which involves the interpretation of the Interpretation Act of 1889, and I say, reading that Act, it does seem to me that this case is one which is preserved by that Act.

Now it was argued by Mr. Cooper Willis that there is something to show a contrary intention on the part of the Legislature such as is referred to in the Interpretation Act of 1889, because it is said there is nothing which is similar to clause (3) of section 169 of the Act of 1883; that the section does contain a

saving of any right or privilege acquired, or duty imposed, or liability, or disqualification incurred just as the Interpretation Act of 1889 does; but that although that language is to be found in the Act of 1883, clause (3) of section 169 goes further, and provides expressly with reference to the Bankruptcy Act of 1869 and proceedings which were commenced under that Act; and Mr. Willis says there is nothing in the Interpretation Act of 1889 which is at all similar to clause (3) section 169 of the Bankruptcy Act of 1883. Now, undoubtedly, there is some little force in that argument, but I think that the fair answer is that if that is so those two clauses do overlap one another, not a solitary instance of legislation of that kind being found in the Act of 1883.

There is another argument also which could be drawn from clause (3) of section 169 of the Act of 1883, and that is, that the Legislature there clearly shows an intention that where there was an order of discharge to be applied for under a bankruptcy in which adjudication had taken place under the old Act, that that old Act was to be preserved for the purpose of hearing the application for the order of discharge, notwithstanding that that application was not made until after the new Act came into operation; and it would therefore be departing from the policy of the Legislature as shown by section 169 of the Act of 1883, if I were to come to the conclusion that in the Act of 1890 they intended to do what they had carefully abstained from doing in the Act of 1883, and had intended to make the position of a bankrupt worse, not only in the case of a future adjudication under the new Act, but also in the case of an adjudication which had actually taken place, and so fixed as it were the position and liability of the bankrupt before the new Act had at all come into force. For these reasons I think that in all cases in which there has been an adjudication under the old Act the bankrupt has a right to have his application for an order of discharge dealt with under section 28 of the Act of 1883, and that this application must be heard under the provisions of section 28 of the Act of 1883 and not under section 8 of the Act of 1890.

Application allowed.

Solicitors for the bankrupt, *Wilde & Wilde.*

Solicitors for the trustee, *Warriner & Kinch.*

Solicitor for the official receiver, *The Solicitor to the Board of Trade.*

Court of Appeal.

From Chan. Div. Feb. 9, 10.

COOKE v. SMITH. (a.)

Practice—Discovery—Affidavit of documents—Deposit—Application for increase of deposit—Time of application—R. S. C., 1883, *ord.* 31, *rr.* 12, 26; *ord.* 65, *r.* 6.

The power of the court, under ord. 31, *r.* 26, *to make an order for payment into court of a sum of money, in addition to the £5 originally deposited, as security for the costs of discovery, is not limited to the time when the order for discovery was made, but may be exercised subsequently, if the court considers that the circumstances of the case require it.*

In order to properly comply with an order for discovery by affidavit of documents, the documents ought not only to be set out in bundles, but each document must be ear-marked by marking it specially, so that the party seeking discovery may be in a position to specify any particular document he may want to see.

Hill *v.* Hart-Davies, 26 *Ch. D.* 471, 32 *W. R. Dig.* 150, *approved.*

Appeal from Kekewich, J.

By a creditor's deed executed in 1876, the members of a firm, carrying on business in partnership as ironmasters, assigned the business and property of the firm to trustees for the benefit of creditors.

The present action was commenced on the 13th of December, 1889, by one of the members of the partnership firm and the representative of a deceased member of the firm, as plaintiffs, the defendants being the trustees of the creditor's deed of 1876, and the Barrow Hæmatite Steel Co. The statement of claim alleged that at the date of the creditor's deed the defendant Smith (one of the trustees) was also managing director of the Barrow Hæmatite Steel Co. (one of the creditors of the partnership firm), and that as manager of that company he supplied, on behalf of that company, steel rails and other materials requisite for the carrying on, by the trustees, of the business of the partnership firm, and habitually made charges therefor largely in excess of the market prices; that the trustees, while carrying on the business of the partnership firm, at various times expended large sums in erecting new and improved machinery (contrary to the terms of the trust deed); that they sold the property and business of the partnership firm to the Barrow Hæmatite Co. at a gross undervalue, and obtained the assent of the other creditors to such sale by misrepresenting to them the value of the assets and the position of the business of the partnership firm. The plaintiffs claimed an account by the trustees of all moneys received by them, and of the sums expended by them in improvements of the works of the partnership firm, and of all materials supplied on account of such works by the Barrow Hæmatite Co.; and that the sale to the Barrow Hæmatite Co., which was effected in 1885, might be set aside as fraudulent.

The defendants' statement of defence was delivered on the 12th of August, 1890.

On the 19th of August, 1890, the plaintiffs, having previously paid into court the sum of £5 as required by ord. 31, r. 26, obtained an order in the common form directing the defendants within six weeks to make discovery of documents.

The defendants finding, as they alleged, that as many as 50,000 documents would have to be examined in order to comply with the order for discovery, took out a summons on the 1st of October, 1890, that the plaintiffs might be further ordered to increase their deposit of £5 paid into court to the amount of £200.

Kekewich, J., on the hearing of this summons, held that the power of the court under ord. 31, r. 26, to order a further sum to be paid into court in excess of the £5, was not a power limited in its exercise to the time when the order for discovery was made; and he considered that the circumstances of the present case rendered it proper that the plaintiffs should be required to increase the amount of the deposit, but he thought that the sum of £200 asked for by the defendants was too much. He accordingly made an order that the plaintiffs should pay into court the further sum of £100, with liberty for the plaintiffs to apply at any time to have that amount reduced.

The plaintiffs appealed.

Henn Collins, Q.C., and *T. E. Mansfield,* for the appellants.—The judge below had no jurisdiction to make the order appealed from. An order, under rule 26 of

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

this case, had not been sold—they might have been seized under the ordinary process of execution by *fi. fa.*, or if he had owned land it might have been taken under an *elegit*. Notwithstanding his lunacy he had been put, as was competent by the law of this country, in the position of a judgment debtor, and the legal consequences of that would follow as a matter of course, subject always to such control over the exercise, as might be possessed by the court in lunacy.

The main object and purpose of the statute I have referred to was to enable a judgment creditor to obtain a charge upon certain property of his debtor which he could not reach by the ordinary means of a *fi. fa.* or an *elegit*.

There is no reason that I can imagine why this remedy should not exist in the case of every person against whom a judgment could be obtained, and, indeed, an express exemption of a lunatic judgment debtor would, it seems to me, be a great hardship upon the creditor, who might have enforced his judgment, as I have pointed out, against either chattels or land of the lunatic if he had possessed any.

This construction does not make the words in the statute, which I have been considering, ineffective. The judgment of Erle, J., in *Watts* v. *Porter*, is now accepted as an accurate explanation of the meaning of those clauses. This object is to confine the charge to such as the debtor could honestly have made, that is, to make it subject to every previous equitable charge upon the fund, and to put the creditor who obtained a charging order precisely in the position of an ordinary execution creditor as defined in *Whitworth* v. *Gaugain*, 1 Ph. 728; but the majority of the judges seem to have agreed that, as Lord Campbell expresses it (3 E. & B. 750), "the words that are to be understood as implied by the Legislature we think are 'validly and effectually.'" The erroneous view taken by the majority of the court was that a prior equitable incumbrancer, not having given notice to the trustees, had not completed his title against the judgment creditor, a decision which has since been overruled: *Beavan* v. *Lord Oxford*, 4 W. R. 112, 6 De G. M. & G. 492; *Kinderley* v. *Jervis*, 4 W. R. 579, 22 Beav. 1; *Pickering* v. *Ilfracombe Railway Co.*, 16 W. R. 458, L. R. 3 C. P. 235; *Scott* v. *Lord Hastings*.

Turning to the recent authorities there is one decision of two experienced judges in point. In *Horne* v. *Pountain* a similar charging order was made on funds of a lunatic standing in the name of the Paymaster-General, but limited to so much of the fund as the Lords Justices sitting in Lunacy might deem applicable.

The case came before Field and Cave, JJ., on an application by the judgment creditor to have the order made unconditional. It was argued that by reason of the words of the statute, which I have read, no order could be made. Neither of the learned judges deals expressly with this argument, but Field, J., says: "Our duty is to give effect to the Act. I find in it no exception nor anything pointing to any distinction between a sane person and a lunatic," and the order was made absolute in form, the condition being struck out. The judgment and charging order were both obtained after the debtor had been found lunatic. This is a direct decision in favour of the claim of the judgment creditors in the present case.

In *In re Onslow's Trusts* a judgment was obtained by default against a man who was of full age for money lent to him while an infant, and a charging order was made upon the judgment. The fund charged was in court, and three incumbrancers upon it, whose charges were undisputed, applied for payment, alleging that the charging order was invalid by the effect of the Infants' Relief Act, 1874, which made his contract for money lent absolutely void. Hall, V.C., decided against the charging order, on the ground that a charging order cannot be obtained upon a judgment for a debt which was not due. The Vice-Chancellor did not accept the judgment as conclusive evidence of the debt, because it was a judgment which had been obtained against the defendant upon a claim for money lent to him during his infancy, which, by reason of the Infants' Relief Act, 1874, could not be recovered. It was argued that the court should follow the decision in *Ex parte Kibble*, 23 W. R. 433, L. R. 10 Ch. App. 373, where, on an attempt to make the same person a bankrupt, the court examined the judgment and treated it as invalid.

For the reason I have given, I am of opinion that the charging orders in this case are valid and effective. The consequence is that, to the extent of such charging orders, the fund does not belong to the estate of the lunatic; if it did, we should simply order the transfer of the fund to the legal personal representative, leaving him to administer it; but as it does not, we must direct the amount due on the several charging orders, which must be verified in each case by affidavit, with the costs of this proceeding, to be paid to the judgment creditors, and the rest of the fund to be transferred to the legal personal representative.

Solicitors, *Ridsdale & Co.; Emanuel & Simmonds.*

From Q. B. Div. [and Q. B. Div.] — Jan. 13; Feb. 2.

REG. *v.* ASSESSMENT COMMITTEE OF ST. MARY ABBOTT'S, KENSINGTON. (*a.*)

Poor rate—Appeal—Assessment committee—Valuation list—Right of objector to appear by agent—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict.* c. 67), *ss.* 19, 32.

There is nothing in the Valuation (Metropolis) Act, 1869, *to limit the right of a ratepayer or body of ratepayers, who object to the valuation list, to appear before the assessment committee by any authorized agent, and the assessment committee have no power to restrict the right of audience to the ratepayer himself, or a member of his family or household, or a member of the legal profession on his behalf.*

Rule *nisi* calling upon the Assessment Commmittee of St. Mary Abbott's to show cause why they should not hear and determine an objection to an assessment.

The prosecutor had objected to any alteration in the assessment of his premises upon the quinquennial metropolitan valuation. He was a member of a ratepayers' association, and employed the agent of the association, a surveyor, to represent him before the assessment committee. The notice of his objections had been sent by the agent, and had been acknowledged by the clerk to the committee under the impression that the agent was a solicitor. Upon the hearing, the committee declined to allow the agent to argue for the prosecutor, on the ground "that he was not a member of the ratepayer's family or household, nor counsel or solicitor," but they offered to let the agent be sworn as a witness. The prosecutor obtained a rule for a *mandamus* calling upon the committee to hear and determine on his objections.

Henn Collins, Q.C., and *J. V. Austin*, for the committee, showed cause against the rule.—The committee are a judicial tribunal having discretion to regulate their proceedings. They have analogous powers to a

(*a.*) Reported by SPENCER L. HOLLAND and A. P. PERCEVAL KEEP, Esqs., Barristers-at-Law.

revising court where a rule had been passed that counsel should not appear professionally on behalf of voters. The committee had offered to hear the agent as a professional witness: *Ex parte Evans*, 9 Q. B. 279; *In re Macqueen and Nottingham Caledonian Society*, 9 C. B. N. S. 793, 10 W. R. C. L. Dig. 38; *Reg.* v. *Williamson*, 38 W. R. 769; *Willis* v. *Maclachan*, 10 Ex. 376, 24 W. R. Dig. 104; *Reg.* v. *Mansell-Jones*, 37 W. R. 508, 23 Q. B. D. 29.

Philbrick, Q.C., and *A. Glen*, for the prosecutor, supported the rule.—A person is entitled to perform any act before a tribunal by an agent, unless expressly prohibited by statute or common law. There was no discretion in the committee to refuse to hear an objection by whomsoever made, if it were properly made: *Jackson & Co.* v. *Napper*, 35 W. R. 228, 35 Ch. D. 162. The committee are not a court exercising judicial functions. Their proceedings are regulated by sections 18 and 19 of the Metropolis Valuation Act, 1869. The words "any body of persons . . . may appeal to the assessment committee" in section 32 imply a right to appear through an agent. This tribunal is analogous to that of Income Tax Commissioners sitting to hear claims or objections under 43 & 44 Vict. c. 19, s. 57, sub-section 9.

POLLOCK, B.—The question raised before us is somewhat novel. We have to deal with an application for a *mandamus* against a rating authority by a person deeming himself aggrieved by a certain rate. The purpose of the application is to command this assessment committee to proceed to hear and determine an objection made to a rate by and on behalf of the applicant. The substance of the complaint is that the applicant, who desired to object to the assessment of his premises, obtained a person to act as his agent and representative before the assessment committee. This person first offered himself as a witness and then applied to be heard on the applicant's behalf as his agent. The committee decided that as this person was not a counsel or solicitor, nor a member of the applicant's family or household, they could not hear him argue on behalf of the applicant, though he could offer himself as a witness on the applicant's behalf. Considering the peculiar position of an assessment committee, it is not of much advantage to treat them as analogous to a judicial tribunal, or to consider cases dealing with the duties of such a tribunal. They have indeed a duty to hear and determine a certain class of applications, but they have no power to compel attendance, or to administer oaths, or to exercise other such inherent rights of judicial tribunals; so that it would not be fair to compare or to draw distinctions between this case and other cases of an analogous kind before other tribunals. The Act under which they are constituted is their sole authority. The language of this Act (32 & 33 Vict. c. 67) is general, and is open to the criticism that by section 19 the committee are "to hear and determine objections" simply, and not specifically the persons making the objections. I think that would be to put too strict a construction on the words. Nor do I think that the analogy, suggested by Mr. Philbrick, of the duty of committees under the Corrupt Practices Act, 1883 (46 & 47 Vict. c. 51), to hear and determine matters, can apply. What right has a man to appoint an agent to represent him? Obviously in some cases it may be necessary where a man is too old, or too ill, to attend; or, again, where he can have no practical knowledge of the subject of the inquiry. The agent, on the other hand, may be a relative or friend having special knowledge or experience of the subject-matter and willing to act; or (as is suggested here) there may be a common objection to an assessment by the occupiers of a whole row or terrace of similar houses, and they may choose to be represented by one of their body or by a house agent authorized to make a common objection for all those assessed in a particular locality. Is the committee entitled to say to such a person, "We will not hear you." It clearly cannot be so. It is a rule of law that a man may appoint an agent to do for him what he is not bound personally to do himself. If so, the agent in this case ought to have been heard.

The committee laid down a fair rule for the proper conduct of their business as to how such a person should be heard. They said that, if he appeared in the double capacity of witness and agent for the one party, they were entitled to say that he could only be heard in one or the other capacity, and not in both. Probably that was the way in which this question arose originally in this case. But I do not consider that the committee were entitled to lay down any rule limiting agency to membership of the applicant's family or household. On these grounds I think the *mandamus* should go.

CHARLES, J.—I agree. The right of ratepayers to appeal against an assessment is a purely statutory right. Nothing in the statute in question makes it essential that the ratepayer should exercise his right himself. I agree with Stirling, J., in *Jackson & Co.* v. *Napper*, where he says that, "subject to certain well-known exceptions, every person who is *sui juris* has a right to appoint an agent for any purpose whatever, and that he can do so when he is exercising a statutory right no less than when he is exercising any other right."

There is nothing to limit in this case the common law right of a person to do by another what he may do *sui juris*. The common law principle is the governing rule unless limited by statute. It is said the assessment committee were equivalent to a court, and so had an inherent right to regulate their proceedings, and as a judicial tribunal to limit the class of persons to whom they would allow a hearing. Though this committee is in a sense a tribunal, I do not think their authority goes to that length. Their duty is to hear and determine objections to any assessment. The mode of conducting such hearing is undoubtedly one for the committee to determine. How they will allow persons a hearing is one thing, but that does not authorize them to exclude any class of objectors, or any properly authorized representative of an objector. That would be to seek to control the class of persons who had a statutory right to have their objections heard and determined.

The assessment committee appealed.

J. V. Austin (*Henn Collins, Q.C.*, with him), for the appellants.

Philbrick, Q.C., and *Alexander Glen*, for the respondents, were not called upon to argue.

Lord ESHER, M.R.—In this case a number of select vestrymen, to whom power is given by statute to hear objections to the valuation list, have taken upon themselves to say that they will not hear the properly accredited agent of the person objecting. It is contended that they have the right to do so because they are a sort of court with judicial, or *quasi*-judicial, functions to discharge, and that, therefore, they have power to make such rules to regulate their procedure. Whatever the assessment committee are, I am clear that they are not a court, nor have they any judicial functions to discharge. The question is whether, being such as they are, they have the power to refuse to hear a person objecting to the valuation list because he appears by some authorized

agent. I think there is nothing which gives them any such power. The person objecting may, I think, appoint any agent he thinks fit to support his objection to the list. It is said that it is inconvenient for the committee to listen to a surveyor who is both an advocate and a witness. I cannot see the inconvenience. It is unnecessary now to determine the question, but I am inclined to think that the committee have no greater power to limit the class of witnesses than they have to limit the class of advocates or agents appearing before them. No doubt they have some discretion as to the number of either whom they will hear, but it is, to my mind, plain that they have no such autocratic power to refuse to hear the agent of an objector, as they have assumed. The *mandamus* must therefore go, and this appeal must be dismissed.

BOWEN and FRY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellants, *Pontifex, Hewitt, & Pitt.*

Solicitors for the respondent, *Nye, Greenwood, & Moreton.*

From Q. B. Div. Dec. 18.

MADELL *v.* THOMAS, SONS, & CO. (*a.*)

Bill of sale—Absolute assignment by deed—Hiring agreement—Fictitious transaction—Loan upon security—Grantor not estopped from showing true nature of transaction—Bills of Sale Acts, 1878 (41 & 42 *Vict. c.* 31) *and* 1882 (45 & 46 *Vict. c.* 43).

A transaction purported to be an absolute assignment by deed of certain chattels by the plaintiff to the defendants, followed by an agreement in writing whereby the plaintiff hired the chattels from the defendants upon the terms that, upon a certain sum being paid by the plaintiff to the defendants by weekly instalments, the chattels were to belong to the plaintiff, and, upon default in payment of any instalment, the defendants were to be entitled to resume possession.

Held, that, notwithstanding the deed, the plaintiff was not estopped from showing that the true nature of the transaction was a loan upon the security of the chattels, and not an absolute assignment; and that the documents were void under the Bills of Sale Act (1878) *Amendment Act,* 1882, *for want of registration.*

Motion on behalf of the defendants for judgment in an action of trespass to goods tried before A. L. Smith, J., and a jury.

The plaintiff, in consideration of a sum of £200 owing by him to the defendants, by deed dated the 21st of December, 1888, assigned certain furniture in his possession to the defendants absolutely. On the same date the plaintiff signed an agreement, under which he hired from the defendants the furniture (which was described therein as belonging to the defendants) upon the terms that on £200 being paid to the defendants by the plaintiff in forty weekly instalments of £5 each the furniture was to belong to the plaintiff; and in case of default in payment of any instalment, the instalments already paid were to become forfeited to the defendants, who should be entitled to resume possession, it being agreed that until the payment of £200 the furniture should remain the absolute property of the defendants. Default having been made in payment of the instalments, the defendants took possession, and the plaintiff thereupon brought an action of trespass, contending that the true nature of the transaction was one of loan and security, and not of sale and re-hiring, and that the documents constituted a bill of sale, and were void for want of registration. The learned judge in summing up asked the jury whether, upon the evidence, the real transaction was an out and out sale coupled with a re-hiring, or whether the real transaction was that there should be a mere security for a loan, and whether the transaction as carried out was a disguise and cloak for a loan. If the former, they were to find for the defendants; if the latter, for the plaintiff. The jury found a verdict for the plaintiff.

Channell, Q.C., and *C. C. Scott,* for the defendants—The assignment being by deed, the plaintiff, who is a party to the deed, is estopped from showing that the deed is a sham. He cannot be allowed to contradict the deed by showing that the assignment was not an absolute one, but only by way of security for money. The plaintiff is estopped from showing the true nature of the transaction: *Doe* v. *Roberts,* 2 B. & Ald. 367; *Bessey* v. *Windham,* 6 Q. B. 166; *Bowes* v. *Foster,* 6 W. R. 257, 2 H. & N. 779. The case of *In re Mary Watson,* 38 W. R. 567, 25 Q. B. D. 27, was not between the parties to the transaction, but between the trustee in bankruptcy of one of the parties and the other party. Nor was there a deed of assignment in that case. The trustee in bankruptcy stands in a better position under the Bills of Sale Act, 1878, than the grantor. Though this deed and hiring agreement may be an absolute bill of sale, and, therefore, within the Bills of Sale Act, 1878, they are not within the Bills of Sale Act, 1882, as they are not given as security for money: *Swift* v. *Pannell,* 31 W. R. 543, 24 Ch. D. 210. They are not therefore void as between the parties to it for want of registration. The action, therefore, will not lie.

They also referred to *Manchester, Sheffield, and Lincolnshire Railway Co.* v. *North Central Wagon Co.,* 37 W. R. 305, 13 App. Cas. 554; *Yorkshire Railway Wagon Co.* v. *Maclure,* 30 W. R. 761, 21 Ch. D. 309; *Redhead* v. *Westwood,* 59 L. T. N. S. 293; *Marsden* v. *Meadows,* 29 W. R. 816, 7 Q. B. D. 80; *In re Mapleback,* 25 W. R. 103, 4 Ch. D. 150; *Gowan* v. *Wright,* 35 W. R. 297, 18 Q. B. D. 201.

J. A. Boyle, for the plaintiff, was not called upon.

Lord ESHER, M.R.—It seems to me that this case comes directly within the decision in *In re Watson.* In that case we had to consider whether, upon the true construction of the Bills of Sale Acts, we were not bound, with regard to written documents of all kinds, to do what but for those Acts it would have been impossible in all cases to do. Both the Bills of Sale Acts of 1878 and 1882 were intended to govern transactions between borrowers and lenders. They were intended for the protection both of borrowers and of creditors. The Act of 1882 was especially intended for the protection of borrowers. Both Acts deal with and include documents which, apart from the Acts, could not be disputed by the parties to them, but by necessary implication from the Acts, though the documents upon their face are not bills of sale within the Acts, upon proof of certain facts not appearing upon their face, they are, nevertheless, in truth bills of sale within the Acts. It was, therefore, intended that the courts should have greater power under the Acts in the case of such documents than in other cases. The Bills of Sale Acts intended that the court should look into the facts and see what was the real intention of the parties. The judgment in *In re Watson* states clearly the point that was in-

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

tended to be decided. I there said that "the only question of law which we are called upon to decide is this—viz., whether, assuming the findings of the county court judge on the questions of fact to be correct—for we have no power to review those findings—it is a true proposition to say that, where the parties have given the transaction, for the purpose of disguising its real nature, a form which is not that of a bill of sale within the Bills of Sale Acts, the court is precluded from deciding the case according to the real truth and substance of the matter by reason of the form so put forward by way of disguise and for the purpose of preventing the court from getting at the true facts." I then went on to state that the county court judge found in effect that the bankrupt did not desire to sell the furniture, but wanted to borrow money on the security of it; and that, as a matter of fact, Love lent the money and was to have some right by way of security over the furniture, so that the bankrupt never intended to sell the furniture, and Love never intended to buy it. Can anything be more apt as regards the present case? Cotton, L.J., also said:—"The county court judge finds, in effect, that the sale and hiring was a sham and a mere pretence, and that the real transaction was that Love advanced money by way of loan, and was to be secured by this agreement. That being so, the hiring agreement was a mere pretence." The Lord Justice further on cited the judgment of Lindley, L.J., in the *Yorkshire Railway Wagon Co.* v. *Maclure*, that "when documents are mere shams or cloaks to hide the real nature of the transaction, the court will not allow them to prevent it from going into the real transaction." The other members of the court delivered judgment to the same effect. These judgments are not confined to documents which, apart from the Act, could be contradicted. They include documents which, apart from the Act, could not be contradicted. It was held that upon the true construction of the Act the court could go through the documents to arrive at the truth, and if the documents were in reality bills of sale they came within the Act. The construction of the Act is the same if the question arises between the parties to the documents. In that case the question arose between one of the parties and the trustee in bankruptcy of the other party. The trustee in bankruptcy, however, simply claims through the party. But even on the assumption that he has a higher right than the party, the court was there construing the Act; and it said that the court might go through the documents to arrive at the truth. The court must hear the evidence and inquire into the truth, though in doing so it must not exclude the form of the documents as part of the evidence. That was the course pursued in the present case, and the case was left to the jury upon that footing, and the jury having found that the transaction was in reality a loan upon the security of the goods, the judgment for the plaintiff must stand. The case is covered by the decision in *In re Watson*, and the motion must be dismissed.

LOPES, L.J.—I also am of opinion that the case of *In re Watson* governs this case. The effect of the decision in that case is that the court, having regard to the Bills of Sale Acts, must look through the form of the documents, and ascertain the true nature of the transaction between the parties. In that case Lord Esher, M.R., said: "The document itself must be looked at as part of the evidence; but it is only part, and the court must look at the other facts, and ascertain the actual truth of the case. Here it is found as a fact that there was no real transaction of sale; that there was nothing but a loan accompanied by a security given upon goods, the terms of which are contained in the document in question. That being so, the form of the document does not prevent our looking at the real truth of the case, which is that the document is not really a hiring agreement, but in substance contains the terms of a loan and the security given for it upon personal chattels." Every word of that applies to the present case. Independently of the decision in *In re Watson* there is plenty of authority before that case for our decision here.

Mr. Channell admitted that if the plaintiff had been the trustee in bankruptcy or execution creditor, *Watson's case* would be applicable; but he urged that that case was distinguishable from the present on the ground that in the present case there is a deed, and that the question arises between the immediate parties to the deed, and that, therefore, the plaintiff is estopped from setting up the true nature of the transaction, which would contradict the deed. I cannot see the distinction. I cannot see that the doctrine of estoppel applies here any more than it would if the trustee in bankruptcy or the execution creditor were plaintiff. The trustee in bankruptcy and the execution creditor must claim through the party, and the doctrine of estoppel would equally apply to them. But, further, the Bills of Sale Act, 1882, was passed for the protection of borrowers against lenders. If the real nature of the transaction could not be inquired into, and the form governed the case, the Act would be evaded every day with the utmost facility. The lender would shape the transaction in the form of a deed of absolute assignment, whereas, in reality, the transaction would be a loan. That consideration forms a strong ground for our looking at the real nature of the transaction, and not the mere form of the documents only. In my opinion, therefore, the verdict and judgment must stand.

KAY, L.J.—I agree. The two documents are the deed which purported to assign the chattels absolutely, and the hiring agreement. The argument put forward was that, the question having arisen between the two immediate parties to the deed, even if the intention was only to give a security for money, the parties are estopped from showing the true nature of the transaction. These documents are not registered, and they would be avoided under the Bills of Sale Act, 1882, even as between grantor and grantee, if they constitute a bill of sale given as security for money. Now the Bills of Sale Act, 1882, adopts the definition of a bill of sale given in the Bills of Sale Act, 1878. How can it be ascertained whether documents of that kind, which, on their face, are not securities for money, are or are not securities for money, except by evidence. Therefore, it seems to me that, when the inquiry is whether documents of that kind are or are not securities for money, evidence must be given. I cannot see how that offends against the law of evidence. It does not contradict the document, it supplements it by showing the whole transaction, which is not apparent upon the face of the document. I quite agree that when there has been an absolute conveyance of an estate, equity would only admit evidence to show that it was a mortgage, for the purpose of having the deed rectified, and upon a proper application to that effect. That, however, does not help us much in the present case. Here, under the Bills of Sale Acts, the evidence can be admitted. This view is in accordance with the decision in *In re Watson*. It was said, however, that *In re Watson* was not the case of a deed, and that the question did not arise between the parties to the transaction. But if there is an estoppel between the parties to the deed, it seems clear to me that the trustee in bankruptcy is also bound by that estoppel.

He takes without any assignment for value, and it is settled law that a trustee in bankruptcy can only take what was vested in the debtor at the time of the bankruptcy, and that he takes subject to any equities against the debtor. Mr. Channell admitted that that would be so in an ordinary case, but he said that the Bills of Sale Act gave exceptional rights to the trustee, and placed him in a different and better position. The Act, however, did not intend to give the trustee any benefit freeing him from the doctrine of estoppel. If either the grantor or the grantee are estopped, there is nothing in the Act to prevent this estoppel from extending to the trustee in bankruptcy or the execution creditor. It seems to me that this case is covered by the decision in *In re Watson*. It would be impossible to carry out the provisions of the Act unless the court could inquire into the nature of the transaction, whether carried out by deed or in any other way, and unless this could be done the Act would be a dead letter.

Application dismissed.

Solicitor for the plaintiff, *G. R. Harrison.*

Solicitor for the defendants, *G. C. Lovell Fry.*

High Court of Justice.

Chan. Div. } Nov. 4; Dec. 14.
Chitty, J. }

FILLINGHAM v. WOOD. (*a.*)

Metropolis Management Acts—Building—"Adjoining owner"—Tenement—Notice by building owner—Injunction—Separate tenements—Metropolitan Building Act, 1855 (18 & 19 *Vict c.* 122), *ss.* 3, 82, 85, *sub-section* 1.

A tenant in possession of part of a house under an agreement for a greater interest than an interest from year to year, is an "adjoining owner" within section 82 *of the Metropolitan Building Act*, 1855, *and is, therefore, entitled, under section* 85, *sub-section* (1), *to three months' notice from the building owner of any intended alteration to a party structure.*

Cowen *v.* Phillips, 11 *W. R.* 706, 33 *Beav.* 18, *followed.*

Motion.

This was a motion by the plaintiff to restrain the defendants, their workmen and agents, until trial of the action from pulling down or otherwise interfering with a party wall. The question turned upon the meaning of the words "adjoining owner" in the Metropolitan Building Act, 1855, which enacts as follows:—

Section 3.—"Owner shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as tenant from year to year or for any less term."

Section 82.—"In the construction of the following provisions relating to party structures such one of the owners of the premises, separated by or adjoining to any party structure, as is desirous of executing any work in respect to such party structure shall be called the building owner and the owner of the adjoining premises shall be called the adjoining owner."

Section 85.—(1) "No building owner shall, except with the consent of the adjoining owner . . . exercise any right hereby given in respect of any party structure unless he has given at least three months' previous notice to the adjoining owner."

The plaintiff, Fillingham, was a tailor carrying on business and residing at 41, Margaret-street, where he occupied a shop and parlour with workshop adjoining, and also the basement and a back bedroom on the third floor, under an agreement for a term of three years from the 1st of February, 1890, renewable at the expiration of such term for another three years. The plaintiff's landlord, who was lessee of the whole house for a long term of years, occupied the front bedroom of the third floor. The rest of the house was let to another tenant, but the plaintiff's landlord was in receipt of the whole of the rents of the house.

In May, 1890, the defendant Wood, who was lessee and occupier of No. 40, Margaret-street, being about to pull down and rebuild, caused the usual party-wall notice to be posted in a registered letter to the plaintiff's landlord. This notice, which was in the printed form sanctioned by the Metropolitan Board of Works and London County Council and the one generally used, was headed and addressed "to J. Smith" (*i.e.*, the landlord) "of 41, Margaret-street and whomsoever it may concern."

After the expiration of this notice, and without having given the plaintiff any other notice, the defendant proceeded to pull down and build, and there was evidence of his having caused damage thereby to the portion of No. 41 occupied by the plaintiff.

Byrne, Q.C., and *E. Ford*, for the motion, argued that the plaintiff was within the definition of "owner" in section 3.—There might be more than one owner to be served with notice under section 85, sub-section 1 (see section 97, sub-section 2).

They referred to *Wheeler* v. *Gray*, 6 W. R. 676, 4 C. B. N. S. 584.

Romer, Q.C., and *E. S. Ford*, for the defendants.—The landlord is the only "owner" to be served.

They cited *Hunt* v. *Harris*, 13 W. R. 742, 19 C. B. N. S. 23; *Reg.* v. *Lee*, 4 Q. B. D. 75; *Caudwell* v. *Hanson*, 20 W. R. 202, L. R. 7 Q. B. 55; and Woolrych's Metropolis Local Management Acts, 2nd ed., p. 296.

Byrne, Q.C., in reply, referred to *Cowen* v. *Phillips*, 11 W. R. 706, 33 Beav. 18, as directly in point.

E. S. Ford, in reply on fresh case cited, said that *Cowen* v. *Phillips* was distinguishable on the ground that there were separate doors and in fact separate tenements.

CHITTY, J., after stating the facts, continued:—The only question for decision is, whether the plaintiff was entitled to have notice from the defendant before he commenced operations, and that question depends mainly upon the 3rd, 82nd, and 85th sections of the Act of 1855. It appears from section 3 that the term "owner" applies to every person who possesses either of the two qualifications which are mentioned; it applies to every person in possession of the land or tenement, or in receipt either of the whole or any part of the rents or profits of any lands or tenements, but it applies equally to any person who is in occupation of the land or tenement for a greater interest than the excepted interest. Now the plaintiff is in possession and occupation of the rooms I have mentioned for a greater interest than the excepted interest. It is observable that in the definition of "owner" that the words "whole or any part of the rents and profits" are made use of, but that the clause does not go on to speak of the person being in occupation of any part of the land or tenement, and,

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

indeed, it would have been difficult to put in such words with reference to land or tenement. I think, however, that the true mode of interpreting the last portion of that definition is to see whether the tenement is held under a title separately. On reading sections 82 and 85 it is also plain that the building owner must give notice to every person who, according to the definition, is "owner," adding, of course, the epithet "adjoining." It is quite clear that the Act of Parliament contemplates the case of certain persons who would be affected and put to inconvenience by the building owner, who are not persons entitled to receive a notice as adjoining owners. Take the case of a person in occupation of an entire house, but who only holds it for six months. I suppose in the general public interest with regard to building within the metropolitan area, it was considered that he must put up with inconvenience at least to this extent, that he is not entitled to have notice given him by the building owner.

Now I have to find out from these sections whether the plaintiff is entitled to a notice or not. I have said that in respect of his interest he is clearly an "adjoining owner." The only question is whether he ought to be held not to be an adjoining owner because he does not hold the entirety of the house. I think, however, on the true construction of this Act (which I admit is very difficult to construe), he does hold a tenement within the meaning of the interpretation clause. There are many other parts of the Act which may be referred to with a view of ascertaining the true interpretation of this somewhat complicated Act of Parliament, and which may throw some light upon the subject. I have referred to them, but I do not think it necessary to mention them in detail. It is obvious, of course, to any lawyer, that one of the difficulties in interpreting an Act of this kind arises from the fact that Parliament has seized hold of the term "owner" (which is unknown to the common law lawyers of this country) as a convenient term to use, and then applied it by means of a definition, and the difficulty arises from this definition not being so clear as to be free from all ambiguity. There are, however, two decisions on this expression "adjoining owner," by both of which I consider myself bound. One is relied upon by the plaintiff and the other is relied upon by the defendants. The first is the case of *Cowen* v. *Phillips*, and no doubt the observations which the defendants' counsel made upon that case are correct. There the point argued was whether a person having a greater equitable interest than merely as tenant from year to year was within the intention of the Act. Cowen, the plaintiff, was in possession of the shop and parlour on the ground floor and two kitchens in the basement which were part of the house, being, as is stated in the report, part of No. 3, Bruton-street, Bond-street, and he received no notice, and the defendant commenced to knock holes in the party-wall exposing part of the shop. Sir John Romilly held that an equitable interest was sufficient, and that the plaintiff was entitled to notice. Therefore, thus far, I have a case in which a judicial interpretation has been put upon this statute some twenty-seven years ago, applicable, so far as I have stated the facts, to the case which is before me now. But no doubt there does appear in the judgment a statement that the house was divided into two, with two doors, and it is said that that is sufficient to distinguish that case from the one which is now before me. In my opinion that distinction is insufficient. I agree that there was, so far as the report goes, no critical examination of the statute itself, and that the main point which was dealt with was this question of the equitable interest.

Now the other case is *Hunt* v. *Harris*. In that case *Cowen* v. *Phillips* was cited, and I think, without reading the judgment, I may say was approved by the judges. Erle, C.J., Byles, J., and Montague Smith, J., all mentioned it. They do not mention it, I agree, as a decision on any other question than the main question as to the equitable interest of the plaintiff Cowen, but they had the case before them. They spoke of it with approval, and certainly without disapproval. Now *Hunt* v. *Harris* itself was a case which turned mainly upon the 97th section, and the point for determination was whether Harris was liable to be sued for contributions by Hunt, the building owner. Harris had let all the rooms in the house separately to different tenants, some of the rooms being let at least for longer terms than year to year, but Harris was in receipt of the whole of the rents and profits of the tenements, and the judgment went against him upon the ground that he at least was liable to contribution, and that he could, either under the statute or under contract, recover over his fair proportion of the expenses which he would have to pay from his tenants. Without reading the judgment through, which is quite unnecessary, I think the sum of the Chief Justice's judgment is to be found towards the end of the judgment at page 37 (19 C. B. N. S.):—"According to the best interpretation I can put upon the statute, the building owner has a right to call upon the person who holds the entire premises for a long term, and is substantially in possession of all the rents and profits. I do not mean to say that the owner in fee simple may not also be liable. But I can see my way clearly to the conclusion that the owner of a long term who is in receipt of the rents and profits is liable." There are other parts of the judgment which I will not stay now to quote, but the substance of that judgment and of the other judgments is that Harris at least was liable. Then Byles, J., raised a question of this sort, whether the undertenants had any interest in the wall, and there may have been something in the facts of that case which justified the conclusion which he apparently came to, or which, at any rate, he was supposed to have arrived at—namely, that the party-wall had not been demised, so that the undertenant had no interest in it. I cannot assume that Byles, J., intended to decide that where a part, say the upper part, of a house is let to a tenant he has no interest in the party-walls, that the landlord can take down the party-walls and leave the rooms bare and open to the sky; but he did say, "I do not find that he"—that is, Harris—"has demised any portion of the party-wall"; and upon the facts of that case that statement may have been justifiable. Unquestionably, at first sight, there seems to be some slight inconsistency in holding that, under the construction of this statute, the adjoining owner who is bound to contribute to the building owner the expense is not the same person as the adjoining owner entitled to notice before the work is commenced. But I think there is no inconsistency.

The point of law is, that the Court of Common Pleas said that Harris at least is liable, and could have got his contribution over, because he is one of the persons at any rate who, under the definition clause, is owner, and they held, in effect, that it was not necessary for the plaintiff Hunt to sue every owner; but such an interpretation, however, cannot, it seems to me, be put on the 85th section. The 85th section requires that notice should be given to "owner," which includes every person according to the language of the interpretation section. To go back to what I consider the substantial point which the defendants' counsel has attempted to raise by reference to the decision of *Cowen* v. *Phillips*, I put this case. Supposing that there are two owners in fee simple of

a house, one being the owner of the lower part of the house, and the other the owner of the upper part of the house, and the owner of the upper part of the house has the right of access of the staircase through the doorway and along the staircase to get to his upper part. In such a case as that, I should take it to be clear that notice must be given to both of those owners. The Act imposes on the building owner the duty of finding out who is the adjoining owner. I am not dealing with a case of dangerous structure, but I am dealing with a case of an alteration in a party-wall for the convenience and for the benefit of the building owner. The 98th section, which I have already referred to, relieves the building owner from a difficulty which conceivably he might be in of not being able to find out who the adjoining owner is by providing in substitution, in cases where he clearly cannot find him out, that he may put up a notice on a conspicuous part of the building. To revert once more to the facts of this case. The plaintiff is the person who will suffer loss and inconvenience by the operation of the building owner, and I think it would be wrong and a narrow interpretation of the sections of the Act which I have had to deal with, if I were to hold that he is not entitled to notice. I think that substantially the case is concluded by the case of *Cowen* v. *Phillips*, which was before Sir John Romilly twenty-seven years ago. I grant the plaintiff an *interim* injunction.

Solicitors, *Cooper & Bake; Hedges & Brandreth.*

Chan. Div. } Nov. 6; Dec. 13.
Stirling, J. }

In re SLEVIN.
SLEVIN *v.* HEPBURN. (*a.*)

Will—Charitable legacy—Extinction of charity after testator's death and before payment of legacy—Unendowed charity—Lapse—Cy-près.

Where a testator bequeaths a legacy to a charity, which is unendowed and is carried on at the cost of the proprietor, and which is in existence at the death of the testator, but comes to an end before the legacy is paid, the legacy will lapse, and will not be applicable cy-près.

Clark *v.* Taylor, 1 *W. R.* 476, 1 *Drew.* 642, *followed.*

Adjourned summons.

John Slevin, of Morpeth, in the county of Northumberland, a Roman Catholic, made his will on the 14th of February, 1883, and thereby appointed the plaintiff, Michael Slevin, and the defendants, A. Hepburn and R. Fogan, executors and trustees thereof, and bequeathed, *inter alia*, the following legacies:—"I bequeath the following charitable legacies—namely, to the sisterhood or body of persons commonly called the Little Sisters of the Poor of Newcastle-upon-Tyne, £500; to the Catholic Industrial School at Tudhoe, in the county of Durham, £500; to the Chadwick Memorial Industrial Schools, Town Moor, Newcastle-upon-Tyne, £500, to be called the Slevin Bequest; to the Brothers of Saint Vincent de Paul, Jarrow-on-Tyne, £200; to the Brothers of Saint Vincent de Paul, South Shields, £200; to the Brothers of Saint Vincent de Paul, North Shields, £200; to the Catholic Church at Jarrow-on-Tyne, £200; to the Catholic Church at South Shields, £200; to the Orphanage at Saint Dominics, Newcastle-upon-Tyne, £200; to the Secular Clergy Fund of the Diocese of Hexham and Newcastle, £20"; and the testator directed that the said charitable legacies should be paid exclusively out of such parts of his personal estate as might be "lawfully applied to charitable purposes, and preferably to every other payment thereout." And the testator bequeathed the residue of his estate upon trust to pay debts and legacies, and subject thereto upon trust for Michael Slevin, Margaret Slevin, Isabella Jefferson, and his daughter, M. M. Slevin, in manner therein mentioned.

The testator died on the 24th of February, 1883, and his will was duly proved by all three executors therein named.

The orphanage at Saint Dominics, Newcastle-upon-Tyne, had been an orphanage founded and managed, since 1874, by Mrs. E. J. Priestman. This orphanage was alleged to have been closed before the death of the testator, and on the 14th of February, 1890, the beneficiaries under the will took out an originating summons asking for a declaration that the legacy of £200 to this orphanage had lapsed and formed part formed part of the residuary estate.

Evidence was put in on behalf of Mrs. Priestman, who was a defendant, to the effect that she undertook the charge of four or five orphan girls about 1874, and rented a small house for them and a matron, in Newcastle. At that time Mrs. Priestman was residing at Benwell, near Newcastle. In 1878 she bought a house in Newcastle for the purposes of the orphanage, the inmates of which numbered nearly thirty. This house was in a Roman Catholic district known as St. Dominic's, and the orphanage was called St. Dominic's Orphanage. The orphanage was carried on as theretofore by Mrs. Priestman, by her and her agents, at her cost, until the month of May, 1882, when Mrs. Priestman went to reside at Clifton, Bristol, to which place she removed most of the children and placed them in various orphanages in the neighbourhood of Clifton, wishing, as she deposed, to keep her orphanage together, leaving six or seven girls at the house in Newcastle under the charge of a matron. They, or some of them, remained there till about the end of March, 1883, when the house became empty, being at the end of 1883 sold by Mrs. Priestman to a Dominican Sisterhood of Newcastle for an infirmary. Mrs. Priestman did not again reside at Newcastle.

No claim was made by or on behalf of Mrs. Priestman or her orphanage until some date after the 18th of May, 1889, when a claim was put in in reply to an advertisement by the executors. Mrs. Priestman was not represented on the hearing of the summons in court and made no claim personally to the legacy. Evidence was also adduced to show that the testator had inspected the orphanage a considerable time prior to his death, and had announced his intention of bequeathing money for the benefit of the institution. It appeared that Mrs. Priestman had left Clifton, and was residing at various health resorts in England.

G. Welby King, for the summons.—The legacy lapses. There is also a question whether the orphanage ceased to exist before the testator's death, but the evidence shows that it virtually did so cease: *Clark* v. *Taylor*, 1 W. R. 476, 1 Drew. 642. There is nothing in the will to show that the testator appropriated any specific part of his estate to charitable purposes as a whole.

He also referred to *In re Ovey, Broadbent* v. *Barrow*, 33 W. R. 821, 29 Ch. D. 560, and *Fisk* v. *Attorney-General*, 15 W. R. 1200, L. R. 4 Eq. 521.

M. Ingle Joyce, for the Attorney-General.—The institution was carried on for a short time after the testator's death. The intention of the testator ought to be carried out, and a scheme *cy-près* framed: *Hayter* v. *Trego*, 5 Russ. 113. The date of the testator's

(*a.*) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

death, 1840, in the report of *Clark* v. *Taylor*, in 1 Drew. 642, is wrong.

R. F. Norton, for the executors.

Welby King, in reply, referred to *Russell* v. *Kellett*, 3 Sm. & Giff. 264, and *Attorney-General* v. *Fraunces*, W. N., 1866, p. 280.

[NOTE.—Upon examination of the record *Clark* v. *Taylor*, since the hearing of this case, it has been found that the date of the testator's death was the 9th of October, 1846. The year in which such death took place is correctly stated at 1 W. R. 476.]

Cur. adv. vult.

Dec. 13.—STIRLING, J. (after stating the facts and coming to the conclusion that the orphanage, although about to be discontinued, had not ceased to exist at the date of the testator's death, continued :—) —The question which I have to decide is whether the legacy of £200 bequeathed to the orphanage ought now to be applied *cy-près* or whether it falls into the residue.

On behalf of the Attorney-General the case of *Hayter* v. *Trego* was relied upon. There Thomas Hodson, by his will dated in June, 1819, gave a legacy of £500 to a voluntary society called the "Plymouth and Devonshire Asylum for the reception of Female Penitents." The testator died in June, 1821, at which time the asylum was still in existence; but on the 29th of May, 1822, long before the assets could be administered, the society was dissolved, the charitable establishment was completely broken up, and the furniture and other property belonging to it were sold. The question in the case was whether the sum of £500 was to be applied to charitable purposes by the Crown under the sign manual, or was to be administered by the court *cy-près*. The Master of the Rolls says, "The testator here having marked out the particular nature of the charity to which he wished the legacy to be applied, the court will execute his intention *cy-près*, and the master must settle a scheme having regard to the testator's will." It seems there to have been assumed, rather than judicially determined, that the legacy was to be applied *cy-près*.

The residuary legatees, on the other hand, contend that the case was governed by the doctrine laid down in *Clark* v. *Taylor*. There the will of James Baylis, the testator, contained the following gift:—"And I give to the treasurer for the time being of the Female Orphan School in Greenwich aforesaid, patronized by Mrs. Enderly, the sum of £50 for the benefit of that charity." It appeared by the evidence that Mrs. Enderly, named in the will, was a lady of fortune who had been in the habit for many years, previous to and after the year 1839, of spending her own money in the education and maintenance of several female children, sometimes in one house, sometimes in another, in Greenwich, which she rented at her own expense, sometimes at her own house. Mrs. Enderly for a portion of the period had a board put in front of the house, with the words "Orphan Girls' School," or "Female Orphan School," or some such words painted on it. There never was any trust or deed of endowment, or any treasurer, the school being simply a school voluntarily kept up by Mrs. Enderly at her own expense. Mrs. Enderly discontinued the school in November, 1846, the children then being educated being sent away, and no such school afterwards continued.

The testator's will was dated March, 1839; he died in October, 1840. (See, however, note above at end of argument.) The question was whether the bequest to this school failed and fell into the residue, or whether it was dedicated to charity and was to be disposed of *cy-près*. [His lordship then read the judgment of Kindersley, V.C., in that case, and continued :—] *Clark* v. *Taylor* was followed by Lord Hatherley, when Vice-Chancellor, in *Fisk* v. *Attorney-General*, where, however, the legacy was given to an institution which was dissolved in the lifetime of the testator. The Vice-Chancellor says :—"Then there is the other point, which was argued by Mr. Wickens, as to the gift to the charity which no longer exists. I am far from saying that that argument may not some day or other require further consideration, but there are two decisions, one by Kindersley V.C., of *Clark* v. *Taylor*, the other by Stuart, V.C., which expressly decide that when a gift is made by will to a charity which has expired, it is as much a lapse as a gift to an individual who has expired." In *In re Ovey*, *Broadbent* v. *Barrow*, Pearson, J., on the authority of *Clark* v. *Taylor* and *Fisk* v. *Attorney-General*, held that a legacy (being one of several described as "money legacies for charitable purposes") in favour of a particular institution lapsed because the institution had ceased to exist at the time when the testator made his will, and consequently at the time of his death.

The doctrine of these cases appear to have been recognized by the Court of Appeal in *Biscoe* v. *Jackson*, 35 W. R. 554, 35 Ch. D. 460. The cases of *Clark* v. *Taylor*, *Fisk* v. *Attorney-General*, and *In re Ovey*, *Broadbent* v. *Barrow*, were cited in argument, and in giving judgment Cotton, L.J., says :—"It is clear that where there is a legacy given to a particular legatee, and that legatee fails before the death of the testator, there being only the gift to the particular legatee, even though that legatee is an institution, the legacy fails."

It thus appears that there is a very considerable weight of authority, too great, in my judgment, to be disregarded by a court of first instance, for the proposition that a legacy given to a particular charitable institution fails if the institution ceases to exist. It is said, however, that there is a difference where (as here) the institution is in existence at the testator's death; that in this respect the cases of *Hayter* v. *Trego* and *Clark* v. *Taylor* are at variance, and that the former decision ought to be preferred.

It seems clear that Lord Hatherley, Pearson, J., and Cotton, L.J., treated the cases, with which they respectively dealt, as similar to the ordinary case of lapse by the death of an individual legatee in the lifetime of the testator. If the legatee survives the testator by one hour, there is no lapse, and it would seem strange if, in this particular case, the law (which, in many instances, upholds gifts to charity which, if made in favour of individuals, would have failed: see *Moggridge* v. *Thackwell*, 7 Ves. p. 69; *Mills* v. *Farmer*, 1 Mer. 55, and cases there cited) were less favourable to a charitable institution. Further, it does not seem right that the destination of the legacy should be affected by the accidental circumstance that a longer or a shorter time is required for the administration of the testator's estate. If, then, the charitable institution intended to be benefited, be expressly organized and endowed with funds devoted to charitable purposes, and be dissolved subsequently to the testator's death, and before the payment of the legacy, it would seem to me that the legacy ought to be devoted to the same purposes as any surplus funds of the institution remaining unapplied at the time of the dissolution, for those funds would presumably have been augmented by the payment of the legacy. That such funds are applicable *cy-près* is shown by many cases, of which *Spiller* v. *Maude*, 32 Ch. D. 158n, is one. I apprehend the decision in *Hayter* v. *Trego* rests on some such view of the law, and I should be prepared to follow it under similar circumstances.

In the present case, however, the institution was not organized or endowed; everything was done at the expense of Mrs. Priestman. If the legacy had been paid over to her at the death of the testator, the result would have been that she would have had so much the less to expend out of her own moneys. It is clear, however, that the testator did intend to benefit. not herself personally, but the institution, and she in fact does not now claim the legacy.

Under circumstances almost identical with these, Kindersley, V.C., held in *Clark* v. *Taylor* that the legacy failed. The *ratio decidendi* appears to be given in the last paragraph of the judgment in that case. It is doubtless unsatisfactory that the case should have been decided without the attention of the Vice-Chancellor being called to *Hayter* v. *Trego*, and it may be thought that the distinction between the two cases savours of refinement. Still, I am unable to say that they are absolutely at variance; further, *Clark* v. *Taylor* was decided in 1853, and, so far from having been overruled, has formed the basis of subsequent decisions. I think that I ought not to depart from it in a case which so closely resembles it.

It was suggested, however, that the words with which the gift commences, "I bequeath the following charitable legacies," amounted to a dedication to charitable purposes of the amounts of the legacies so bequeathed, and that effect ought to be given to the general charitable intention thus indicated. I think, upon consideration of the whole will, and particularly of the words which introduce the immediately preceding gifts, "I bequeath the pecuniary legacies following," that the words relied on are made use of merely as a convenient mode of grouping together the various particular institutions which the testator meant to benefit, and that it would strain them too much to hold that a general charitable intention is thence to be inferred.

In my opinion, therefore, the legacy fails, but the costs of all parties, including the Attorney-General, must be paid out of the fund.

Solicitors, *Grundy, Izod, & Grundy*, for *W. Webb*, Morpeth; *Pattison, Wigg, & Co.*, for *H. E. Richardson*, Newcastle-upon-Tyne; *Hare & Co.*, for *The Solicitor to the Treasury*.

Chan. Div.
Kekewich, J.

Jan. 22.

In re CROOM.

ENGLAND *v.* PROVINCIAL ASSETS CO. (LIMITED). (*a.*)

Bankruptcy — Scheme of arrangement — Approval of scheme by court—After-acquired property of debtor—Order of discharge—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18, 28, 44.

In a liquidation by scheme of arrangement or composition under the Bankruptcy Act, 1883, *it is matter of contract between the creditors and the debtor what property shall vest in the trustee for the creditors, and at what date the debtor shall be discharged.*

Accordingly, in the absence of any stipulation in the scheme approved by the court to the contrary, the scheme only operates to convey to the trustee property to which the debtor is entitled at the date of the approval of the scheme by the court, and the approval by the court operates as a discharge of the debtor.

Adjourned summons.

On the 4th of May, 1888, H. L. Croom, a trader, filed a petition in bankruptcy in the Poole County Court, and on the same day a receiving order was made against him. Subsequently his creditors passed a resolution for a scheme of arrangement, and on the 16th of July, 1888, the scheme was duly approved by the court. Under the scheme the whole of Croom's estate was vested in Ernest Foreman as trustee, for the purpose of paying the debts in full, with interest, by certain instalments; in case of failure to pay any instalment, the trustee was, within fourteen days, to proceed to realize the estate for the purpose of paying the creditors; also, the trustee was to be employed to carry on Croom's business under the supervision of a committee of inspection. Croom having made default in payment of the instalments, the trustee took steps to realize the estate, and on the 22nd of February, 1889, he, with Croom's consent, entered into an agreement in writing with the Provincial Assets Co. (Limited) for the sale to them of all Foreman's estate and interest as trustee under the bankruptcy proceedings.

On the 10th of September, 1889, Charles Croom, the uncle of H. L. Croom, died, having by his will, dated the 27th of January, 1888, devised and bequeathed his residuary real and personal estate to trustees upon trust for sale, and to divide the proceeds equally between H. L. Croom and seven other persons. The share of H. L. Croom, after deducting a sum of £71 claimed to be retained by one of the trustees in discharge of a debt due to him from H. L. Croom, amounted to £306.

By an indenture dated the 31st of December, 1889, and made between Foreman, the bankruptcy trustee, of the one part, and the Provincial Assets Co. of the other part, after reciting the agreement of the 22nd of February, 1889, Foreman, in consideration of the purchase-money therein mentioned, granted and assigned to the company "all that the estate and interest of him, the said E. Foreman, of, in, and to the real and personal property vested in or belonging to the said E. Foreman as trustee under the said bankruptcy proceedings, to hold the same unto and to the use of the company for all the estate and interest of the said E. Foreman therein."

On the same day one Atkinson obtained judgment against H. L. Croom for £116 and costs in a Queen's Bench action commenced on the 17th of December, 1889.

By an agreement under seal, dated the 27th of January, 1890, and made between H. L. Croom of the first part, the Provincial Assets Co. of the second part, and Edward Bicker and Henry Charles Bicker of the third part, after reciting the bankruptcy proceedings, and that H. L. Croom would, except for the scheme of arrangement, be entitled under the will of his uncle to an interest in his estate, "which said interest is, by virtue of the said scheme of arrangement, now vested in the company, as the said H. L. Croom hereby admits," it was agreed that such interest should be received by the company, who, after realizing the same, should pay the net proceeds to the Messrs. Bicker for distribution among such of the creditors of the said H. L. Croom, to whom he had incurred debts since the scheme, as the company should direct.

The trustees of Charles Croom's will having received notice of the respective claims of the judgment creditor and of the company, under their assignment, took out a summons to have it determined what person or persons were entitled to the £306 in their hands, and in what proportions. No order for H. L. Croom's discharge had yet been pronounced in the bankruptcy proceedings.

S. Dickinson, for the trustees of the will.

Marten, Q.C., and *R. W. Harper*, for the com-

(*a.*) Reported by JAMES H. BAKEWELL, Esq., Barrister-at-Law.

pany.—H. L. Croom has not obtained an order of discharge, and the bankruptcy proceedings are still continuing; the legacy, therefore, vested in the trustee for the creditors, and passed to the company by the assignment of the 31st of December, 1889: Bankruptcy Act, 1883, s. 18. Secondly, the debtor and his judgment creditor, who claims under him, are bound by the subsequent agreement of the 27th of January, 1890.

George Elliott, for the judgment creditor.—The approval by the court on the 16th of July, 1888, of the scheme of arrangement is equivalent to an order of discharge; the legacy was acquired after that date, and did not vest in the trustee, and did not pass by the conveyance by him to the company of "all his estate and interest as trustee": *Ex parte Clark, In re Clark*, 32 W. R. 775, 13 Q. B. D. 426, at p. 434. The agreement of the 27th of January, 1890, was executed under the erroneous impression that the legacy had become vested in the trustee, and should not be enforced.

Marten, Q.C., in reply.—The *dictum* of Baggallay, L.J., which is relied on, was not necessary to the decision in *Ex parte Clark*, and was not concurred in by the other judges.

KEKEWICH, J.—There is an essential distinction between a liquidation by arrangement, composition, or scheme, and a bankruptcy. In bankruptcy there is what is called a *cessio bonorum* by force of the statute. The contract between the bankrupt and his creditors has the seal of the statute; it derives its force from the statute; and one expects to find, and does find, that more operative power is given to that contract than would be given to it if it were a contract between parties under ordinary circumstances. The debtor is bound to hand over—that is to say, the statute takes out of him and hands over—not only the property vested in him at the moment, but that to which he becomes entitled so long as the bankruptcy continues; and that is all appropriated for payment of his creditors; and there are many other provisions in the statute which obtain their force simply from the statute, and which one would not expect to find in an ordinary contract. On the other hand, a liquidation by a scheme of arrangement is sanctioned by the statute, and, according to the statute and the rules made thereunder, is only a contract between the parties; and one approaches a contract between parties from a different point of view from that from which one regards a mere statutory provision. One would not expect to find, in the case of parties contracting, that any definite act on a given day should operate to vest in any of the parties, or a trustee for them, property not then in existence, but to be acquired at some future date. The parties might make any contract they pleased that it should be so, but it is obvious that without the statute no words used in any agreement, whether under seal or not, will vest in any person, as trustee, property not yet belonging to one of the parties, but which may belong to him at a future time. That must be borne in mind. Then, turning to the statute, section 18 provides for a composition or scheme of arrangement; and it provides what may be done in that way, how it is to be arrived at by the creditors with the debtor, and, having been arrived at between them as a matter of contract, how it is to be approved by the court. It does not specify in so many words what property is to belong to the trustee for the creditors, for the very reason that it may be that there is no property at all which is to belong to him; and still less could the Legislature foresee what particular property the creditors would insist on taking from the debtor, or, as not infrequently happens, those of his friends who are assisting him in his difficulties. That is a matter of contract between the parties; and provided that it is within the language of the statute, or that which the statute says may be done, the scheme is approved and takes effect under the statute. Again, the statute does not say when the debtor shall be discharged from his debts; there is nothing which I can find equivalent to a provision for discharge—that is, not in express terms. That seems to have been left to the discretion of the creditors. They are to say, not only what property shall pass to the trustee to be administered for their benefit, but when they will be so satisfied with the provision made for payment of their debts that they will turn him out as a free man, again to trade and contract other debts, discharged from his liability to them.

Some parts of section 18 have reference to other parts of the Act, but there is nothing in sub-sections 12 or 13 referring to the order of discharge; and I think that, reading section 44 into those sub-sections, what is meant by the commencement of the composition or scheme of arrangement must be the time when the composition or scheme is sanctioned by the creditors. It is at that time it commences, and I cannot adopt the view that it means the time of the order approving the composition or scheme, because the order is, by sub-section 12 of section 18, expressly made equivalent to an order of adjudication. Then, what is to be done when the scheme has been sanctioned by the creditors? It is then to be submitted to the court, and the court is to see whether the terms are reasonable. The court is directed to withhold its sanction if any facts are proved which show that the debtor, being a bankrupt, would not be entitled to his order of discharge; and to ascertain the way in which that is to be done reference must be made to section 28, which states what will justify the court in refusing the order of discharge. But beyond that there is no provision that the approval of the scheme shall be equivalent to the order of discharge. At the same time it is almost implied in the provision that the court is, on the occasion when it is asked for its approval of the scheme, to determine whether the debtor has or has not been guilty of any of those acts which, if he were a bankrupt, would, if proved, disentitle him to his order of discharge. It is necessary to refer to section 44, sub-section 2 (i.), which says that the property of the bankrupt divisible among his creditors shall consist of "all such property as may belong to, or be vested in, the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge." Now, unless I find something directly equivalent to "before his discharge," I think that I am thrown back on the contract between the parties, construed, of course, with reference to the statute and the bankruptcy law in general. The contract is that the whole of the debtor's estate shall be assigned to Mr. Foreman as trustee, and that the claims shall be paid in full by certain instalments, and that, in the event of failure to pay the instalments, the trustee shall within fourteen days proceed to realize; and, of course, it is to be borne in mind that there is a large power behind in the event of the debtor not doing his duty—a power of revoking the scheme so that bankruptcy may supervene. That points to a contract between the parties; the debtor having made a statement of what he had which was available for payment of his debts, the creditors met and considered what the debts were, and a composition was thereupon agreed to—a composition which in the present case is, no doubt, to result eventually in the payment of 20s. in the pound; but still it is none the less a

composition because they were not to be paid a sum down in full of their claims, but time was to be given, which is an important part of a compromise. The creditors were to be paid in that way because, on a review of the whole matter, they saw and were satisfied that the debtor's property was enough to pay them in that way.

That seems to me to exclude the consideration of property coming to the debtor at a future time. The estimate was made of what he had then, and that might include, and probably would include, a reversionary interest, whether vested or contingent, but could not, in my opinion, include a mere expectancy. The estimate was framed on the estate then available for payment of debts. All that seems to show that when this was sanctioned and became binding, the court having by force of the statute considered whether the debtor would be entitled to his order of discharge or not, he was discharged and was a free man. That seems to be the necessary result of the consideration of the Act, though I do not find any express provision in the Act that any particular event shall operate as an order of discharge. There is, moreover, distinct authority upon the point in *Ex parte Clark*. I do not forget that what was there said by Baggallay, L.J., was not necessary to the decision; but neither of the other two Lords Justices dissented from his view; on the contrary they appear to have supported it. I think that, unless there is a stipulation between the creditors and the debtor, approved by the court, that after-acquired property shall be brought in, such property is not brought in. I hold, therefore, that the proper construction is that the scheme only operates to convey to the trustee what the debtor was entitled to at the date of the approval of the scheme by the court, when it became completely operative. That being so, this legacy, which was not known to exist, and did not exist until the death of this testator in the following September, did not vest in the trustee, and did not pass under the deed of December 31, 1889, to the Provincial Assets Co.; and accordingly their claim, so far as it rests on the statute, fails. With respect, however, to the agreement of January 27, 1890, the debtor is bound by the admission there made under seal, that this legacy was at that date vested in the company, and the judgment creditor who claims under the debtor is also bound. I do not see how I can get over that admission, but I will give the judgment creditor an opportunity of taking such proceedings as he may be advised to set the agreement right. The order will be for payment of the fund in the hands of the trustees of the will (after deducting their costs) to the company at the expiration of fourteen days after service by the trustees of the order upon H. L. Croom.

Solicitors, *Winter & Co.*, for *Mooring, Aldridge, & Haydon*, Bournemouth; *Ramsden, Radcliffe, & Co.*, for *Ramsden, Sykes, & Ramsden*, Huddersfield; *Peacock & Goddard*, for *J. H. R. Smythe*, Bournemouth.

Q. B. Div. (Day and Lawrance, JJ.) } Oct. 27.

CONYBEARE *v.* LONDON SCHOOL BOARD. (*a.*)

School board—Member of—Imprisonment for "crime"—Conviction by court of summary jurisdiction—Elementary Education Act, 1870 (33 & 34 *Vict.* c. 75), *Schedule II., Part I., r.* 14—*Criminal Law and Procedure (Ireland) Act*, 1887 (50 & 51 *Vict.* c. 20).

The plaintiff, who was a member of a school board, was punished by imprisonment under the Criminal Law and Procedure (Ireland) Act, 1887, *for "taking part in a criminal conspiracy to interfere with the administration of the law."*

Held, that the offence for which he had been punished was a "crime" within the meaning of rule 14 *of Schedule II., Part I., of the Elementary Education Act*, 1870, *and that, in consequence, he ceased to be a member of the school board, and his office had become vacant.*

Special case stated by consent of the parties.

The plaintiff, who was a member of the London School Board, was convicted and imprisoned for three months by a court of summary jurisdiction under the Criminal Law and Procedure (Ireland) Act, 1887, on a charge of taking part in a criminal conspiracy to interfere with the administration of the law. The conviction and sentence were confirmed on appeal.

The action was brought against the defendants for assault and for refusing the plaintiff's vote as a member of the board; and also for a *mandamus* to record the plaintiff's vote as a member at certain proceedings of the board from which he had been excluded on the ground of his imprisonment.

Asquith, Q.C., and *Allen*, for the plaintiff.—The Elementary Education Act, 1870, is only applicable to England. A "crime" meansan indictable offence, and not an offence for which the plaintiff could be punished on summary conviction: *Attorney-General* v. *Radloff*, 10 Exch. 84, at p. 96.

Jeune, Q.C., and *A. J. Ram*, for the defendants.—The object of the rule is to create a high standard with respect to members of a school board. The offence committed is one which is indictable at common law both in England and Ireland. The fact, therefore, that the conviction took place in Ireland makes no difference: *In re Woodhall*, 36 W. R. 655, 20 Q. B. D. 832.

Asquith, Q.C., replied.

DAY, J.—I am of opinion that the plaintiff has been imprisoned for a crime, and that his office on the school board is therefore vacant. Conspiracy is a crime in Ireland as in England. It is an offence against the Crown for which an indictment lies at common law. The circumstance that the Crown did not proceed against the plaintiff for conspiracy by indictment, but preferred the charge upon which he was convicted before a court of summary jurisdiction in Ireland, cannot alter the nature of the charge. The defendants, therefore, are entitled to judgment.

LAWRANCE, J., concurred.

Judgment for the defendants.

Solicitors for the plaintiff, *Hores & Pattison.*

Solicitors for the defendants, *Gedge, Kirby, & Millett.*

(*a.*) Reported by G. K. PALEY, Esq., Barrister-at-Law.

Court of Appeal.

From Chan. Div. Jan. 28.

MILLS v. DUNHAM. (a.)

Restraint of trade—Covenant—Construction—Validity.

Agreements in restraint of trade are to be construed according to the principles of construction applicable to all other agreements, and are not to be approached with any primâ facie *presumption against their validity.*

Leather Cloth Co. *v.* Lorsont, 18 *W. R.* 572, *L. R.* 9 *Eq.* 345, *discussed.*

The test in each case of the validity or invalidity of an agreement in restraint of trade is whether, on the true construction of the agreement, the restraint is not or is, having regard to the nature of the business and the character of the employment, greater than is reasonably required for the protection of the employer.

Appeal from Chitty, J.

By an agreement dated the 14th of March, 1887, between G. S. Mills and A. Mitchell, manufacturers, trading under the style of "The Food Antiseptic Co.," of the one part, and J. Dunham of the other part, it was witnessed that Mills & Mitchell thereby engaged Dunham as a traveller and assistant, as from March 14, 1887, at a salary (therein specified) to be paid weekly as thereinafter mentioned, and 6s. per week, to cover all expenses while travelling in London and suburbs, and 10s. per day while travelling in the country; and it was thereby mutually agreed as follows:—"(1) That Dunham agrees to become the traveller and assistant of the said Mills & Mitchell as from March 14, 1887, at the aforesaid salary; (2) That Dunham shall devote his whole time, &c., . . . to promote and further the said business of Mills & Mitchell; (3) That it shall be amongst other things the duty of Dunham to travel the country and districts required by Mills & Mitchell, and to call upon and solicit orders for all articles and commodities in the way of the said Mills & Mitchell's trade in the business of antiseptic manufacturers, and to receive moneys for or on account of the said Mills & Mitchell, &c. . . . ; (4) That Dunham shall make a daily report to Mills & Mitchell of all calls made by or upon him, and shall also keep proper accounts, and books, &c., . . . ; (5) That one week's notice on either side, and given at any time, or a breach by Dunham of the stipulations of this agreement, shall terminate this agreement, and in the event of the termination of this agreement by such one week's notice given on either side, or breach of the stipulations, or otherwise, it is agreed that Dunham shall not, for or on account of any employer, or on his own account, at any time, either by himself or in partnership with any other person or persons or firm, call upon, or directly or indirectly solicit orders from, or in any way deal or transact business with, any person or firm who, during the continuance of this agreement, shall be customers of the said Mills & Mitchell, or any future successors of the Food Antiseptic Co., or any of the successors in business of such customers."

Dunham entered into the service of Messrs. Mills & Mitchell under this agreement, and continued therein until September, 1890, when the latter terminated the agreement by giving Dunham one week's notice. After leaving their service, Dunham entered into the employment, as traveller, of a rival company called "The Freeze-all Food Preservative Co.," and solicited on their behalf orders from persons who were customers of Messrs. Mills & Mitchell during the continuance of Dunham's agreement with them.

Messrs. Mills & Mitchell brought an action to restrain Dunham from committing a breach of the covenant contained in the agreement.

Chitty, J., held that the covenant was intended only to restrain Dunham from entering into a business similar to that carried on by the plaintiff firm, that the covenant was not void as being too extensive, and granted an *interim* injunction to restrain Dunham "from calling upon, or directly or indirectly soliciting orders from, or in any way dealing or transacting business with, any person or firm who, during the continuance of the above agreement, were customers of the plaintiff firm, in breach of clause (5) of such agreement, and from so acting for or on account of any employer, or on his own account, and either in partnership with any person or firm."

The defendant appealed.

Levett, Q.C., for the appellant.—In clauses (2) and (3) the word "business" is expressly specified as the business carried on by the plaintiff firm, but in clause (5) there is no such limitation, and the variation of language is obviously intentional, and expressly prohibits Dunham having any business dealings whatever with any present or future customers of the plaintiff firm. The covenant is therefore unreasonable, because it goes beyond what is reasonably required for the protection of the plaintiff firm in their business; it is unlimited either in time or space, and would prevent Dunham carrying on a similar business, even in Australia. The covenant is therefore void: *Davies* v. *Davies*, 36 W. R. 86, 36 Ch. D. 359; *Baines* v. *Geary*, 35 Ch. D. 154, 35 W. R. Dig. 64; *Baker* v. *Hedgecock*, 36 W. R. 840, 39 Ch. D. 520; *Pickering* v. *Ilfracombe Railway Co.*, 16 W. R. 458, L. R. 3 C. P. 235, at p. 250; *Mallan* v. *May*, 11 M. & W. 653.

Byrne, Q.C., and *Upjohn*, for the respondents.—The question is, really, what is the true construction of clause (5)? To determine that, the whole agreement must be looked at, and in that view the word "business" as used in clause (5) ought to be read as meaning the business specified in the previous clauses—*i.e.*, the business of the plaintiff firm; this is also apparent from the words in clause (5), "customers of the said Mills & Mitchell"; the additional words as to the "successors" of the said firm, and the "successors in business" of such customers, are intended to apply to the case of the plaintiff firm taking in a new partner, or any of their customer firms doing likewise. [They cited *Rannie* v. *Irvine*, 7 Man. & Gr. 969; *Nicholls* v. *Stretton*, 10 Q. B. 346; *Price* v. *Green*, 16 M. & W. 346; *Hayne* v. *Burchell*, 35 SOLICITORS' JOURNAL, 88; *Horner* v. *Graves*, 7 Bing. 735; *Roussillon* v. *Roussillon*, 28 W. R. 623, 14 Ch. D. 351.] Agreements of this nature are to be construed according to the canons of construction applicable to all other agreements, and are not to be approached with a leaning against their validity: *Mumford* v. *Gething*, 8 W. R. 187, 29 L. J. C. P. 105.

Levett, Q.C., in reply.—Covenants in restraint of trade are *primâ facie* bad: *Leather Cloth Co.* v. *Lorsont*, 18 W. R. 572, L. R. 9 Eq. 345, *per* James, V.C., at p. 354. The *onus*, therefore, lies on the plaintiffs to prove that this covenant is valid.

LINDLEY, L.J.—The question we have to consider in this case is whether the covenant has been properly construed by the judge in the court below, for, if it has, then his judgment is right, but, if not, then his

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

judgment is wrong. [The Lord Justice then read the agreement above set out, and, observing that clause (5) was the clause which the court had to construe, proceeded:—] Now that clause is certainly expressed in very wide terms.

It was urged on behalf of the appellant that the clause means literally what it says, and that it, therefore, would preclude Dunham from having any communication with any of the customers of his former employers upon any business matter whatever—for instance, that it would preclude Dunham, even if he became the traveller of a watchmaker or an umbrella-maker, calling upon any customer of the plaintiff firm. On the other side, it was argued that in order to ascertain the true construction of clause (5) the whole agreement must be looked at; that, looking at the whole agreement, it was impossible to put such a wide and extravagant construction on clause (5), and that that clause, when properly construed, applied only to such business dealings as related to the business of the plaintiff firm, or which could be treated as such. It was argued that the real object of the clause was to prevent Dunham drawing away his former employers' customers, and that to adopt the wider construction contended for by the opposite side would be doing violence to the spirit and object, if not to the language, of the covenant.

Now what is the principle of construction to be applied to cases of this kind? The first thing is to ascertain the object and meaning of the language used, having regard to the whole subject-matter. Mr. Levett cited a passage in the judgment of James, V.C., in *Leather Cloth Co.* v. *Lorsont*, in which the Vice-Chancellor said:—"All the cases seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy unless they are natural and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract"; and contended that it laid down as a principle of construction that a covenant in restraint of trade is *primâ facie* bad, and that in every case it lay on the employer to justify it. In my opinion, such a principle of construction would be utterly unsound. [The Lord Justice then read the passage in the judgment of James, V.C., in *Leather Cloth Co.* v. *Lorsont*, beginning with the words "The principle is this," and ending, "having regard to the subject-matter of the contract," and continued:—] I do not think that James, V.C., when the whole passage is looked at, meant to say that the court ought to approach the construction of covenants of this kind with a leaning against their validity. The test in every case is whether the covenant was reasonably necessary for the protection of the employer in his business. Looking at this covenant in that view, I think that the construction put on it by Chitty, J., is the fair construction.

The object and intention of both parties to the agreement was not to prevent Dunham from engaging in any business whatever with the customers of the plaintiff firm, but to prevent him from entering into any business which would be to the detriment of his former employers. It is unnecessary, therefore, to decide the further point as to whether this covenant is severable or not.

As to the limit of time in covenants of this kind, I will merely refer to the case of *Davies* v. *Davies*.

This is not a case of an employer stretching the words of the covenant so as to make them cover the acts of a former servant, but it is a case in which the servant himself seeks to put a strained and wide interpretation on the words of the covenant in order to make the covenant void. Although the construction of the covenant does not depend on the conduct of the parties, yet it is satisfactory, in the circumstances of the case, to think that Dunham is held to his contract. The appeal must be dimissed.

LOPES, L.J.—I entirely agree. What is the principle applicable to cases of this kind? The true question in each case of this kind is whether the restraint, having regard to the nature of the business and the character of the employment, is greater than is reasonably required for the protection of the employer.

The difficulty in the present case arises on clause (5). Mr. Levett says that that clause is so wide and general in its terms as, on its true construction, to prevent Dunham having dealings of any sort or kind in respect of any business whatever with the customers of the plaintiff firm; so that Dunham could not, for instance, buy his meat from any person who was a customer of the plaintiff firm, and, further, that he could not be employed, in any trade you may like to name, by any person who was a customer of the plaintiff firm. In my opinion such a construction of the clause is not a reasonable construction. I think that the prohibitory words in clause (5) must be confined to the business then carried on by the plaintiff firm. I think that agreements in restraint of trade ought to be construed in the same way as all other agreements, and ought not to be approached with any preconceived presumption either in favour of, or against, their validity. The duty of the court is to ascertain the true meaning of the parties from the whole agreement. Looking at clause (5) alone, no doubt it would be difficult to resist Mr. Levett's contention as to its meaning; but the whole agreement must be looked at. [The Lord Justice read clauses (2) and (3) of the agreement, and observed that "the business" therein referred to was the business carried on by Mills & Mitchell as antiseptic manufacturers, and continued:—] In my opinion the business contemplated in clause (5) was, not any business of any kind or sort, but the business above described as being carried on by the plaintiff firm. In my opinion, therefore, there is nothing in that stipulation which violates the principle which I have enunciated at the commencement of my judgment.

KAY, L.J.—I do not dissent from the conclusion at which the other members of the court have arrived—confirming as they do the view taken by Chitty, J. Nor is there any difference among any of us as to the principles of law applicable to cases of this kind. I adopt the remarks of Erle, C.J., in *Mumford* v. *Gething*, and I "entirely disagree with the notion that these agreements are to be discouraged or held void, as being in restraint of trade, in order to protect the interests of those who, like the defendant, agree to such partial restrictions." Such agreements must be construed without any predisposition in favour of, or against, them.

The difficulty which I have felt, and which has not even yet been removed, is as to what is the real meaning of the particular words used in clause (5). I am inclined to think that Mr. Levett's view is, of the two which have been taken, the sounder. Clause (2) describes the business as "the said business of Mills & Mitchell"; and in clause (3) it is further described as "the trade or business of antiseptic manufacturers," which must mean manufacturers of antiseptic compounds. But in clause (5), as Mr. Levett forcibly observed, the phrase in changed, and there is no reference whatever to the "said business" or "the business of antiseptic manufacturers." [The Lord Justice read clause (5), and continued:—] Mr. Levett contends that what the employers said in that clause, and what they also meant, was that Dunham was to have no business relations whatever with their customers, and that their object was to avoid any danger whatever to their trade. I agree with Mr. Levett's

argument, looking at clause (5) alone, that that is the grammatical meaning of the words used; I can see no difference between the words "shall not . . . in any way deal or transact business," and "shall not deal or transact any business whatever." I can find nothing in clause (5) itself to restrict the word "business" as used there, to "rival or competing business." I do not think that the use of the word "customers" in clause (5) can so restrict the meaning of the word "business," because the word customers there, is only a mode of describing the persons with whom Dunham is not to carry on business. I agree, however, with the Lords Justices in thinking that the whole agreement must be looked at; and when clause (5) is looked at in connection with the other parts of the agreement, it seems to me—and this is the only reason why I bring myself to agree with the decision of the other Lords Justices—that there is an ambiguity as to the meaning of the word "business" in clause (5).

When once an ambiguity is found, then two rules of construction become applicable. The first is, when a clause in favour of the employer is introduced into an agreement and it is capable of bearing either a wide or a narrow construction, the benefit of the doubt ought to be given to the person employed. But it is not giving the benefit to the employed within the meaning of that rule to adopt the wider construction in favour of the employer so as to destroy the contract.

The second rule of construction applicable is that illustrated in *Gray* v. *Pearson*, 5 W. R. 454, 6 H. L. Cas. 61, and referred to in *Abbott* v. *Middleton*, 7 *ibid.*, at p. 83, 7 W. R. H. L. Dig. 6—viz., that where an instrument is capable of two constructions, one of which would render it valid, and the other of which would destroy it, then the former construction is to be preferred.

For these reasons I agree with the other members of the court.

Solicitor for the appellant, *Geo. Reader*.

Solicitors for the respondents, *Morgan, Son, & Upjohn*.

From Q. B. Div. Feb. 7.

OVERSEERS OF PUTNEY *v.* LONDON AND SOUTH-WESTERN RAILWAY CO. (*a.*)

Poor rate—Deficiency in assessments—Lands taken in consideration of owners withdrawing opposition in Parliament—Lands not used for the purposes of the works—Lands Clauses Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 133.

A railway company purchased certain houses outside the limits of deviation in pursuance of agreements entered into with the owners in consideration of their withdrawing their opposition to the passing of the special Act. These houses were not required or used for the purposes of the works. Some of the houses were unoccupied at the time of the passing of the special Act. A deficiency having, in consequence, arisen in the assessments of the houses to the poor rate,

Held (*affirming the judgment of the* Queen's Bench Division, ante, *p.* 144, [1891] 1 *Q. B.* 182), *that the company could not be heard to say, as against the parish, that the houses had not been "taken or used for the purposes of the works" within the meaning of section* 133 *of the Lands Clauses Act*, 1845, *and that the company were liable to make good the deficiency.*

Held, also, that, in estimating the amount of the deficiency, the assessments of the houses, both occupied and unoccupied, at the time of the passing of the special Act, must be compared with the assessments of the houses made subsequently from time to time until the completion of the works.

Appeal from the judgment of the Queen's Bench Division (*ante*, p. 144, 1891, 1 Q. B. 182) upon a special case stated to determine whether the defendants were liable to make good the deficiency in the assessments to the poor rate of certain houses in the parish of Putney, under section 133 of the Lands Clauses Act, 1845.

The Kingston and London Railway Act, 1881, authorized the construction of a line in, among other places, the parish of Putney. By an Act of 1886 the undertaking and the liabilities of the Kingston and London Railway Co. were vested in the defendants. Both these Acts incorporated the Lands Clauses Act, 1845. The works were completed in July, 1889. Certain land with houses erected thereon, outside the limits of deviation, had been purchased by the defendants or their predecessors in pursuance of agreements entered into between the owners and the promoters of the Kingston and London Railway in consideration of the owners withdrawing their opposition to the passing of the Kingston and London Railway Act, 1881. None of these houses had been pulled down or used for the purposes of the works. At the time of the passing of the Act many of these houses were unoccupied. By reason of the construction of the railway the assessments of the land and houses to the poor rate were reduced, and the plaintiffs claimed that the defendants were liable to make good the deficiency in the assessments up to the time of the completion of the works. The Divisional Court gave judgment for the plaintiffs. The defendants appealed.

By section 133 of the Lands Clauses Act, 1845, "If the promoters of the undertaking become possessed by virtue of this or of the special Act, or any Act incorporated therewith, of any lands charged with the land tax or liable to be assessed to the poor rate, they shall from time to time, until the works shall be completed and assessed to such land tax or poor rate, be liable to make good the deficiency in the several assessments for land tax or poor rate by reason of such lands having been taken or used for the purposes of the works, and such deficiency shall be computed according to the rental at which such lands with any buildings thereon were valued or rated at the time of the passing of the special Act."

E. Page, for the defendants.—The railway company did not "become possessed of these lands" by virtue of the Lands Clauses Act or the special Act. The lands were not "taken or used for the purposes of the works." They were taken to buy out the opposition of the owners in Parliament. The company had no power to take these houses, and the purchase was *ultrà vires*. Therefore section 133 of the Lands Clauses Act, 1845, does not apply, and the company cannot be called upon to make good the deficiency in the assessments. Secondly, if the company are bound to make good the deficiency, inasmuch as some of the houses were unoccupied at the time of the passing of the Act of 1881, no rates were payable in respect of them, and therefore there could be no deficiency in respect of the unoccupied houses. The word "assessments" in section 133 must mean amount received for the poor rate.

He referred to *Reg.* v. *St. Pancras*, 25 W. R. 827, 2 Q. B. D. 581; and *Stratton* v. *Metropolitan Board of Works*, 23 W. R. 447, L. R. 10 C. P. 76.

Jelf, Q.C., and *Dryden*, for the plaintiffs, were not called upon.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Lord ESHER, M.R.—The railway company in the present case have taken certain property. The company had no power to take, whether by agreement or otherwise, any property except under their Act for the purposes of their undertaking. Here the property was purchased by the company, not for the purposes of the undertaking, but for totally different reasons. The company have been assessed to the poor rate in respect of this property, and upon an application being made upon them to make good the deficiency under section 133 of the Lands Clauses Act, 1845, they allege that, though they are in possession of the property, they acted without any legal right in buying it, and that therefore section 133 is not applicable. In my opinion the company cannot, as against the parish, be allowed to allege that. They must be held, as against the parish, to have taken the land for the purposes of the undertaking, and it must be held that the land has been legally taken.

The next question arises as to the true construction of section 133 with regard to the deficiency. The company "have become possessed of lands liable to be assessed to the poor rate," and until the works are completed they shall from time to time "be liable to make good the deficiency in the several assessments for poor rate by reason of such lands having been taken or used for the purposes of the works." The words "such lands" in the latter part of the section refer to the lands mentioned at the beginning of the section, of which the company have become possessed by virtue of this or the special Act. In my opinion, for the purpose of ascertaining the deficiency, the comparison must be made between the assessment of these lands at the time of the passing of the special Act and the several assessments of the same lands made from time to time after the passing of the special Act down to the completion of the works and their assessment to the poor rate. The lands would be assessed whether occupied or not, that is to say, the assessment would be entered in the rate book; but if they were unoccupied, nothing would be received in respect thereof. The difference between those two assessments would give the measure of the deficiency, which the company would have to make good by reason of the lands having been taken or used for the purposes of the works. The company would have to pay, not the difference in the assessments, but the deficiency in the poor rate arising from the difference in the assessments. The judgment of the Divisional Court must be affirmed.

BOWEN, L.J.—I am of the same opinion. The company must be treated as standing in the shoes of the Kingston and London Railway Co. The company find themselves in this position. They are asked to pay a certain sum as having taken lands and become possessed of them for the purposes of their works. They come here and say that they have not taken the lands for the purposes of their works, but that they have become possessed of them under no statutory powers. The company is a statutory corporation, and as such, their powers are limited by their Act, and no consent of the shareholders can give the company power to take lands if their Act gives them no such power. That doctrine has been laid down in many cases, notably in *Ashbury Carriage Co.* v. *Riche*, 24 W. R. 794, L. R. 7 H. L. 653, and *Wenlock* v. *River Dee Co.*, 10 App. Cas. 354, 33 W. R. Dig. 228, and the company could be restrained at the suit of the Attorney-General from taking such lands. That being the position of the company, they fall within the common law rule that they cannot come into court and allege an illegal act to escape from liability to taxation. This rule is not founded upon the doctrine of estoppel, but it is an old common law rule.

With regard to the second point, under section 133 the company must make good the deficiency in the assessment of the lands to the poor rate caused by the lands having been taken or used for the purposes of the works. The deficiency is to be computed according to the rental at which the lands were rated at the time of the passing of the special Act. The deficiency is in the assessments to the poor rate. To ascertain what this deficiency is, the assessment of the lands at the time of the passing of the Act must be compared with the assessment of the same lands made subsequently from time to time up to the time of the completion of the works. From the difference between those assessments the sum to be paid in respect of the deficiency in the poor rate can be ascertained. We are not driven to the absurdity of holding that, because some of these houses were unoccupied at the time of the passing of the special Act, there was, therefore, no deficiency in respect of them. This section is, in truth, a parochial indemnity section.

FRY, L.J., concurred.

Appeal dismissed.

Solicitor for the plaintiffs, *W. Reeve.*

Solicitors for the defendants, *Bircham & Co.*

From Q. B. Div. Feb. 5.

SOUTH STAFFORDSHIRE TRAMWAYS CO. v. SICKNESS AND ACCIDENT ASSURANCE ASSOCIATION. (*a.*)

Insurance — Accident — Insurance against claims for personal injury from accidents caused by vehicles — Payment not to exceed £250 "in respect of any one accident" — Accident causing injury to several persons.

By a policy of insurance the defendants agreed, as regards claims for personal injury and damage to property made against the plaintiffs in respect of accidents caused by their vehicles for which the plaintiffs should be liable, to pay to them £250 "in respect of any one accident," but not exceeding in all the sum of £1,500 in any one year. During the currency of the policy one of the plaintiffs' vehicles was overturned and forty persons were injured, and the plaintiffs became liable to pay compensation to the amount of £833. Upon a special case to determine the amount of the defendants' liability under the policy, Day, J., *held that there had been only one accident within the meaning of the policy, and that the plaintiffs were only entitled to recover £250;* Lawrance, J., *holding that the injury to each person was a separate accident.*

Held, by the Court of Appeal, *that the injury to each person was a separate accident within the meaning of the policy, and that the plaintiffs were entitled to recover £833.*

Appeal from the judgment of the Queen's Bench Division upon a special case stated in an action upon a policy of insurance against accidents.

The policy, after reciting that the plaintiffs, thereinafter called the assured, by a proposal had applied to the defendants for an indemnity against all such claims as thereinafter mentioned for compensation for personal injuries and damage to property caused by vehicles in their possession, stated that the defendants agreed "that so far as regards claims for personal injury and damage to property made against the

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

assured in respect of accidents caused by vehicles, or the motive power thereof while attached thereto, belonging to the assured and specified in the subjoined schedule, and for which accidents the assured shall be liable," they would pay to the assured the sum of £250 "in respect of any one accident," but not exceeding in all the sum of £1,500 in any one year.

During the currency of the policy one of the plaintiffs' vehicles specified in the policy was overturned, and forty persons were injured, and the plaintiffs became liable to pay compensation and expenses to the amount of £833 in all. The defendants contended that the plaintiffs were only entitled to recover £250, on the ground that there had been only one accident.

The question for the court was whether the injury caused to each person was a separate accident within the meaning of the policy.

In the Divisional Court Day, J., was of opinion that there had been only one accident within the meaning of the policy, while Lawrance, J., was of opinion that the injury to each person was a separate accident.

Lawrance, J., having withdrawn his judgment, judgment was entered for the plaintiffs for £250.

The plaintiffs appealed.

Moulton, Q.C., and *Disturnal*, for the plaintiffs.

R. T. Reid, Q.C., and *Eardley Wilmot*, for the defendants.

Lord ESHER, M.R.—In my opinion the true meaning of this policy, so far as regards personal injuries, is that it covers injuries to a person arising from accidents caused by vehicles of the plaintiffs. If that is so, the injury to each person is a separate accident within the meaning of the policy, and there were as many accidents as there were persons injured. I agree, therefore, with the judgment of Lawrance, J., and the plaintiffs are entitled to judgment for £833.

BOWEN, L.J.—I am of the same opinion. The word "accident" may be used in many senses. For instance, if a bridge breaks down while a railway train is upon it, and the passengers are injured, it may be said that there is an accident to the bridge, or to the train, or to the passengers in the train. One must look at the document to see in what sense the word is used. The policy, after reciting the proposal, insures against claims for personal injury and damage to property made against the assured in respect of accidents caused by vehicles. If the policy had stopped there it would be perfectly clear that the word "accident" could only be construed as an accident to the person. The difficulty arises from the subsequent words limiting the payment to a particular sum "in respect of any one accident." If, however, the word "accident" has the meaning I have given to it in the earlier part, it must have the same meaning in the later part. There are no words in the later part to limit or alter that meaning.

FRY, L.J.—I agree. The words "personal injury and damage to property" mean injury to persons and damage to property, and the words "accidents caused by vehicles" mean accidentally caused by vehicles. Therefore the policy covers injury to persons and damage to property accidentally caused by vehicles. I should have come to that conclusion apart altogether from the recital, but when one looks at the recital the meaning is quite clear.

Then, as regards the subsequent words, "in respect of any one accident," it seems to me that the word "accidents" there refers to the same thing as the words "accidents caused by vehicles" above, and means injury to persons and damage to property accidentally caused by vehicles. I think, therefore, that the judgment of Lawrance, J., was right.

Appeal allowed.

Solicitors for the plaintiffs, *Smiles & Co.*, for *Duignan & Elliott.*

Solicitor for the defendants, *G. H. Hoyle*, for *H. A. Fitter.*

From Q. B. Div. Dec. 4.

BOLTON v. BUCKENHAM. (a.)

Mortgage—Principal and surety—Covenant for repayment—Consolidation of mortgages—Covenant for repayment at a later date—Discharge of surety by giving time.

By a covenant in a mortgage deed of the 4th of September, 1857, the mortgagor and the defendant, as surety, covenanted to pay the mortgage debt of £450 on the 4th of March, 1858. By a deed of the 15th of December, 1884, to which the defendant was not a party, this mortgage and other mortgages on other properties were consolidated. Under this deed the several mortgagees were paid off, and they assigned their mortgages to the plaintiff, with the full benefit of the covenants in the respective mortgage deeds. The mortgagor by this deed covenanted with the plaintiff to repay the full amount of the mortgage debt on the 19th of January, 1885.

Held, that, by the covenant in the deed of 1884, the time for repayment of the mortgage debt of £450 contained in the deed of 1857 had been enlarged, and the liability of the defendant as surety had been discharged.

Appeal from the judgment of Day, J., at the trial without a jury of an action to recover £450 on a covenant in a mortgage deed dated the 4th of September, 1857. The defence was that the defendant covenanted as surety for one J. C. Buckenham, and that time had been given to the principal debtor, thereby discharging the defendant.

By a deed dated the 4th of September, 1857, the defendant and J. C. Buckenham assigned certain freehold property, in which they were jointly interested, to one Cooper as security for the repayment of £450 advanced by Cooper to J. C. Buckenham. The deed contained a joint and several covenant by the defendant and Buckenham to pay to Cooper £450, and interest thereon, on the 4th of March, 1858. The defendant executed this mortgage as surety for J. C. Buckenham.

In 1884 J. C. Buckenham, who had mortgaged other properties as security for sums advanced by other persons, was desirous of consolidating the mortgages, and a deed dated the 15th of December, 1884, was executed, by which, after reciting that an application had been made by J. C. Buckenham to the plaintiff for an advance of £3,200 to pay off the various mortgages, and that the plaintiff, upon having the repayment of the said sum of £3,200, with interest, further secured in manner thereinafter appearing, had agreed to advance the said sum, the various mortgagees assigned to the plaintiff the various mortgages, including the mortgage of the 4th of September, 1857, and the full benefit of the covenants and other powers and provisions contained in the respective mortgage deeds, and of all securities for the same. The defendant was not a party to this deed. This deed contained a covenant by J. C. Buckenham to repay to the plaintiff the said sum of £3,200, and interest, on the 19th of January, 1885.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Day, J., held that the deed of 1884, by reason of the covenant for repayment therein contained, gave time to the principal debtor, J. C. Buckenham, and that, consequently, the defendant, as surety under the deed of 1857, was discharged. The plaintiff appealed.

Haldane, Q.C., and *G. E. Lyon*, for the plaintiff.—The deed of 1884 expressly kept alive the covenant for repayment in the deed of 1857. There were in effect two securities given for the same debt. The two covenants are separate and independent covenants. There was no merger, as the securities were of equal degree. The deed of 1884 does not say that the debtor shall not be sued until the 19th of January, 1885. He therefore continued liable to be sued at any time on the covenant in the deed of 1857, and there was no giving of time so as to discharge the surety.

They referred to *Drake* v. *Mitchell*, 3 East, 251; *Twopenny* v. *Young*, 3 B. & C. 208; *Munster and Leinster Bank* v. *France*, 24 L. R. Ir. 82, 37 W. R. Dig. 150; *In re Frisby*, 38 W. R. 65, 43 Ch. D. 106.

Channell, Q.C., and *Jason Smith*, for the defendant, were not called upon.

Lord ESHER, M.R.—It seems to me that the covenant for repayment in the deed of 1857 is a separate and independent covenant. The defendant, who was a party to that deed, undertook, in consideration of the loan of £450 to J. C. Buckenham, to become surety for its repayment in accordance with the terms of the covenant. That was a separate covenant independent of all the other covenants in the deed. It seems to me that a covenant, upon certain conditions being fulfilled, to repay on a certain day necessarily implies a covenant not to sue until that day upon those conditions being fulfilled. The affirmative covenant necessarily implies the negative. By the deed of 1884 the £450 was made part of the £3,200, and under the covenant in that deed the £3,200 is not to be repaid until a date later than that named in the deed of 1857. That covenant applies to the £450. That covenant necessarily implies a covenant not to sue until the date named. This covenant swallows up the covenant in the former deed, as it is entirely inconsistent with it. It is said that the plaintiff, by the deed of 1884, has reserved his rights under the covenant in the first deed. I care not whether he has purported to do so or not. He cannot say that he reserves his rights under that covenant when by the very terms of the second covenant he gives them up. It is useless for him to purport to reserve his rights. That being so, it is clear that the surety, who is no party to the second deed, is discharged. The judgment for the defendant is, therefore, right, and the appeal must be dismissed.

LOPES, L.J.—I am of the same opinion.

KAY, L.J.—I am of the same opinion. The deed of 1884 consolidated the various mortgages, including the mortgage of 1857 for £450. The several securities so consolidated were assigned as security for each and all of the debts, and therefore there would be further security given for the £450. That would satisfy the words "further security" in the deed of 1884. The deed of 1884 stipulates for payment of the principal sum secured thereby on a day later than that named in the deed of 1857. The argument urged on behalf of the plaintiff is that this covenant is not inconsistent with the covenant for repayment in the deed of 1857. It is clearly inconsistent if it means that the debt cannot be sued for until the day named. In my opinion that is the meaning of the covenant. There is that implied negative in the covenant, and it is not consistent with the covenant in the earlier deed. The result is that time has been given to the principal debtor, and, there being no reservation of rights against the surety, the surety is discharged.

Appeal dismissed.

Solicitor for the plaintiff, *A. B. Chubb.*

Solicitor for the defendant, *Gilbert Robins*, for *Salmon & Son.*

From Q. B. Div. Dec. 1.

HEWETT v. BARR. (a.)

Practice—Renewal of writ after expiration of twelve months—Statute of Limitations—Ord. 8, *r.* 1; *ord.* 64, *r.* 7.

The time for renewing a writ of summons will not be extended after the expiration of twelve months from the date of the issue of the writ where, in the absence of such renewal, the plaintiff's claim would be barred by the Statute of Limitations.

Doyle *v.* Kaufman, 26 *W. R.* 98, 3 *Q. B. D.* 7, 340, *followed.*

Appeal from the decision of a divisional court refusing an application to renew a writ of summons made more than twelve months after the date of the issue of the writ.

It appeared from the affidavits that every effort had been made to serve the writ within the twelve months, but that the defendant could not be found, and that on the last day of the twelve months a clerk to the plaintiff's solicitors was on his way to obtain a renewal of the writ when he was unexpectedly detained until it was too late to make the application that day.

The next morning an application to renew the writ was made to a master, who refused it on the authority of *Doyle* v. *Kaufman*, 26 W. R. 98, 3 Q. B. D. 7, 340, on the ground that the period fixed by the Statute of Limitations had in the meantime expired.

The Divisional Court upheld this refusal.

Cooper Willis, Q.C., for the plaintiff. — Even although the period of six years from the accruing of the debt for which the action is brought has elapsed, the court will under exceptional circumstances extend the time: *Weldon* v. *Neal*, 35 W. R. 820, 19 Q. B. D. 394; *Eyre* v. *Cox*, 25 W. R. 303. The rule laid down in *Doyle* v. *Kaufman* is not inflexible.

He referred to ord. 64, r. 7.

Lord ESHER, M.R.—According to the true construction of ord. 8, r. 1, this writ cannot be renewed. It is laid down in *Weldon* v. *Neal* as a general rule of conduct that amendments ought not to be granted where they will have the effect of altering the existing rights of the parties. This principle applies even more strongly where we are asked to renew a writ, and where by so doing we should deprive the defendant of his existing right under the Statute of Limitations. We must, I think, refuse this application and dismiss the appeal.

LOPES, L.J.—I am of the same opinion, and I base my decision on the case of *Doyle* v. *Kaufman*. In that case Cockburn, C.J., held that the power to enlarge the time given by ord. 57, r. 6, of the rules then in force did not apply to the renewal of a writ where the remedy had been lost by operation of a statute. When that case came to the Court of Appeal, although the appeal was dismissed on other grounds,

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

the court intimated its approval of that opinion, and the practice has, I believe, been followed ever since.

KAY, L.J.—I think that under exceptional circumstances the court might, under ord. 64, r. 7, have power to grant such an application as the present. Here, however, there are no such circumstances as would warrant us in doing so. The affidavits merely state vaguely that every effort was made to find the defendant, and no sufficiently good reason seems to be given for having postponed the application for renewal till the very last moment.

I agree, therefore, that the application should be refused.

Appeal dismissed.

Solicitors for the plaintiff, *Latham, Farmer, & Co.*

From Q. B. Div. Nov. 17.

VESTRY OF ST. MARTIN, *Appellants.*
GORDON, *Respondent.* (a.)

Metropolis — Vestry — Removal of ashes — "Refuse of trade, manufacture, or business"—Metropolis Local Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 125, 128.

Clinkers produced in the furnaces of certain boilers in an hotel, and used to generate steam for supplying power for the electric lighting of the hotel, for the heating of the public rooms, and for other purposes, are not "refuse of a trade, manufacture, or business" within section 128 *of the Metropolis Local Management Act,* 1855, *so as to entitle the vestry to demand payment for their removal.*

Per Lord Esher, M.R., *and* Lopes, L.J.—Gay *v.* Cadby, 2 *C. P. D.* 391, 25 *W. R. Dig.* 156, *dissented from.*

Appeal from the judgment of the Queen's Bench Division upon a case stated by a metropolitan police magistrate in the matter of a dispute referred to him under section 129 of the Metropolis Local Management Act, 1855, as to whether certain clinkers were "refuse of a trade," within the meaning of section 128 of that Act.

The respondent was the proprietor of the Hotel Metropole, within the appellants' district. The clinkers were produced in the furnaces of certain boilers which were situate in the basement of the hotel, and which were used to generate steam for the purpose of supplying power for the electric lighting of the hotel, for heating the large public rooms, passages, staircases, and halls, for cooking, and occasionally for working the lift, and pumping water to the top of the hotel. There were fireplaces and fires in the ordinary rooms of the hotel.

It was contended on behalf of the appellants that the clinkers were refuse of a trade within the meaning of section 128 of the Metropolis Local Management Act, 1855, and that the appellants were not bound to remove them without payment. The magistrate decided that the clinkers were not refuse of a trade.

The Divisional Court (Lord Coleridge, C.J., and Wills, J.) affirmed this decision. The appellants appealed to the Court of Appeal.

R. G. Glenn, for the appellants.—These clinkers are refuse of the trade or business of the hotel within section 128, and are not dirt, ashes, or rubbish within section 125, which the vestry would be bound to remove without payment. Section 125 deals with insanitary matter, and these clinkers never can become insanitary.

J. E. Bankes, for the respondent.—The clinkers are "ashes" in a solidified form produced in a furnace giving out great heat. These ashes are not the refuse of a trade, manufacture, or business, but were produced in a fire used for domestic purposes.

The following authorities were referred to:—*Law* v. *Dodd,* 1 Ex. 845; *Lyndon* v. *Standbridge,* 5 W. R. 590, 2 H. & N. 45; *Gay* v. *Cadby,* 2 C. P. D. 391, 25 W. R. Dig. 156; *Collins* v. *Vestry of Paddington,* 27 W. R. 504.

Cur. adv. vult.

Nov. 17.—Lord ESHER, M.R.—The question here is whether the vestry is entitled to be paid for the removal of these clinkers, which are in truth ashes, the result of a fire in a furnace used for various purposes connected with the hotel. I do not wonder at the difficulty felt in construing this Act, for it seems to me that different words are used in different parts of the Act when probably the same thing was intended. By section 125 of the Metropolis Local Management Act, 1855, the vestry is required to appoint and employ a sufficient number of persons, called scavengers, or to contract with any company or persons, for collecting and removing all dirt, ashes, rubbish, ice, snow, and filth in houses and places within their parish. That section is obviously a compulsory section. It is clear that what the vestry was asked in the present case to remove were ashes. Therefore, unless there is something in the Act to limit that obligation, the vestry would be bound to remove these ashes. We must give the full meaning to those words unless there is something in the Act to limit that meaning. The next section, section 126, provides that any occupier of any house or land, or other person, who refuses or does not permit any soil, dirt, ashes, or filth to be taken away by the scavengers, or who obstructs the scavengers in the performance of their duty, shall for every such offence forfeit and pay a sum not exceeding £5. Here we find that the word "soil" is introduced, the words "rubbish, ice, and snow" being omitted. Then comes section 127, where the words again are different from the words in either of the preceding sections, the words being all "dirt, dust, night-soil, ashes, and rubbish." Then comes section 128, which is the section relied upon as limiting the general obligation imposed upon the vestry by section 126. Section 128 provides that in case any scavenger be required by the owner or occupier of any house or land to remove the refuse of any trade, manufacture, or business, such owner or occupier shall pay to the scavenger a reasonable sum for such removal, such sum, in case of dispute, to be settled by two justices. That section deals with a case where the scavenger is required by the owner or occupier to remove the refuse. That cannot apply to matter which the vestry is bound to remove whether asked to do so or not. It cannot impose upon the owner or occupier an obligation to pay when the scavenger is simply asked to do that which it is his duty to do, and which he would be bound to do whether asked or not. It seems to me to apply to things which the owner or occupier may remove for himself if he pleases, and if he requires the vestry to remove them he must pay for it. It seems to me that the section cannot refer to the same things as in section 125. The words are new—"the refuse of any trade, manufacture, or business." The words are not "the refuse, the result of any trade, manufacture, or business." I think that the words "the refuse of a trade, manufacture, or business" are well known as a business term. The "refuse of a manufacture" applies where

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

a material or subject-matter is being manufactured into something else, and in the course of the manufacture refuse from the material or subject-matter so being manufactured is produced. I cannot say that that is the only refuse of manufacture possible.

Next as to "refuse of a trade." I cannot define that term. I can see what is not included in that term. Take the case of a linendraper. No one could contend that the ashes resulting from fires used for warming the rooms in which the employees worked would be refuse of a trade. The refuse of that trade would be the pieces cut off the materials being made up for the purposes of that trade. There may also be other things which are refuse of that trade. But I cannot think that ashes from the fires would be refuse of that trade.

Then we have the words "refuse of a business." It may be that the word business was inserted because it was thought that the word trade was confined to cases where there was buying and selling. Can the ashes from the furnace used for the purpose of performing certain work in the hotel be the "refuse of a business"? I suppose there is a refuse of the business of an hotel keeper, but I am unable to say what it would be. But I cannot think that ashes from fires for working engines and for other purposes of the hotel are the refuse of the business of the hotel. I am therefore of opinion that the words of section 128 do not limit the large words in section 125, and that the vestry is bound to remove these ashes without payment.

With regard to the case of *Gay* v. *Cadby*, from what I have said, it is impossible to agree with that decision.

LINDLEY, L.J., read the following judgment:—The question in this case is whether the clinkers from the furnaces used in the Hotel Metropole for the purposes mentioned in the special case are to be removed by the parish scavengers without extra payment beyond what they are paid out of the rates, or whether those scavengers are entitled to extra payment from the hotel keeper for removing such clinkers. This question turns on the true construction of sections 125—129 of the Metropolis Local Management Act, 1855, and on the proper application of those sections to the facts of this case.

The special case assumes that the term "clinkers" requires no definition or description, and is well known to the court. I understand by it that hard material which is formed by the combustion of coal or coke as distinguished from the ordinary fire ash which is produced by the combustion of the same materials. Small clinkers are frequently found amongst the ashes of an ordinary fireplace. Closed stoves, such as Arnott's stoves or their modern varieties, produce larger and more numerous clinkers than ordinary fireplaces; and furnaces produce larger and more numerous clinkers still. All this is common knowledge, but has to be borne in mind. It is also well known that the uses to which clinkers can be put are very limited. Speaking generally they are unsaleable, and those who produce them are only too glad to get rid of them. They are rubbish.

In the sections of the Metropolis Local Management Act, 1855, which relate to the removal of matter by scavengers, a distinction is drawn between matter which the scavengers are bound to collect and remove without special payment, and matter which they are not bound to remove without such payment: see sections 125 and 128. Matter of the latter sort is referred to as "the refuse of any trade, manufacture, or business, or of any building materials": see section 128. Matter of the former sort is referred to as "dirt, ashes, rubbish, ice, snow, and filth": see section 125. The words "soil," "dust," and "night-soil," also fall within this class: see sections 126 and 127. Penalties are imposed on persons who will not allow matter of this sort to be removed: see section 127; and such matter, when collected by the scavengers, becomes the property of the vestry or local board appointing them: see section 127. I say "when collected by the scavengers," for that is, in my opinion, the meaning of "collected as aforesaid" in section 127. It is obvious that with so very rough a classification of matter as the above, questions would probably arise as to the class to which some kinds of stuff would belong; and, accordingly, it is provided by section 129 that such questions shall be decided by a magistrate. But now his decision may be reviewed on a case stated by him: see 42 & 43 Vict. c. 49, s. 33.

In this case the magistrate has decided that the clinkers in question are not "refuse of any trade," &c., within section 128, and this decision has been upheld by a divisional court. We are, however, invited to say that trade refuse (to use a compendious expression for that which is referred to in section 128) must include the clinkers in question in this case, and reliance is placed on *Gay* v. *Cadby*. In that case, however, the ashes were the produce of the furnace of a saw mill used exclusively for manufacturing purposes. The court there held that trade refuse cannot be confined to the waste residue of things manufactured, but can also comprehend the waste residue of substances used in the course of manufacture. This, in my opinion, is quite right. Take the case of metal smelting or roasting; the slag of the smelted or roasted metal and the clinkers of the furnaces employed to smelt or roast the metal may both be waste refuse within the meaning of section 128. Many other cases of the same sort may be put. I do not, however, think that *Gay* v. *Cadby* compels the court to say that the clinkers here must be trade refuse within section 128. The furnaces here are principally used for the same domestic purposes as ordinary grates or stoves, and are not used, as in *Gay* v. *Cadby*, exclusively for wholly different purposes. I am not prepared to define trade refuse, but I can see that in many trades and manufactures clinkers might come under that description. I think *Gay* v. *Cadby* was right, but I also think that these clinkers may, consistently with that decision, be regarded as falling within that kind of stuff which the scavengers must remove without extra payment.

LOPES, L.J., read the following judgment:—The question in this case is whether certain clinkers are "refuse of any trade, manufacture, or business" within the meaning of section 128 of the Metropolis Local Management Act, 1855.

The facts are set out in the special case. To determine the question raised it is necessary to consider the scheme of certain sections in the Act beginning with section 125 and ending with section 129 (being the sections relating to scavengers), and the meanings of those sections. The scheme of the sections appears to be twofold: With regard to certain things of no value, and which the owner or occupier of the house would wish to get rid of as being of no value and inconvenient to retain, to compel the vestry to remove them, subjecting those responsible for their non-removal, whether the vestry or its scavengers, and the occupier of the house if he obstructs their removal, to a penalty; but in the case of any refuse of a trade, manufacture, or business there is no such compulsion; there must be a request by the owner and occupier, and a reasonable sum paid for removal, on the ground, I presume, that such refuse may have some commercial value and on that account the owner

or occupier may not desire its removal, and requiring a payment, because its removal is rather for his convenience than for any sanitary requirement.

These clinkers are ashes in a vitrified form. They are the unconsumed portions of the fuel used for the purpose of producing heat and light in aid of the business carried on in the hotel, but not refuse of the business, and fall within section 125 just as much as any other ashes. Fire is kept for the purpose of almost every trade, manufacture, and business. If we were to hold these clinkers refuse of a trade or business, I cannot see how any ashes produced in aid of any trade, manufacture, or business would be removable without payment, and this would be to limit the meaning of the word ashes in section 125 to an extent which I cannot think was contemplated.

It is difficult to give any exhaustive definition of "refuse of any trade, manufacture, or business," but the definition I am about to give describes what I think those words mean. It is what is discarded after the rest has been utilized for the purpose of working the trade, manufacture, or business; refuse which is the immediate and direct result of the trade, manufacture, or business; not a kind of refuse which would arise as much if there was no trade, manufacture, or business, and is only increased in quantity by reason of the trade, manufacture, or business.

I cannot agree with *Gay* v. *Cadby*. Lindley, L.J., can scarcely be correctly reported. He says: "Whatever be the true meaning of the word 'refuse,' it clearly means something beyond what is meant by the same word in section 125." The word refuse does not occur in section 125.

Appeal dismissed.

Solicitors for the appellants, *Fladgates.*

Solicitors for the respondent, *Ingram, Harrison. & Ingram.*

High Court of Justice.

Chan. Div. North, J. — Jan. 15.

In re ELLIOTT.
ELLIOTT *v.* JOHNSON. (a.)

Will — Bequest to a "superstitious use" — Testator domiciled in England — Legatees resident abroad — 1 Edw. 6, c. 14.

A legacy to a "superstitious use," given by a testator domiciled in England, is void, even although the legatee is resident abroad where such a legacy is good.

A testator, who was a domiciled Englishman, bequeathed to priests of the Society of Jesus at Richmond, Victoria, one thousand pounds to be spent in masses for the repose of the soul of his late wife and his own.

Held, that the legacy, being void by the law of the testator's domicil as a gift to a "superstitious use," was not rendered valid by the fact that the legatees were domiciled in the colony of Victoria, although by the law of that colony the legacy would be valid.

Further consideration.

Charles Elliott, by his will, dated the 19th of September, 1882, provided as follows:—"After payment of all my just debts, funeral and testamentary expenses, I give, devise, and bequeath unto the priests of the Society of Jesus at Richmond, Victoria, one thousand pounds sterling, to be spent in masses for the repose of the soul of my late wife, Catherine Elliott, and my own." The will also contained other legacies and a gift of residuary estate.

The testator died on the 10th of July, 1886, domiciled in England.

The action was brought for administration of the testator's estate; the defendants were the two executors and trustees of his will, one of whom resided in England and the other in Australia.

This was the further consideration of the action, one of the questions for determination being whether the bequest to the priests of the Society of Jesus at Richmond, Victoria, was valid, notwithstanding that it was a gift to superstitious uses, because by the law of Victoria, where they were domiciled, such a gift was valid.

Burleigh Muir, for the plaintiff.—The bequest is void, as the testator died domiciled in England, and by English law, which governs the distribution of his personalty, a bequest of money to be spent in masses for the good of the soul is void by virtue of statute 1 Ed. 6, c. 14, as a gift to a superstitious use: *West* v. *Shuttleworth*, 2 My. & K. 684, 697.

Theobald, for the priests.—Such a gift was valid by the general law of England before the statute 1 Ed. 6, c. 14, which does not in terms make it void. Such a gift has only been declared void by implication, by virtue of that Act, which does not extend to the colony of Victoria. The gift is good according to the law of Victoria. The law of the testator's domicil does not make invalid such a bequest to a legatee domiciled abroad, but only when the legatee is in England. The object of the law against superstitious uses is to prevent superstitious uses in England, not abroad, and the English law invalidating gifts to superstitious uses does not apply to a legacy given to persons abroad. Such a gift is not like a gift immoral in itself, which is void everywhere.

He referred to *Yeap Cheaah Neo* v. *Ong Cheng Neo*, L. R. 6 P. C. 381, 24 W. R. Dig. 174; *In re Michel's Trust*, 8 W. R. 299, 28 Beav. 39; *Mackintosh* v. *Townsend*, 16 Ves. 330.

Woodroffe, for the residuary devisee.

George J. Duncan, for a legatee.

Richard Muir, for the executor in England.

Swinfen Eady, for the executor in Australia.

NORTH, J.—I think that the legacy is clearly bad. In *Sill* v. *Worswick*, 1 H. Bl. 665, Lord Rosslyn says, at p. 690, "It is a clear proposition, not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is not that personal property has no visible locality, but that it is subject to the law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies it is not the law of the country in which the property is, but the law of the country of which he is a subject, that will regulate the succession." That being so, as this testator was a domiciled Englishman, the English law governs the distribution of his personal property. According to the law of England a gift to a body of priests to be spent in masses for the soul of the testator's deceased wife and for the soul of the testator, is void as a gift to a superstitious use. It is none the better because the persons to whom the money is given have a domicil which is not that of England.

Solicitors, *Morrisons; Lee, Ockerby, & Everington; Stanley & Woodhouse.*

(a.) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

Chan. Div. }
Kekewich, J. } Feb. 12.

ASHLING v. BOON. (a.)

Evidence — Promissory note — Insufficient stamp — Evidence for collateral purpose—Stamp Act, 1870 (33 & 34 *Vict. c.* 97), *s.* 54, *sub-section* 1.

The defendant tendered as evidence of a loan an insufficiently-stamped promissory note.

Held, that the receipt of the money was of the essence of the promissory note and inseparable from it; that to admit the note as evidence of the loan would not be to admit it for collateral purposes; and that it must be rejected.

Trial of action.

A question arose in this case as to whether an insufficiently stamped promissory note could be admitted as evidence of the receipt of the money.

The defendant in the action claimed to be an equitable mortgagee of certain property in respect of advances made by him to a person since deceased, and as evidence of one of these advances he tendered at the hearing a document in the form of a promissory note for £40, whereby the recipient promised to pay £40 on demand for value received. This document was stamped with an adhesive penny stamp only, and could not be used as a promissory note, but it was argued that it was admissible as evidence of the receipt of the money.

Renshaw, Q.C., and *E. Bray*, for the plaintiff.—The document is insufficiently stamped, and cannot be made available for any purpose whatever: Stamp Act, 1870, s. 54, sub-section 1; *Gregory* v. *Fraser*, 3 Camp. 454; Roscoe's *Nisi Prius* Evidence, 15th ed., p. 558; *Green* v. *Davies*, 4 B. & C. 235. In *Evans* v. *Prothero*, 1 De G. M. & G. 572, the document was a contract, and not within this section. [KEKEWICH, J., referred to *Ionides* v. *Pacific Insurance Co.*, L. R. 6 Q. B. 674, 20 W. R. C. L. Dig. 80, 21 W. R. 22, L. R. 7 Q. B. 517, and Tilsley on the Stamp Laws, 3rd ed., pp. 104, 247].

Marten, Q.C., and *C. E. E. Jenkins*, for the defendant.—The leading case on the point is *Evans* v. *Prothero*, which overrules the former cases, and shows that an insufficiently stamped document can be used for collateral purposes. There are two parts in this document—the promise, and the expression "for value received": *Sutton* v. *Toomer*, 7 B. & C. 416; *Reg.* v. *Gompertz*, 9 Q. B. 824. Section 17 of the Act of 1870 puts all instruments on the same footing.

KEKEWICH, J.—The defendant says that he from time to time advanced to James Donaldson certain moneys, making up a specific total amount, and that the first loan was £40, and in proof of that he tenders a document which expresses on the face of it that £40 was received by James Donaldson from the defendant on or before the 30th of April, 1878. The admission of that document as evidence is objected to by the plaintiff on the ground that it is a promissory note for that sum of £40, and being stamped only with a penny stamp is insufficiently stamped, and cannot be received in evidence. That it is a promissory note and is insufficiently stamped is beyond question. The defendant urges me to admit it on the ground that, according to the decision of Lord St. Leonards in *Evans* v. *Prothero*, this document, though not admissible as a promissory note, is admissible for some other purposes, and that the present purpose is within the exception. The words of the Act are stringent—"available for any purpose whatever." That certainly seems as if a promissory note could not be used for any purpose, either to be sued on as a note, or for any other purpose, if insufficiently stamped. That was the view taken in *Green* v. *Davies*, where an earlier statute governed the case, but a statute expressed in as stringent terms as the Act of 1870; and the court there, on a considered judgment, declined to admit the promissory note tendered in evidence because it was insufficiently stamped, and they declined to admit it as evidence of an account stated. At p. 242 Bayley, J., says:—"We therefore feel ourselves bound, though reluctantly, to say that the stamps in this case were not sufficient, and, if not, it follows as a consequence upon the third point that the note could not be received as evidence of an account stated. The statute 31 Geo. 3 provides explicitly that no note shall be given in evidence or available in law or equity unless the paper on which it is written is duly stamped; and to allow it as proof of an account stated would be to admit it in evidence and make it available on the last question."

Therefore, in that case, on a statute practically the same as the Act of 1870, I have a distinct decision that an insufficiently stamped promissory note cannot be admitted as evidence of an account stated, and therefore it follows that it could not be admitted as evidence of the receipt of money. Another authority has been referred to, *Gregory* v. *Fraser*, which I do not wish to pass over, for although the statute is not set out in the report, and may have been different from the present Act, still it is a decision of Lord Ellenborough, and entitled to great respect. There the note which it was attempted to put in was unstamped, and the object of putting it in was to prove that it had been obtained from the maker at a time when he was drunk, and Lord Ellenborough said it could not be admitted as a security or to prove the loan of the money, but it was admitted to be used for collateral purposes. That decision is of less value because we do not know what statute was in force at the time. There is another case of *Sutton* v. *Toomer*, in which a document was admitted, not being unstamped, but one which had been altered, and had become void on that account. So that takes it out of the present discussion. Here the document, which is said to be admissible, is insufficiently stamped. Mr. Marten's argument really comes to this, that these decisions were all before *Evans* v. *Prothero*, in which Lord St. Leonards laid down a different rule with respect to the case before him, and that that is the governing case now. As far as I am aware, that rule has never been departed from. There a document was put in which could not be admissible as a receipt because it was insufficiently stamped in that character, but it contained the essential elements of a contract, and Lord St. Leonards admitted it as evidence of a contract, although not as a receipt. He states the law at page 575, "that the document in question was receivable as evidence of an agreement, although, by reason of the fiscal regulations of the country, not as evidence of a receipt."

The answer to that case is that what he was dealing with was not a bill of exchange, but a document to which the same stringent regulations have not been applied. But, apart from that, the contract was entirely different from the receipt. It was one document containing two instruments, and the contract was clearly unconnected with the receipt. There might be a good receipt and no contract, or a good contract and no receipt.

Another case, somewhat nearer the present case, with reference to a slip for a marine policy, which is also subject to stringent provisions, is *Ionides* v. *Pacific*

(a.) Reported by H. C. ROPER, Esq., Barrister-at-Law.

Insurance Co., where Blackburn, J., in giving a considered judgment at L. R. 6 Q. B. p. 685, says:—"As the slip is clearly a contract for marine insurance, and is equally clearly not a policy, it is, by virtue of these enactments, not valid—that is, not enforceable at law or in equity; but it may be given in evidence wherever it is, though not valid, material; and in the present case it is material." [His lordship referred to the judgment at some length, and continued:—] He must have meant material to some fact outside the policy. That goes to show, as I think *Evans* v. *Prothero* does too, that one must regard the fact it is admissible to prove as something collateral. Is the receipt in this case something collateral? The receipt of the money secured by the promissory note is of the essence of the promissory note. It is impossible to read this document as partly a receipt and partly a promissory note. It is a note for £40, and if I admit it as evidence of the receipt of £40 I shall in any other action—and, indeed, in this action—be giving him the right to sue for £40, notwithstanding that the statute says the note shall not be available for any purpose whatever.

On these grounds I feel compelled to reject the evidence, and I do so with the less hesitation because my doing so need not stop the case, for it is not the foundation of the whole claim, but only one item of it. If I am wrong, and if the defendant proves the rest of his case, he will have to prove the receipt of this £40 elsewhere.

[The case then proceeded, and in the event his lordship held that the defendant was not entitled to an equitable mortgage.]

Solicitors, *Harper & Battcock; W. B. Glasier*, for *J. S. B. Glasier*, King's Lynn.

Chan. Div. Romer, J. } Jan. 27, 28; Feb. 2.

In re LACON.
LACON *v.* LACON. (*a.*)

Ademption—Double portions—Legacy to son of shares in partnership—Gift of shares during life of testator.

A testator by his will gave to his three sons equally as tenants in common his shares in a partnership in a brewery business. At the date of the will he owned twenty-one twenty-fourth parts or shares therein. Between that date and his death he admitted one of the sons as partner, assigning to him two of such shares. The son at the same time gave up a salary he received as manager, and continued in active management of a branch of the business.

Held, that the two shares assigned to the son were ejusdem generis *with the gift of shares contained in the will, and that there was an ademption of the shares given by the will to that extent.*

Trial of action.

This was an action brought by some of the beneficiaries under the will of Sir Edmund Henry Knowles Lacon, deceased, to have it declared that a gift in the testator's will to the defendant Ernest de Montesquion Lacon of a share in the business of a brewer and in the property, effects, goodwill, and book debts thereof, was adeemed to the extent of two equal twenty-fourth shares in the said business, assigned to the defendant by the testator in his lifetime.

By his will, bearing date December 22, 1884, the testator gave all his parts or shares, estate, right, and interest of and in the trade or business of a brewer then carried on by him in Great Yarmouth, and in the City of London, and elsewhere, in co-partnership, under the style or firm of "Sir Edmund Lacon & Sons, the Great Yarmouth Brewery," and of and in all messuages, tenements, beerhouses, malthouses, public-houses, breweries, buildings, lands, and other hereditaments of every tenure whereon the said trade or business should at the time of his death be carried on, or which should then belong to the said co-partnership, and of and in all engines, machinery, fixtures, implements, utensils, plant, stock-in-trade, horses, drays, carts, carriages, tubs, and all other effects and things which at the time of his death should be used or employed in the said business, or belonging to the said co-partnership, and of and in the goodwill of the said trade or business, and of and in all book and other debts which, at the time of his death, should be due and owing to the said co-partnership, or on account of the said trade or business (but not his part or share of the cash which, at the time of his death, should be in the hands of the said co-partnership, or in the bank, or elsewhere, to the credit of the said co-partnership), to his sons, the plaintiff, Thomas Beecroft Ussher Lacon, and the defendants, Henry Sidney Hammet Lacon and Ernest de Montesquion Lacon, and their respective heirs, executors, administrators, and assigns respectively according to the nature and tenure of the subjects respectively, to and for their own use and benefit respectively in equal shares as tenants in common and not as joint tenants.

The will also contained a gift of the residue of the testator's estate and effects upon trust for all his children equally.

At the date of his will the testator was entitled to twenty-one equal twenty-fourth shares in the business. In December, 1887, the testator made over to the defendant E. de M. Lacon two of his twenty-one shares, and, though no assignment was actually executed, the latter was treated as owning such shares in a partnership deed dated the 19th of December, 1887. In this deed it was declared that the capital of the partnership should be taken to be contributed as to nineteen equal twenty-fourth shares thereof by Sir E. Lacon, as to two such shares by Admiral Willes, as to two such shares by the defendant, and as to the remaining one such share by Samuel Nightingale.

The defendant E. de M. Lacon had entered the business in 1874, and had since 1884 managed the London branch at a salary of £1,000. Since that date the business had increased and he frequently applied to his father for an increase of salary. To these requests Sir E. H. K. Lacon had never acceded until he voluntarily made his son a partner by the deed above mentioned, which was merely submitted to the latter for signature, but as to the terms of which he had not been consulted. At the same time Sir E. H. K. Lacon intimated that the salary and allowances hitherto enjoyed by the defendant would cease, as the profits from his share of the partnership would, in his opinion, be ample remuneration, and to this the defendant assented. The profits therefrom did in fact largely exceed £1,000 a year.

The testator died on September the 6th, 1888.

Sir H. Davey, Q.C., and *Borthwick*, for the plaintiffs.—There are no documents disclosing any negotiation or purchase of the shares in the partnership. The case is on all fours with *In re Lawes, Lawes* v. *Lawes*, 30 W. R. 33, 20 Ch. D. 81, and *In re Vickers, Vickers* v. *Vickers*, 36 W. R. 545, 37 Ch. D. 530. Ademption is easier to apply than satisfaction.

Rigby, Q.C., Neville, Q.C., and *D. G. Begg*, for the

(*a.*) Reported by J. W. GREIG, Esq., Barrister-at-Law.

ture. As to whether the furniture was, in fact, dealt with by this agreement, I think the finding of the judge is conclusive that the previous transaction was completely undone by the parties, and that the furniture had revested in Wenman before he made the settlement. Two other points were raised. It was said that this agreement for a settlement was void under 13 Eliz. c. 5 as a fraud upon creditors. The county court judge has found that at the date of the agreement Wenman was solvent, and had money in the bank; undoubtedly he seemed to treat that as decisive of the question. It is said that he ought also to have found that there was no intention to defeat creditors. But there was no evidence of any such intention, and therefore the learned judge came to the right conclusion. The fourth question was whether this agreement for a settlement was a bill of sale. I appreciate the argument based on the analogy between this case and the cases upon the applicability of the Conveyancing Act, 1881, to agreements for leases, but I do not think the analogy exists. I think that the words "marriage settlement" in section 4 include marriage articles, which are not exactly a legal settlement, carefully and formally drawn. The reasoning which was used in *In re Player* exactly applies to this case. Cave, J., says: "The end and purpose of the thing must be a settlement—that is, a disposition of property to be held for the enjoyment of some other person." Those words are exactly in point when we are considering the construction which we are to put on the words "marriage settlement" in section 4, and I think that those words include documents which are in substance, though not in form, settlements made in consideration of marriage.

Appeal dismissed. Leave to appeal granted.

Solicitors for the appellants, *Stokes, Saunders, & Stokes.*

Solicitor for the claimant, *Walter Frederick Stokes.*

Q. B. Div. (Day and Lawrance, JJ.) Oct. 28.

MAYOR, ALDERMEN, &c., OF MANCHESTER *v.* WILLIAMS. (*a.*)

Libel—Corporation—Personal charges made against a corporation—Right of action.

A corporation, as distinguished from its individual members or officials, cannot sue for a libel merely affecting personal reputation.

This was a point of law raised by pleadings under order 25. The plaintiffs, who were the Municipal Corporation of Manchester, brought an action for libel against the defendant upon the following letter.

"THE GAS SCANDALS.

"To the Editor of the *Examiner and Times.*

"Sir,—Manchester has lately been pitying poor Salford and has exhibited much cheap sympathy or contempt for that misguided, misgoverned, and much defrauded royal borough. Let Manchester look at home before it throws mud across the Irwell. Some years ago I felt it my duty to write for one of your contemporaries some half dozen articles dealing with the city council's scandalous and abominable expenditure of about £100,000 upon 'our' Victoria Hotel. That investigation brought some strange occurrences (not yet revealed by me) to my knowledge. I received visits from several gentlemen of high standing amongst us, who confided to me facts that dumbfounded me, and which showed that the citizens lost large sums of money by the lax way in which the job was managed, and that bribery and corruption prevailed to a regretable extent. Let me express the hope that the commission which Salford is asking for, may be extended so as to include Manchester, and if it possesses statutory power to send for persons and papers I will undertake to bring before it witnesses and documents who will (and I deeply deplore it) prove that in the case of two, if not three, departments of our Manchester Civic Council, bribery and corruption have existed and done their nefarious work.—Yours, &c., "S. NORBURY WILLIAMS."

The statement of claim alleged that the defendant meant by the said letter that bribery and corruption existed in three departments of the Manchester City Council, and that the plaintiffs were either parties thereto or culpably ignorant thereof. There was no allegation that the plaintiffs had been injured in the way of pecuniary or other loss by reason of the said letter. The defendant, in his pleading, objected that the words complained of were not capable of being construed as a libel upon the plaintiffs; that the statement of claim disclosed no cause of action; and that the municipal corporation could not sue in a corporate capacity in respect of the words complained of.

C. A. Russell, for the defendant.—This is not a libel upon the corporation, but upon individual members or officials of the corporation. The corporation has no personal character which can be injuriously affected by libel, and no injury to property is alleged. In the case of *Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 7 W. R. 265, 4 H. & N., p. 90, Pollock, C.B., says:—"A corporation cannot sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes, nor can it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it may."

Blake Odgers, for the plaintiffs.—The libel here complained of can refer only to the corporation as a whole, for it speaks of "scandalous and abominable expenditure," and that money must be voted by the corporate body and not by its individual members. For this wrong the corporation must be entitled to damages. A corporation is liable to be sued for a malicious prosecution, on the ground that it can be guilty of malice by its servants; there is no reason, therefore, why it should not be guilty of corruption by its servants; and if that is the case, it is entitled to sue for an imputation of such corruption.

DAY, J.—This is an action brought by a municipal corporation to recover damages for what is alleged to be a libel on the corporation itself as distinguished from its individual members or officials. The libel complained of consisted of a charge of bribery and corruption. The question is whether such an action will lie. I think it will not.

It is altogether unprecedented, and there is no principle on which it could be founded. The limits of a corporation's right of action for libel are those suggested by Pollock, C.B., in the case which has been referred to. A corporation may sue for a libel affecting property, not for one merely affecting personal reputation. The present case falls within the latter class. There must, therefore, be judgment for the defendant.

LAWRANCE, J.—I am of the same opinion.

Judgment for the defendant.

Solicitors for the plaintiffs, *Austin & Austin*, for *Town Clerk*, Manchester.

Solicitors for the defendant, *Pritchard, Englefield, & Co.*, for *Hinde, Milne, & Bury*, Manchester.

(*a.*) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

IN BANKRUPTCY.

Q. B. Div. (Cave and Vaughan Williams, JJ.) Jan. 15.

Ex parte MANCHESTER AND COUNTY BANK. *In re* HULTON. (*a.*)

Bankruptcy—Money stolen by cashier of bank—Purchase of shares—Right of bank to shares purchased.

The bankrupt, who was the cashier in a bank, misappropriated moneys intrusted to him by his employers for banking purposes, and purchased therewith certain shares. The bankrupt absconded, and an application by the bank for an order that they were entitled to the shares purchased with the stolen money was refused by the county court judge.

Held, on appeal, that the order of the county court must be reversed, and that the trustee in bankruptcy must deliver up the shares to the bank.

Appeal from the refusal of his Honour Judge Jones, in the county court at Oldham, to make an order declaring that certain gold mine shares standing in the name of the bankrupt were the property of the Manchester and County Bank (Limited), and to direct the trustee to deliver up, the scrip and other documents of title to such shares, to the bank.

The bankrupt was formerly in the employment of the Manchester and County Bank as cashier in the branch bank at Oldham, and on January 27, 1890, fifteen £100 notes were sent from the head office at Manchester to the branch at Oldham for banking purposes.

On January 28, 1890, a letter was received by Messrs. Beazley & Co., stock and share dealers, in London, from the bankrupt containing fifteen £100 notes in payment for certain shares. These notes were identical in amounts, dates, and numbers with those sent to the bankrupt from the head office.

On February 1, 1890, the bankrupt absconded, and on the same day a warrant was obtained against him by the Manchester and County Bank on a charge of embezzlement, but this warrant had not been executed.

An order of adjudication having been made against the bankrupt in his absence, the Manchester and County Bank applied to the county court judge for an order declaring that they were entitled to the shares purchased with the money stolen from them, but this application was refused, the judge holding that the bank could not claim the produce of the stolen notes, but could only prove against the bankrupt's estate for the loss sustained by the theft.

The bank appealed.

Smyly, for the appellants.—The notes were put into the care of the cashier as the servant of the bank, and he held them in a fiduciary relation. When he committed a breach of duty to his master in stealing the notes and purchasing the shares, as the notes can be traced in the purchase of the shares, the bank can follow and claim them against the trustee.

Yate Lee, for the trustee.—I admit that stolen property may be followed, but that does not extend to a case where property is stolen and things purchased with the proceeds. The doctrine of following the property has never been so extended, and in certain cases a person might have to elect which property, that stolen or that converted, would be taken.

CAVE, J.—A very ingenious argument has been raised on behalf of the trustee, but it is impossible for us to give effect to it. It is admitted that if the clerk had stolen the fifteen notes and retained them, the trustee must have been ordered to give them up; but it is said that as the notes were exchanged into shares, something was thereby effected so as to enable the trustee to keep the proceeds. In my opinion it is impossible to find any authority for such a contention. The appeal must be allowed, and there must be an order on the trustee to deliver up the shares and to do all things necessary to vest them in the appellants.

VAUGHAN WILLIAMS, J., concurred.

Appeal allowed.

Solicitors for the appellants, *Sale, Sedden, & Co.*, Manchester.

Solicitors for the trustee, *Field, Roscoe, & Co.*

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. Admiralty. Nov. 10.

"THE COUNTY OF DURHAM." (*a.*)

Practice — Appeal — County court having admiralty jurisdiction—District in which to commence action—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 72), *s.* 21—*County Courts Admiralty Jurisdiction Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 2.

A claim by a shipowner under the 2nd section of the County Courts Admiralty Jurisdiction Act, 1869, *arising out of an agreement in relation to the use or hire of a ship belonging to him, is properly brought in the county court having admiralty jurisdiction within the district of which such ship happens to be at the date of the commencement of the suit.*

This was an appeal from a decision of his Honour Judge Seymour, the judge of the county court of Northumberland, holden at Newcastle-upon-Tyne.

By the decision appealed from the county court judge had, in an action arising out of an agreement in relation to the use or hire of the ship *County of Durham*, refused to grant a motion on behalf of the defendants, the charterers of the said vessel, that the action should be dismissed for want of jurisdiction, the ground of the motion being that the suit had been wrongly commenced in the county court of Northumberland, holden at Newcastle-upon-Tyne, within the district, for admiralty purposes, of which *The County of Durham* was at the commencement of the suit.

The judgment of the county court judge, as printed for the purposes of the appeal, was in terms as follows:—

His Honour Judge SEYMOUR.—This is an action brought in the County Court of Northumberland held at Newcastle, on the admiralty side of this court, by the owners of the steamship *County of Durham*, Messrs. Johnson Brothers, of Newcastle, assignees of a charter-party dated the 2nd of April, 1889, made between Messrs. McAllum & Co., of Newcastle, and the defendants, the Poole, Baltic, and Quebec Timber Co. (Limited), as charterers of the ship, for breach of a clause in the charter-party, whereby the defendants warranted a certain depth of water at their wharf at Poole to berth the ship in, and owing to a breach of such warranty the ship ran aground and was damaged. It is expressly agreed between the parties that at the time of the commencement of this action the ship was in the Tyne, and therefore within the admiralty jurisdiction of this court.

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

The defendants have applied by way of motion to dismiss the action for want of jurisdiction, and the question I have to decide is whether their objection is good.

As the question is one of great importance to the shipping interest here and elsewhere, and as I believe this is the first occasion on which the point has been raised in any court, I have taken time to consider my decision.

So far as the plea may be said to depend upon the general admiralty jurisdiction of county courts over a charter-party of this description, no difficulty exists. The difference which prevailed a few years ago between the High Court of Admiralty and the Courts of Common Pleas and Exchequer on the one hand, and the judges of the Privy Council on the other, as to whether county courts in admiralty have not, under recent legislation, a more extensive jurisdiction in certain matters than the High Court in admiralty actions, has been finally set at rest by the decision of the Court of Appeal in the case of *The Alina*, 29 W. R. 94, 5 Ex. D. 227. This case, and that of *Cargo ex Argos*, L. R. 5 P. C. 134, 22 W. R. Dig. 46, are direct authorities for the proposition that an action on a charter-party by the owner or charterer of a ship is an action on an agreement made in relation to the use or hire of a ship within section 2 of the County Courts Admiralty Jurisdiction Act, 1869, and that that Act has given a jurisdiction to the county courts which the High Court of Admiralty did not possess.

The omission of any form applicable to the present case from the statutory forms given under the Act of 1868 may be explained, therefore, by assuming that the latter were, no doubt, compiled from those in use in admiralty actions in the High Court, which had jurisdiction in the cases mentioned in that Act, but not having jurisdiction in cases like the present, necessarily supplied no forms applicable to the case before me.

The only ground, therefore, upon which a plea in denial of the jurisdiction of the court can prevail is that to which the defendants have mainly limited their contention—viz., that the present action has been entered in the wrong district.

In the Act of 1869 there is no express clause defining or limiting the district in which proceedings are to be commenced, but by section 1 of the Act of 1869, the Act of 1868 and the Act of 1869 are to be read and interpreted as one Act. Turning, then, to the Act of 1868, s. 21, it is there provided that proceedings in an admiralty cause shall be commenced—(1) in the county court having admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings; and (2) if the foregoing rule be not applicable, then in the county court having admiralty jurisdiction in the district of which the owner of the vessel or property to which the cause relates, or his agent in England, resides, &c.; and it has been strongly contended and urged with great reliance upon the forms and procedure in admiralty, that the word "vessel" to which the cause relates can only mean the ship or vessel of the defendant. It is clear that until the passing of the Act of 1869 the jurisdiction of the county court over claims for salvage towage, necessaries, or wages, or for damage to cargo or damage by collision, were all in the nature of proceedings for services rendered to, or injury done by, the ship or vessel of the defendant, and in any proceeding *in rem* the only ship in the contemplation of the parties would naturally and logically be the ship of the defendant; but now, by section 2, subsection 1, of the Act of 1869, a county court with admiralty jurisdiction can try any claim arising out of any agreement made in relation to the use or hire of any ship, and the present action is a proceeding *in personam*, under a charter-party, for the use or hire of the plaintiffs' ship, and complaining of damage resulting from breach of that agreement.

It has been argued that the present is not properly a cause relating to a ship, but I don't agree with that view, the expression "cause relating to a ship" only differs from "cause relating to the use or hire of a ship" as the greater differs from the less. If an action on a charter-party which, *ex concessis*, is an action upon an agreement relating to the use of a ship is not an action relating to a ship, it seems difficult to admit that an action for towage or wages is an action relating to a ship. To what ship does the present cause relate? The proceeding itself is not *in rem* but *in personam*, and the only ship indicated is the ship which is the subject of the agreement of hire, for breach of which this action is brought, and there is nothing in the words themselves, "vessel or property to which the cause relates," which involves any violence of construction in holding them to be applicable to the ship either of plaintiff or defendant as the case may be. I hold, therefore, that the present cause does relate to the plaintiffs' vessel, and as that vessel was within my jurisdiction at the time the cause was entered I decide against the application, and I hold that I have jurisdiction to try this action.

I may add that section 4 of the Act of 1869, which extends the jurisdiction of county courts in admiralty to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed £300, is plainly intended to cover cases in which damage may be occasioned in many other ways besides collision, and in which the only vessel to which the cause could be said to relate would be the damaged vessel for which the plaintiffs brought this action. Whether upon the hearing of this cause it may appear to me more convenient and proper that it should be tried within the jurisdiction of the county court at Poole, is a matter which I may have to consider hereafter, but for the present I dismiss the defendants' application, with costs.

The appeal was now heard before the President and Butt, J., sitting as a divisional court of the Probate, Divorce, and Admiralty Division.

J. P. Aspinall appeared for the appellants, defendants in the court below.—The provision contained in the 22nd section of the County Courts Admiralty Jurisdiction Act, 1868, as to the arrest of vessels "to which the cause relates" shows clearly that the Legislature meant by the same phrase in the 21st section of that Act, the vessel of the defendant in the action. This meaning, so known to the Legislature when the Act of 1869 was passed, cannot have been altered by the fact that the two Acts are "to be read as one." Why should a different construction from what it originally bore be put on the section, because rules specifying the districts in which causes like the one now before the court should be commenced, have not yet been made?

Boyd, for the respondents, was not called on to argue.

HANNEN, P.—I have nothing to add to the judgment of the learned county court judge. The County Courts Admiralty Jurisdiction Act, 1868, and the County Courts Admiralty Jurisdiction Act Amendment Act, 1869, are, by section 1 of the later Act, to be read as one. If the construction put on the language of the first Act before the passing of the second Act did not apply to the present case, the effect of the second Act, in my opinion, has been to extend the meaning to be given to that language, and, therefore, applying, as I must do, the words "vessel or property to

which the cause relates" to the actions over which jurisdiction is given by the second Act, I think the action in this case was brought within the right district.

BUTT, J.—I concur, though if it had not been that the two Acts are to be read as one, I should have felt a great doubt.

Solicitors for the appellants, *Cooper & Co.*

Solicitors for the respondents, *Botterell & Roche.*

Court of Appeal.

From Chan. Div. Feb. 10.

In re ARBIB'S AND CLASS'S CONTRACT. (a.)

Vendor and purchaser—Conditions of sale—Right to rescind—Costs of investigating title—"Notwithstanding previous litigation"—Will—Devise to trustee "if and when he shall return to England."

The words "notwithstanding any previous negotiation or litigation" in a condition of sale stipulating that the vendor should be at liberty to annul the sale if unable to satisfy any objection insisted on by the purchaser, cannot be construed as including litigation in which a judicial decision adverse to the vendor has been actually given. Consequently, when, on a vendor and purchaser summons, an order had been made declaring that the vendor had not shown a good title, and directing him to pay the purchaser the costs of investigating the title,

Held, that it was then no longer open to the vendor to avail himself of the above condition.

A testator who died in 1877 *appointed B., "now residing at Adelaide, Australia, if and when he shall return to England," and C., executors and trustees of his will, and devised real estate to his said trustees on trust for sale. The will was proved by C., with power reserved to grant probate to B. if and when he returned to England. B., at the time of the testator's death, and down to and at the present time, was domiciled in Australia, but in* 1885 *he came on a visit to England for the benefit of his health, and stayed there six months, after which he returned to his home in Australia. B. never proved the will, and although in* 1879 *he had indicated an intention to act as trustee, he had not during his visit to England or since, assented to the devise or taken any part in the administration of the trusts of the will, but he had not actually disclaimed.*

Held, that, under the above circumstances, the condition "if and when he shall return to England" had been satisfied by B.; and, consequently, that the trusteeship had become vested in him in 1885.

Appeal from North, J.

W. Bucknall, by his will made in 1871, appointed his son, F. E. Bucknall, "now residing at Port Adelaide, Australia, if and when he shall return to England," G. C. Class, and J. A. Worge executors and trustees of his will; and devised his freehold estates to his said trustees upon trust, that the said trustees or the survivor of them, or other the trustees or trustee for the time being of the will, should sell the estates. The will contained a declaration that the power of appointing a new trustee or new trustees should be exercised by the surviving or continuing trustee or trustees for the time being of the will; and the three sons of the testator were given successively three months' option to take the freehold estates themselves, before the power of sale given to the trustees could take effect, such option to be communicated to the trustees.

Worge died in 1875, during the life of the testator, who died in February, 1877. The will was proved by Class, power being reserved to grant probate to F. E. Bucknall if and when he should return to England. F. E. Bucknall at the date of the will, and down to and at the present time, was domiciled at Adelaide in Australia, and was a member of the Legislature of the Colony of Victoria.

In April, 1879, F. E. Bucknall executed what purported to be a power of attorney to Class to act for him in the matter of the trusts of the will. This instrument, however, not being stamped, was not put in evidence. In 1885 F. E. Bucknall, being ordered a long sea voyage for the benefit of his health, came to England and stayed there with Class for a period of six months till January, 1886, when he returned to Australia. While living in England, Bucknall took no part in the administration of the trusts of the testator's estate, but had not then executed any formal disclaimer. In February, 1886, shortly after Bucknall's departure to Australia, Class, believing himself to be in fact the then sole trustee, appointed Pennick as a new trustee of the will in the place of the deceased trustee Worge; and on November 6, 1890, Class and Pennick, assuming themselves to be the only trustees of the testator's will, and purporting to act as such trustees, in exercise of the power of sale, entered into a contract with E. Arbib to sell the real estate to him.

The 8th condition of the contract stipulated that if the purchaser should make and insist on any requisition or objection, either as to title or conveyance, which the vendors should be unable or unwilling to remove or comply with, the vendors should be at liberty, notwithstanding any previous negotiation or litigation, on giving to the purchaser not less than ten days' notice in writing, to annul the sale; in which case the sale should, at the expiration of the notice, be annulled, the purchaser being, in that event, entitled to a return of the deposit, but without interest, costs, or compensation.

The purchaser took the objection that the testator's freehold estate had vested in F. E. Bucknall when he returned to England in 1885; that Bucknall and Class were therefore the persons in whom the estate was now vested as trustees, and that the present vendors accordingly had not a good title to the property.

On the 6th of November, 1890, North, J., made an order, on a vendor and purchaser summons taken out by the vendors, declaring that the vendors had not shown a good title to the property comprised in the contract.

The purchaser then applied to the vendors to return the deposit, and, the vendors refusing, a summons was taken out by the purchaser to compel them to return it. This summons was heard on November 24, 1890, the vendors opposing the application on the ground that an appeal had been lodged by them against the order of November 6. North, J., directed the deposit to be paid into court, and ordered the vendors to pay to the purchaser the costs of the investigation of title of the property, together with the costs of that summons.

After the decision of North, J., F. E. Bucknall executed a disclaimer of the estate devised to him upon trust by the will of the testator.

The vendors appealed from both orders of North, J.

Byrne, Q.C., and *Grosvenor Woods*, for the appellants.—The first point is as to the meaning of the words "if and when he shall return to England"; that is a question of intention to be gathered from the

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

been made for obvious purposes, after he had accepted the trusts and after the estate had vested in him, and it is, therefore, made too late.

On the second point I agree with the rest of the court. In *In re Hargreave's Contract*, 34 W. R. 708, 32 Ch. D. 654, it was decided that under the words in section 9 of the Vendor and Purchaser Act, which say that on an application in chambers "the judge shall make such order on the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid," the court has power to decide what is to be done as to the costs of the investigation of the title.

On the first of the applications in the present case, where the only question was whether the vendors could make a good title, nothing was said in the order as to who should pay the costs of investigating the title. Then a subsequent summons was taken out to deal with the deposit in the hands of the vendors, and the judge on the hearing of that summons made an order that Class and Pennick should pay to the purchaser the costs of investigating the title. It cannot be denied that this order was within the jurisdiction of the court; that is established by *In re Hargreaves*. When that summons was before the judge it was not then argued that by reason of this condition in the contract of sale giving the vendors the right to rescind and to escape liability for the costs of investigating the title, that order as to costs ought not to be made.

But now the vendors, not having succeeded in persuading us that the order of the judge below as to the title was wrong, ask to be relieved from the further order as to the costs of investigating title. I agree with the Lord Chief Justice and Lindley, L.J., that the condition which allows the vendor to rescind "notwithstanding previous litigation" cannot apply to such a state of things as have happened here. The words "notwithstanding previous litigation" mean, in my opinion, notwithstanding litigation pending, not litigation decided at the time adversely to the vendor. I do not think that the words mean "notwithstanding previous litigation and judgment against the vendor."

Appeal dismissed.

Solicitor for the vendors, *J. M. Mitchell.*

Solicitors for the purchaser, *Wild & Wild.*

From Chan. Div. Feb. 9.

COX v. BENNETT (No. 1). (*a.*)

Trustee—Administration action—Trustees appointed by the court to receive rents and to manage estate with commission upon rental—Commission to rent collector.

Trustees who have been appointed by the court to receive the rents of, and to manage a trust estate, receiving a commisson upon the rental, will not be allowed to charge additional payments made by them to a collector of rents.

Appeal from Kekewich, J.

William Tomlin, by his will dated the 3rd of April, 1865, appointed Edward Cox, George Legg, and John Bennett trustees and executors thereof, and gave to each of his executors who should prove his will the sum of £50, and after making various devises and bequests, devised and bequeathed certain messuages or tenements at Bromley unto his said trustees, upon trust out of the rents thereof to pay and discharge the ground-rents, rates, taxes, and other outgoings, and keep the same in proper repair and insured against fire, and to stand possessed of the surplus rents and profits thereof upon trust to pay the annual proceeds thereof to his daughter Laura for life for her separate use without power of anticipation, and upon trust after her death as therein directed; and the said testator directed that it should be lawful for his said trustees, with and out of the moneys which should come to their respective hands by virtue of the trusts aforesaid, to retain and reimburse themselves respectively and allow to his or their co-trustee or co-trustees all such costs, charges, and expenses as they or any of them should or might respectively actually sustain or incur in or about the execution of the trusts aforesaid, or in anywise relating thereto.

The testator died in 1866 and his will was duly proved by the three executors. The testator's daughter was at the time of these proceedings married to W. J. Midwinter.

In 1867 an action was commenced for carrying the trusts of the will into effect. On the 22nd of April, 1882, an order was made whereby R. Brown and W. J. Midwinter, two of the plaintiffs, were appointed trustees of the will, jointly with John Bennett, in the place of Edward Cox, deceased, and of G. Legg; and it was also ordered that these three trustees should receive the rents and profits of the trust estate and be allowed a commission of £3 per centum per annum, as stated in a former order dated the 1st of February, 1876.

In the trustees' accounts from the 24th of March, 1889, up to and including the 24th of March, 1890, the trustees not only charged their own above-mentioned commission of £3 per cent. on the rents received on Mrs. Midwinter's account, but also charged a further commission of £3 10s. per cent. for Messrs. W. & D. Brown as rent collectors, which further commission was represented by four items of payment, being severally £16 1s. 9d., £15 10s. 3d., £15 8s. 5d., and £15 7s. 6d.

The defendant Mrs. Midwinter took out a summons in the action asking (*inter alia*) that these four items should be disallowed, and on the 1st of December, 1890, an order was made by Kekewich, J., that these four items of disbursement charged against the applicant's share of income of the trust estate in respect of commission at the rate of £3 10s. per cent. paid to Messrs. W. & D. Brown for collecting rents should be disallowed.

The trustees appealed.

Renshaw, Q.C., and *Bramwell Davis*, for the appellants.—The commission paid for collecting the rents has been allowed for years. It was necessary and proper to employ such collectors in the case of rents received monthly from property of a small class. It is a necessary expense which, following the general practice, should be allowed.

J. Mulligan, for Mrs. Midwinter, argued that the trustees could not charge both commissions, and cited *Swaby* v. *Dickon*, 5 Sim. 629.

Renshaw, Q.C., replied.

LINDLEY, L.J. (after referring to the facts, and to the administration action especially).—The substantial question is, whether the trustees should be allowed the payments made by them as commission to the rent collectors whom they employed. What were the trustees directed to do? The order of the 1st of February, 1876, contained nothing authorizing them to pay that commission as well as the commission to themselves, it simply ordered that the trustees should be at liberty to deduct out of the income an allowance of £3 per cent. for their management of the testator's real and leasehold estate. Nothing was

(*a.*) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

aid as to two commissions, but the trustees appear o have paid the salary to the collectors and to have assed their accounts. In 1882 the second order was ade; there is nothing in that order to show that the ourt ever contemplated two commissions. There are ot sufficient grounds for allowing these payments, nd the appeal must be dismissed, with costs.

KAY, L.J. (after stating the facts).—In 1882 an order as made that the trustees should receive the rents nd receive a commission of £3 per cent. as stated in he order of 1876. It is almost impossible that the ourt should allow such a commission as the one now n question. The beneficiary now, being separately epresented, objects to the two commissions, and the bjection must be allowed.

Appeal dismissed, with costs.

Solicitors, *D. Stock; R. T. Webster.*

Original motion. Oct. 24.

In re APOLLINARIS CO.'S TRADE-MARKS. (*a.*)

Practice—Appeal—Security for costs—Appeal by foreign company having a branch business in England—Assets in England of a fluctuating character.

A company resident in France but having a branch business in England, carried on in leasehold premises, upon which they had stock-in-trade to the value of £12,000, besides plant, horses, and vans worth about £1,200, and having also a large amount of English book debts, appealed from an order. The respondents applied for security for the costs of the appeal, upon the ground of the appellants being resident out of the jurisdiction, and of the moveable and fluctuating nature of the English assets.

Held, that there could be no reasonable doubt that the available assets in this country of the appellant company would be found amply sufficient to satisfy any possible costs of the appeal, and, therefore, an order for security for the costs ought not to be made.

Original motion.

In the year 1886 Messrs. Ingram & Royle, who carried on the business of mineral water merchants in England, had given notice of motion under the Patents, &c., Act, 1883, and the Trade-Marks Registration Act, 1875, to remove two trade-marks of the Apollinaris Co. from the register. The business of Messrs. Ingram & Royle had, in the meantime, been purchased by the Vichy Co., which was a duly constituted French company, and when the motion came on for hearing, that company applied by counsel for leave to amend by substituting the name of the Vichy Co. for those of Ingram & Royle. The Apollinaris Co., finding their opponents were a foreign company, applied on that ground for security for the costs of the motion to remove their trade-marks from the register, and obtained an order for security to the amount of £400.

Kekewich, J., having refused with costs the motion to remove the trade-marks from the register, the Vichy Co. appealed from that refusal.

The Apollinaris Co. then applied for security for the costs of that appeal.

The evidence showed that the Vichy Co. had paid £12,000 for their English business purchased from Messrs. Ingram & Royle as mentioned above, that that business was carried on upon leasehold premises in London, the leasehold interest in which was said to be valuable, that the stock-in-trade on those premises was worth more than £12,000 at cost price, and that the company possessed plant, horses, and vans in England to the value of about £1,200, besides book debts owing in the United Kingdom worth more than £8,000, and bills and cash in hand and at their bankers to a considerable amount.

Neville, Q.C., and *John Cutler*, for the Apollinaris Co.—The Vichy Co. is a French company, resident and having its office in France. That creates a *primâ facie* liability on their part to give security for costs. they say they have assets in England, but those assets are of a fluctuating nature and can be readily removed if their appeal is dismissed with costs: *Ebrard* v. *Gassier*, 33 W. R. 287, 28 Ch. D. 232, 235. In that case security for costs was refused on different grounds following *Redondo* v. *Chaytor*, 27 W. R. 701, 4 Q. B. D. 453, but we rely upon that part of the judgment which deals with the fluctuating nature of the assets. [FRY, L.J.—Does *Ebrard* v. *Gassier* apply to the costs of an appeal?] Ord. 58, r. 15, is the rule dealing with such costs. *Grant* v. *Banque Franco-Egyptienne*, 26 W. R. 68, 2 C. P. D. 430, decided on that rule, says nothing as to assets, but decides that the fact of a company being a foreign company is a "special circumstance" (within the meaning of the rule) affording a reason for ordering security. Having regard to the removable nature of the assets here, security should be ordered: *Sacker* v. *Bessler*, 4 Times L. R. 17.

They also referred to *In re Kathleen Mavourneen*, W. N., 1878, p. 215, and to ord. 65, r. 6a.

Warmington, Q.C., and *Sebastian*, for the Vichy Co., were not called upon.

Lord HALSBURY, L.C.—I am of opinion that there is no ground for this motion. The application seems to me to have been made under a misapprehension as to what the rule originally was, whatever its application to the Court of Appeal may be. There is no such hard and fast rule as suggested, that because a litigant is resident abroad he must necessarily give security for costs. The fact of his being so resident creates a *primâ facie* case for requiring him to give security, but to that there is the well known and ordinary exception that if he has goods and chattels in this country available for execution and sufficient to answer every possible claim of the other litigant, it is not customary for the courts to order him to give security for costs. Whether the rule in the Court of Appeal is the same as in courts of first instance I do not consider, because, upon the facts of the present case, I am satisfied that there is no ground for requiring the Vichy Co. to give security. It is said, and with perfect truth, that £12,000 worth of mineral waters and £1,200 worth of horses and carts may be got rid of. Anything may be got rid of. Even land may be sold before the day of execution. But we must bring our common sense to bear upon a matter of this sort; and when we consider the nature of the business carried on by the Vichy Co. and the amount of the stock-in-trade in their possession in this country it is impossible to doubt that their available assets within the jurisdiction will be found capable of answering any possible costs of the appeal, and, therefore, an order for security for costs ought not to be made.

BOWEN, L.J.—I agree.

FRY, L.J.—I agree.

Motion refused.

Solicitors for the Apollinaris Co., *Janson, Cobb, Pearson, & Co.*

Solicitors for the Vichy Co., *M. Abrahams, Sons, & Co.*

(a.) Reported by R. H. DEANE, Esq., Barrister-at-Law.

From Q. B. Div. Feb. 23.

DREW AND ANOTHER v. LEWIS. (a.)

Practice—Charging order—Application to rescind order absolute—Jurisdiction—1 & 2 Vict. c. 110, ss. 14, 15.

The court has no jurisdiction to grant an application to rescind or vary a charging order on stock under 1 & 2 Vict. c. 110, ss. 14, 15, after the order has been made absolute.

Jeffryes v. Reynolds, 52 *L. J. Q. B.* 55, 31 *W. R. Dig.* 147, *followed.*

Appeal from the decision of the Queen's Bench Division affirming an order of the judge in chambers refusing to rescind a charging order absolute.

The plaintiffs, having recovered judgment against the defendant, obtained an order *nisi* under 1 & 2 Vict. c. 110, ss. 14, 15, charging the defendant's interest in certain shares standing in his name in a joint-stock company with the payment of the amount due on the judgment. After the charging order had been made absolute, one Martin took out a summons at chambers to rescind it, on the ground that the shares had been assigned to him by the defendant prior to the charging order *nisi*. Martin had never been registered as owner of the shares, and after the charging order had been granted, the company refused to register him. The Divisional Court (Wills and Wright, JJ.), affirming the order of the judge at chambers held, upon the authority of *Jeffryes* v. *Reynolds*, 52 L. J. Q. B. 55, 31 W. R. Dig. 147, that the court had no power to rescind a charging order absolute.

Martin appealed.

David, for the appellant.—The charging order ought to be rescinded. The shares were not standing in the defendant's name "in his own right" within 1 & 2 Vict. c. 110, s. 14. They had been assigned by deed to the appellant before the judgment had been recovered. The last clause of section 15 of 1 & 2 Vict. c. 110 gives the court power to "discharge or vary" the order. That clause is not confined to the order *nisi*. The decision in *Jeffryes* v. *Reynolds* was wrong, and ought not to be followed. The appellant had no notice of the charging order *nisi*, and so had no opportunity of showing cause against it being made absolute. If this application fails he will be unable to get himself registered and to deal with the shares, and there will be no remedy open to him.

He also referred to *Brereton* v. *Edwards*, 37 W. R. 47, 21 Q. B. D. 488.

C. M. Plumptre, for the plaintiffs, was not called upon.

Lord ESHER, M.R.—In my opinion the decision in *Jeffryes* v. *Reynolds* was perfectly right. The charging order has been made under 1 & 2 Vict. c. 110, ss. 14, 15, and every step prescribed by those sections has been duly followed in this case. The charging order has been made absolute, and it must be assumed rightly made absolute, as there has been no appeal against that order. This is not an appeal against making the order absolute, but it is an independent application to rescind the order absolute. The question, then, is whether the court has any power upon such an application to rescind or vary such an order. The order is made under the provisions of a statute, and the power to rescind or vary it must be conferred by statute. It was said that the last clause in section 15 gives such a power. That clause enacts as follows: "Provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order." Before the order was made absolute such a person as the present applicant, though he would not be served with the order *nisi*, might have appeared to show cause against the order being made absolute. It seems clear to me that the words "such order" in the above proviso refer to the order *nisi*, and not to the order absolute. That proviso does not apply, and there is therefore no enactment giving the court power to discharge or vary the order absolute. Nor has the court any inherent jurisdiction either at common law or in equity to do it. The court, therefore, has no jurisdiction to do what is asked in the present case. It was urged that if this application failed the applicant would have no remedy. It is immaterial to consider whether or not he has any remedy, or to indicate what that remedy is. I must decline to have anything to do with such a consideration.

FRY, L.J.—I am of the same opinion. I concur in saying that *Jeffryes* v. *Reynolds* was rightly decided. The last two clauses of section 15 provide for three things. They provide for making the charging order *nisi* absolute; for discharging it; or for varying it. There is no provision for discharging or varying the order absolute. It was then said that, if that were so, the applicant would have no remedy. I am far from convinced, if the applicant has an absolute equitable interest in these shares, that that is the case, merely because the interest of a third person, the judgment debtor, has been charged. It is not necessary now to consider what that remedy is.

Appeal dismissed.

Solicitors for the applicant, *Rooks & Co.*

Solicitors for the plaintiffs, *Burgess & Cosens.*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

From Q. B. Div. Jan. 26.

MONK v. BARTRAM. (a.)

Practice—Stay of execution pending application for new trial—Judicature Act, 1890 (53 & 54 *Vict. c.* 44).

In the absence of special circumstances the court will not grant a stay of execution pending an application for a new trial where the judge before whom the case was tried has declined to stay execution.

Application for a stay of execution pending the application for a new trial.

The action was tried before Grantham, J., and a jury, and verdict and judgment were given for the plaintiff. The defendant applied for a stay of execution, but Grantham, J., refused the application. The defendant had given notice of motion for a new trial.

Kemp, Q.C., and *Horace Browne*, for the defendant.—The ground of this application is that the judge misdirected the jury at the trial.

Scarlett, for the plaintiff, was not called upon to argue.

Lord ESHER, M.R.—We are very anxious, now that these applications for new trials come to us instead of going to the Divisional Court, not to disturb or depart from the practice which has prevailed. We have, therefore, consulted the judges of the Queen's Bench Division, and we find that the practice which existed there was very like the practice of this court upon similar applications where there has been a trial by a judge without a jury. Where the judge before

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

whom the action was tried, whether with or without a jury, has refused himself to stay execution, the court will not grant a stay unless there are some special circumstances in the case. It is impossible to lay down any hard and fast definition of those special circumstances, but a mere allegation of misdirection, or that the verdict was against the weight of the evidence, or that there was no evidence to go to the jury, is not such a special circumstance. They are the ordinary circumstances of every application for a new trial. In the present case, as no special circumstances have been shown, the application must be refused.

BOWEN and FRY, L.JJ., concurred.

Solicitor for the plaintiff, *Martelli*, for *R. Preston*, Tonbridge.

Solicitor for the defendant, *Frank Cherry*.

From Q. B. Div. Jan. 14.

PITTARD v. OLIVER. (a.)

Slander — Privileged occasion — Meeting of board of guardians—Presence of reporters—Words spoken in bonâ fide *belief of their truth.*

The defendant, a member of a board of guardians, made a speech which would have been privileged if the meeting of the board at which it was made had been a private one.

Held, that the presence of reporters at the meeting, who were not in any way brought there by the defendant, did not destroy the privilege.

Appeal from the decision of Mathew, J.

The plaintiff was clerk to a poor law board of guardians, and in that capacity had claimed to retain certain moneys which had been collected in connection with his office, contending that the board owed him an amount exceeding the amount of these moneys. The plaintiff was called upon by the board to give an explanation within a fortnight. He in the meantime resigned his position, on the ground of ill-health. The defendant shortly afterwards became a member of the board, and at a subsequent meeting of the board, at which reporters were present, moved an amendment to a proposal to pay the plaintiff £50 in settlement of his claim. In the course of his speech he was reported to have said, "The fierce light which had lately been thrown upon public boards prevented them from condoning in any way the defalcations of an unfaithful servant. Surely they could defend themselves and the public against a man, who for years had been robbing public money, by not giving him one farthing more than he could claim." The dispute between the plaintiff and the board, having afterwards been brought before the court, was decided entirely in the plaintiff's favour, and he thereupon brought this action against the defendant for slander.

The defendant pleaded that the words were uttered on a privileged occasion, and the case was tried before Mathew, J., and a jury. The jury found that "the words were spoken honestly in the discharge of a public duty without malice, but carelessly." Mathew, J., entered judgment for the defendant, and the plaintiff appealed.

Candy, Q.C., and *Henry Kisch*, for the plaintiff.—The sole question is whether or not the occasion on which these words were spoken was privileged. It is admitted that, if they had been spoken at a private meeting of the board, that would have been a privileged occasion. The guardians had power to exclude the public from their meetings: *Purcell* v. *Sowler*, 25 W. R. 362, 2 C. P. D. 215. A person claiming privilege makes any defamatory statement at his peril: *Williamson* v. *Frere*, 22 W. R. 878, L. R. 9 C. P. 393. The presence of reporters destroyed the defendant's privilege.

They also cited *Popham* v. *Pickburn*, 10 W. R. 324, and *Lawless* v. *Anglo-Egyptian Cotton Co.*, 17 W. R. 498, L. R. 4 Q. B. 262.

Lockwood, Q.C., and *Johnston Watson*, for the defendant, were not called upon.

Lord ESHER, M.R.—In this case the plaintiff accuses the defendant of having slandered him. The defence is that what was said was spoken without malice and on a privileged occasion. The jury found that the words were spoken without malice and with a *bonâ fide* belief in their truth, but carelessly. The question, therefore, is whether or not the occasion on which they were spoken was privileged. The defendant was a member of a board of guardians. A discussion was raised at a meeting of the board as to the conduct of the plaintiff, who had been a servant of the board. The question before the board was whether the salary then due to the plaintiff should be paid to him in full, or whether part of it ought to be kept back on the ground of (as was alleged) defalcations of the public money on his part.

Undoubtedly it is the duty of a board of guardians to see that the money of the ratepayers is properly expended. It was the defendant's duty as a member of the board to express his opinion on the matter, and being *bonâ fide* of opinion that the money ought not to be given to the plaintiff, he moved an amendment to this effect. It was his duty to give his reasons for his opposition, and he gave them. They amounted to a statement that the plaintiff had embezzled the money of the board. That is really what his reasons come to. He made that statement, as the jury have found, without malice and with a *bonâ fide* belief in its truth, but it was not true. Therefore, if the occasion were not privileged, he would be liable for having made it. If he had made that untrue statement at a meeting at which only the other members of the board were present, it is admitted that the occasion would have been privileged, because he was discharging his duty in discussing the matter, and in expressing his opinion upon it. But the question is whether the presence of other persons who were not members of the board affects the privilege. I do not know whether those other persons were ratepayers or not. If they were ratepayers they were persons interested in the discussion. I know of no authority for saying that it would be any the less the defendant's duty to say what he thought because persons who were obviously interested in the discussion as ratepayers were present. If a person has a duty cast upon him to make certain statements to certain people, and he calls in others to be present who have no interest in the matter for the obvious purpose of letting them hear what he has to say, then I should hold, not that it became any the less his duty to say what he believed to be true, but that the invitation to the other persons to be present was evidence of such malice as would destroy the privilege. In the present case, assuming that some of the persons who were present were reporters and not ratepayers, there is no evidence that the defendant invited them to be present. He could not order them to leave. That could only be done by a majority of the votes of the board. They were allowed to be present by the board, over whose acts he had no con-

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

trol. Was it his duty to refrain from saying what he thought on the matter because persons other than his brother guardians were present, over whose presence he had no control? Surely such a question answers itself. The occasion was privileged for the performance of his duty to his fellow guardians, and the privilege is in no wise affected by the presence of those persons.

We were pressed with a ruling of mine in the case of *Williamson* v. *Frere*. That was not a case of saying anything in the presence of persons other than those interested; it was a publication to persons who were not interested. It is well settled law that to write to a man and tell him that he is a thief or what not is no publication of the libel, and that no question of privilege arises in such a case. But if a person writes defamatory matter on a postcard, which every postman can read, that is a publication, not to the person to whom it is written, but to the postmen. So, too, with regard to cases where something has been said at a place and time where the saying of it is privileged, but a report of it has been inserted in a newspaper. A question then arises as to the privilege of the newspaper proprietor. For instance, as to proceedings in courts of justice, and speeches in the House of Commons. Newspapers may report them, because everyone in the country has an interest in knowing what takes place there. But when a newspaper publishes matter which is not for the benefit or interest of the public at all, then, although the occasion on which the words were spoken may be privileged, the publication by the newspaper of what was said is not privileged, because it is published for its own advantage and not for the interests of the public. That is, in my opinion, the meaning of the case of *Purcell* v. *Sowler*. It is clear, I think, in this case that this was a privileged occasion, and that the action cannot be maintained against the defendant in the absence of malice on his part. The appeal must, therefore, be dismissed.

Sir JAMES HANNEN.—I am of the same opinion. The finding of the jury has eliminated all questions of malice from the case, and the only question left is that of privilege. No doubt in the case of *Purcell* v. *Sowler* all the judges say that it is discretionary whether boards of guardians shall admit the public or not to their discussions, but they do not say that the admission of the public destroys the privilege. The defendant, as a member of the board, had, in my opinion, a duty to state the grounds of his opposition to the proposal. The jury have found that he did honestly believe the statements which he made. The admission of the public was not in any way his doing, it was done by consent of the whole board.

That is the ground on which I base my decision. He had to do his duty under the conditions in which he found the board. It matters not whether the persons present were reporters or not. His duty to speak what he believed to be right was unaffected by a condition of things which had been brought about by the action of the board of guardians. The cases which have been cited are totally different. They have to do with the subsequent publication of privileged matter. Lord Bramwell puts that very clearly when he says in *Purcell* v. *Sowler*, "There was no duty to report such *ex parte* proceedings. If the guardians did not exclude strangers, as they might well have done, the reporter ought to have taken care what he was about, and not to have reported libellous matter, and the defendants, having published it, must take the consequences." That implies that in Lord Bramwell's opinion the original publication at the meeting of the board was privileged.

FRY, L.J.—I am of the same opinion. The defendant, as a member of the board of guardians, owed a duty both to his brother guardians and to the ratepayers to bring forward the amendment which he believed to be the right thing to do under the circumstances, and to support that amendment by such arguments and statements of fact as he considered right and reasonable. The jury have found that he did not go beyond that. The guardians had apparently established a practice of admitting the public at their deliberations. I do not think that the presence of the public in any way affected the defendant's duty and consequent privilege. I will only add that I think it very desirable, where discussions as to the character of individuals take place at meetings of boards of guardians, that the guardians should bear in mind what was said by Cockburn, C.J., in *Purcell* v. *Sowler*, and should conduct such discussions *in camerâ*.

Appeal dismissed.

Solicitor for the plaintiff, *Alexander Pope.*

Solicitors for the defendant, *Charles Robinson & Co.*

High Court of Justice.

Chan. Div. Stirling, J. — Nov. 18, 19; Dec. 18.

MOORE v. KNIGHT. (*a.*)

Partnership—Liability for fraud of co-partner—Solicitor and client—Misrepresentation—Statute of Limitations (21 *Jac.* 1, *c.* 16)—*Trustee Act*, 1888 (51 *&* 52 *Vict. c.* 59), *s.* 8.

S. M. deposited, between the years 1867 *and* 1876, *with her solicitors, Messrs. M., G., & B., sums amounting to* £351 *for investment. G. died in* 1877, *B. died in* 1887, *and M., who was adjudicated bankrupt in* 1888, *died in* 1890. *Interest at five per cent. was paid to S. M. by the firm down to G.'s death, and by the surviving partners from then to* 1886. *S. M. claimed to recover from the joint assets of the partnership, which was being wound up in another action, or (if these were not sufficient) from the legal personal representatives of G. and B. and the trustee in bankruptcy of M., the sums so placed with the firm for investment, which (except as to an amount of* £50) *were in fact never invested, but misappropriated and applied to the purposes of the firm.*

In 1876, *before G.'s death, an account was rendered by the firm containing misrepresentations as to all the sums (except the* £50), *and by a continuance of such misrepresentations the plaintiff was prevented from discovering the truth till* 1886, *when the period fixed by the Statute of Limitations had expired.*

The personal representative of G., who alone really defended the action, relied on a plea of this statute and the Trustee Act, 1888.

Held, that the principles laid down in Blair v. Bromley, 5 *Hare*, 542, 2 *Phil.* 354, *which did not proceed on any rule or principle of equity specially applicable to trustees, applied and remained unaffected by the Trustee Act*, 1888, *and the plaintiff was entitled to the relief claimed by her.*

Action.

The plaintiff, Sarah Moore, at various dates between the 28th of June, 1867, and the 9th of

(*a.*) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

December, 1874, deposited with Messrs. Miles, Gregory, & Bouskell, a firm of solicitors carrying on business at Leicester, various sums, amounting in the whole to £351, for the purpose of investment. During the period just mentioned, and for some time afterwards, the firm consisted of Thomas Miles, William Gregory, and James Bouskell.

William Gregory died on the 30th of April, 1877, and the defendant Gregory Knight was his legal personal representative.

In 1878 an action, *In re Gregory, Miles* v. *Knight*, was commenced by Miles against Gregory Knight and Bouskell for the purpose of winding up the partnership affairs. In this action, which was still pending, a receiver had been appointed, and in his hands or in court were considerable assets of the partnership.

James Bouskell died on the 4th of January, 1887, and the defendant, Rose Mary Bouskell, was his legal personal representative.

In April, 1888, Thomas Miles was adjudicated a bankrupt, and the defendant Palmer was trustee in his bankruptcy. Miles himself died in the beginning of 1890.

Down to the death of W. Gregory interest at five per cent. was regularly paid by the firm to the plaintiff, and, after his death, down to 1886 interest at the same rate was paid to her by the surviving partners. The firm invested £50, part of the funds so deposited with them, on an investment called Frost's security, and no question arose as to this in the present action.

The books of the firm were most imperfectly kept, and, with the exception of the Frost investment, already mentioned, the only trace of any investment which appeared in them was of a sum of £152 (made up apparently of a sum of £150 deposited on the 28th of June, 1867, and £2 to be taken as interest which had accrued thereon), which would seem to have been lent on the security of property belonging to one Miss Ellen Price. In the ledger under date the 18th of December, 1876, there were the following entries:—

	£	s.	d.
To cash, from Mr. John Bunny, balance of purchase-money	1,000	0	0

	£	s.	d.
By cash paid Miss Sarah Moore, principal on mortgage . .	152	0	0
By cash paid Miss Moore, interest on mortgage	3	14	5
By cash, on account . . .	20	0	0
By balance	824	5	7

And there was appended a receipt signed by Ellen Price for the balance of £824 5s. 7d.

The sum of £152 was not paid to the plaintiff, nor was she informed of the security (if it existed) having been paid off; and no trace of any reinvestment of the £152 was to be found in the books.

From time to time the plaintiff received accounts of the interest due to her, the first being that for interest during the year 1876, but no investment except that of Frost was specifically mentioned.

The account for 1876 contained the following entries:—

	£	s.	d.
June 25, half-year's interest on £152, due this day	3	15	4
December 31, interest on £152 from the 25th of June to this day .	3	18	8

It was proved that this account was made out, or copied by a clerk of the firm on behalf of the firm.

The subsequent accounts were similar in form, and contained similar entries.

The present action was brought by Sarah Moore against Gregory Knight, Rose Mary Bouskell, and Palmer, alleging by her statement of claim that Miles, Gregory, & Bouskell invested £50, part of the funds so deposited with them by the plaintiff, on a security called Frost's security, but that they converted the rest of the money to their own use; and she claimed the following relief:—(1) A declaration that she was entitled to be paid out of the assets of the late firm of Miles, Gregory, & Bouskell the sums neglected to be invested, with interest at five per cent. per annum, and that the plaintiff be at liberty to carry in a claim for this amount in the action of *In re Gregory, Miles* v. *Knight*; (2) A declaration that if the joint estate was not sufficient the plaintiff was entitled to recover the balance out of the separate estates of the partners.

Rose Mary Bouskell did not appear, and as against her the action came on upon motion for judgment. Palmer appeared, and at the trial in substance supported the case of the plaintiff. Gregory Knight alone really defended the action, and at the trial, having abandoned various defences raised by the pleadings, he relied on a plea of the Statute of Limitations (21 Jac. 1) and 51 & 52 Vict. c. 59 (the Trustee Act, 1888), s. 8.

Ribton and *Bartley Denniss*, for the plaintiff.—We rely on the decision in *Blair* v. *Bromley*, 5 Hare, 542, 2 Phil. 354, which shows that a partner is bound by the misrepresentations of his co-partner in matters within their business, and that the effect of the misrepresentations, as far as regards the Statute of Limitations, is the same as if they had been made on the day after the fraud had been discovered.

They also cited *Gibbs* v. *Guild*, 30 W. R. 407, 591, 8 Q. B. D. 296, 9 *Ibid.* 59; *Metropolitan Bank* v. *Heiron*, 29 W. R. 370, 5 Ex. D. 319; and *Dooby* v. *Watson*, 36 W. R. 764, 39 Ch. D. 178.

Graham Hastings, Q.C., and *Woodroffe*, for the defendant Gregory Knight.—The Trustee Act, 1888, has rendered the decision in *Blair* v. *Bromley* inapplicable, and the plaintiff cannot bring his case within any of the exceptions of section 8 of that Act.

They cited *Watson* v. *Woodman*, 24 W. R. 47, L. R. 20 Eq. 721, and *Manby* v. *Manby*, 24 W. R. 699, 3 Ch. D. 101.

B. Fossett Lock, for the trustee in bankruptcy of Miles.

Ribton, in reply.—*Blair* v. *Bromley* proceeds upon the principle of partnership, and not of any rule specially applicable to trustees. The Trustee Act, 1888, has therefore no application, and the propositions in that case remain unaffected.

Cur. adv. vult.

Dec. 18.—STIRLING, J.—[After stating the facts, and observing that the form of the accounts was such as would naturally lead the person receiving them to believe that the various principal sums mentioned in them had been duly invested, and therefore amounted to representations that investments had been duly made of the various sums deposited by the petitioner, taking as example the account for 1876:—] In support of the plaintiff's case *Blair* v. *Bromley* was mainly relied on. For the defendant Knight it was hardly disputed that but for the recent change introduced into the law by the Trustee Act, 1888, *Blair* v. *Bromley* would have applied; but it was said that that statute had rendered that decision no longer applicable, and that the present case did not fall within any of the exceptions mentioned—viz., "where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee is party or privy, or is to recover trust pro-

perty or the proceeds thereof, still retained by the trustee, or previously received by the trustee, and converted to his use."

To this it was answered, first, that the case fell within the specified exceptions, and, secondly, that, even if the statute applied, a trustee was under it entitled to the benefit of the Statute of Limitations in the like manner and to the same extent as a person not a trustee; that *Blair* v. *Bromley* did not proceed on any principle or rule of equity specially applicable to trustees; and that the principle of the decision remained unaffected by the statute.

I have not been able to satisfy myself that the present case, regard being had to section 2, sub-section 4, does not in truth fall within the last exception. The money was received by the firm, and upon the evidence it was, in my opinion, converted to the use of the firm on or shortly after December 31, 1876. I think, however, it is unnecessary to express a final opinion on this, as in my judgment the second argument urged on behalf of the plaintiff ought to prevail.

The material facts in *Blair* v. *Bromley* were that William Bromley and Joseph Wm. Bromley carried on business in partnership as solicitors. In 1829 William Bromley received from the plaintiffs a cheque for £4,500 for investment on a specific mortgage then in contemplation; and the amount was received and placed to the account of the Messrs. Bromleys with their bankers. The mortgage transaction was subsequently broken off, and the money was never invested; but William Bromley concealed the fact from the plaintiffs and rendered accounts from time to time in which he treated the £4,500 as invested on the specific mortgage. In 1834 the partnership was dissolved. Interest was paid down to 1844, when William Bromley became bankrupt, and the plaintiffs therefore filed a bill against Joseph Wm. Bromley, the innocent partner, to recover the amount, and the defendant pleaded the Statute of Limitations, but the plea failed. [His lordship then referred to the judgment of Cottenham, L.C., in 2 Ph., at pp. 359 and 360, and continued:—] It appears, therefore, that the money came into the hands of the firm without fraud, and that one of the firm afterwards committed a fraud in respect of it, but made misrepresentations (some of which were attributable to the firm) which prevented the fraud from being discovered until the period fixed by the Statute of Limitations had expired. It was held that the innocent partner was deprived of the benefit of the statute by these representations, which bound him as a partner. The decision is rested on principles of the law of partnership, not on those of trust; and I think it is unaffected by the provisions of the Trustee Act, 1888.

Here the money of the plaintiff came without fraud into the hands of the firm for investment; no investment was made, but the money was (by some act of which I am willing to believe that William Gregory was innocent) misappropriated, and applied to the purposes of the firm. In 1876, before the death of Gregory an account was rendered by the firm, which contains misrepresentations as regards all the sums except that invested on Frost's security, and by a continuance of such misrepresentations the plaintiff was prevented from discovering the truth until 1886. The principles laid down in *Blair* v. *Bromley* appear to me to apply.

It was said that a distinction ought to be made as regards the sum of £152, inasmuch as that was paid off only a few months before the death of William Gregory, and the firm would be entitled to time, to find another investment. There is nothing, however, to show that this sum did not, on the 18th of December, 1876, find its way into the general assets of the firm, or that it was, when received, set apart or earmarked in any way. The account of 1876 contains misrepresentations as regards this sum as well as all the other sums deposited, except that which became the subject of Frost's security; and with that exception it seems to me that no distinction can be drawn between any of the deposits.

If reliance is placed on section 8, sub-section 1 (*b*), of the Act of 1888, then it is to be observed that the case of *Gibbs* v. *Guild* shows that, by a proper form of pleading, the benefit of the decision in *Blair* v. *Bromley* (which is recognized by the Court of Appeal in *Gibbs* v. *Guild*) may be obtained by the plaintiffs. As regards Frost's security, it appears to have consisted of a conditional surrender by one Samuel Frost to the plaintiff of certain copyhold property held of a manor of which Thomas Miles was the steward. This conditional surrender was not entered on the court rolls, and contained, when handed to the plaintiff, a memorandum indorsed thereon in the following terms: "Paid off 2nd April, 1885." The plaintiff never received the money, nor knew that it had been paid off; and she compromised her claim against the owner of the property which formed the subject of the surrender for £25. There is no evidence to show that Wm. Gregory is in any way responsible in respect of this investment, and I do not see how any claim in respect of it can be made against the joint assets of the partnership or the separate assets of Wm. Gregory. It appears, however, from the interest accounts that the total sum on which interest was paid was not £351 (in respect of which the action is brought) but £408. I have not been able to discover the explanation of the discrepancy; subject to this, it seems to me that the plaintiff is entitled to relief against the assets and the estate of Wm. Gregory in respect of £301. As to the nature of the relief, first the plaintiff is entitled to be paid the amount of her claim out of the partnership assets of the firm of Miles, Gregory, & Bouskell. Those assets are under the control of the court in the action of *In re Gregory, Miles* v. *Knight*, and the simplest mode of making them available for the plaintiff's benefit appears to be to give her leave to make such application as she may be advised in that action. The plaintiff is also entitled to a declaration that if the joint estate is not sufficient to satisfy her claim, she is entitled to recover the balance out of the separate estates of Wm. Gregory, Jas. Bouskell, and Thos. Miles.

As regards the estate of Wm. Gregory, it appears that on the 8th of December, 1877, judgment was given for the administration of it in an action, *In re Gregory, Astley* v. *Knight*, the plaintiff being one of the next of kin of Wm. Gregory. The plaintiff did not prove her debt in that action. By the certificate, dated the 26th of May, 1888, the debts were found, and it is further stated as follows:—"In addition to the said debts there may be a liability on the part of the intestate to pay a sum in respect of the partnership in which he was engaged at the time of his death, which is now the subject of an action in this court entitled *In re Gregory, Miles* v. *Knight*." By the order on further consideration, dated the 24th of July, 1886, it was ordered, with the consent of the next of kin, and also of Thos. Miles and Jas. Bouskell, that the residue of the intestate's estate, after payment of the debts, should be paid out to the defendant Knight upon his undertaking duly to administer such estate. The residue was paid out accordingly; how it has been disposed of does not appear, and the defendant Knight does not admit assets. The strict right of the plaintiff would seem to be to enforce the undertaking embodied in the order of the 24th of

July, 1886, but I understand that the defendant Knight does not object to an order in this action for appropriate accounts and inquiries.

The defendant Rose Mary Bouskell does not appear. As regards her, the plaintiff would seem entitled to an administration judgment according to the form given in *Hills* v. *McRae*, 9 Ha. 297: see also *In re Hodgson*, 34 W. R. 127, 31 Ch. D. 177.

The proof of the plaintiff against the estate of Thomas Miles has been admitted by the defendant Palmer, and consequently no further relief is required against him.

The plaintiff is entitled to costs against Gregory Knight, who has set up a defence which has failed.

Solicitors, *H. H. Hood Barrs; Robinson, Preston, & Stow*, for *Berridge & Miles*, Leicester; *Smith, Fawdon, & Son*, for *Wright, Williams, & Wright*, Leicester.

Chan. Div. } Kekewich, J. } Feb. 6.

GREENWOOD v. TURNER. (a.)

Vendor and purchaser—Specific performance—Purchaser in possession—Title accepted—Purchaser's option to pay purchase-money into court or give up possession—Interest.

The underlessee of some property contracted to purchase it, paid a deposit, and accepted the title. By the contract the day fixed for completion was the date of the expiration of the lease, and the purchaser was to pay interest on the purchase-money in default of completion. The purchaser remained in possession, but refused to complete or pay the purchase-money; he claimed to be in possession under the sub-lease, not under the contract, and now offered to pay rent. On motion for an order on the purchaser to pay the purchase-money into court,

Held, that the purchaser had an option, and must elect to pay the purchase-money into court within a month or to give up possession; and, if he should give up possession, that he must pay interest on the purchase-money at four per cent. from the day fixed for completion.

There is no rule that a purchaser in possession loses this option by accepting the title.

Motion that the defendant, having accepted the title to certain hereditaments, the subject of the action, and being in possession thereof, might be ordered, within four days after service of the order, to lodge in court to the credit of the action the sum of £4,750, being the unpaid balance of the purchase-money of the said premises, together with interest thereon at four per cent. from the 24th of June, 1890, to the date of payment.

The question was whether the defendant ought to be allowed the option of giving up possession.

The action was for specific performance of an agreement of the 22nd of August, 1889, whereby the defendant agreed to purchase the property in question. At that time he was in possession of the property as underlessee of a tenant whose lease would expire on the 24th of June, 1890. It was accordingly provided by the agreement that that should be the date fixed for completion, and that the purchaser should pay interest on the purchase-money in default of completion on that date.

The defendant paid a deposit of £250, and made no objection to the plaintiffs' title, but he retained possession of the property after the 24th of June, 1890, and refused to complete the purchase or pay purchase-money, or interest, or rent. He now filed an affidavit alleging that he was in possession under the sub-lease, not under the contract, and offering to pay rent.

Warmington, Q.C., and *Dauney*, for the plaintiffs.—We are entitled to an order for payment into court. The defendant has accepted our title, and on that account he will not be allowed to elect whether to give up possession or to pay the purchase-money into court. He only has that option where the title has not been made out: *Crutchley* v. *Jerningham*, 2 Mer. 502; *Tindal* v. *Cobham*, 2 My. & K. 385; *Clarke* v. *Wilson*, 15 Ves. 317; *Gibson* v. *Clarke*, 1 Ves. & B. 500; Sugden on Vendors and Purchasers, 14th ed., p. 229.

Theobald, for the defendant, referred to *Lewis* v. *James*, 34 W. R. 619, 32 Ch. D. 326.

Warmington, Q.C., replied.

KEKEWICH, J.—I feel strongly tempted to make this order, because I cannot help thinking that the purchaser has retained possession as long as he could, and but for this action would have retained it still. That is to say, he is endeavouring as far as possible to have the benefit of the contract and yet retain the purchase-money. If I could find any authority to that effect I should act upon it with great readiness, but my recollection of the practice of the court and the cases combined, prevents me from making the order. If I did so I should be establishing a new rule. In *Lewis* v. *James* Cotton, L.J., states the rule, which is well known, and I only take it from that case because it expresses the rule in plain words and in better language than I could frame. He says: "This is in some respects like a case where a purchaser, being in possession, is required to pay into court, if he remain in possession, the purchase-money agreed upon; but it is well known that in such a case, under ordinary circumstances, an option is given to the purchaser to go out, and the order only is that if he continue in possession he must pay the price into court." He then refers to two cases, one of which is that of a railway company, which illustrates a large class of cases where the purchaser remains in possession and is doing something which is inconsistent with the property remaining intact or with restoring it in its original state, and the court on that ground orders payment into court. The Lord Justice refers to the principle of those cases as being what I have already stated, and he does not refer to any other exception from the ordinary rule. I turn to the other cases, and in all of them I find that the purchaser has had the option of retiring from possession.

Now it is said that in all these cases there was an objection to the title. There was an objection in *Clarke* v. *Wilson*, and in *Tindal* v. *Cobham*, and in *Gibson* v. *Clarke*. There there were very special circumstances, for the purchaser had been let into possession in the confidence that a good title would be made out, and the confidence was not made good, and Lord Eldon said that he must pay the money or restore the land; the order, made by agreement, was that the purchaser should restore possession, accounting for the rents, without prejudice to any question between the parties.

I find no rule, nor anything approaching to a rule, that where a purchaser has taken and remains in possession, although the possession was under the contract, he is bound to pay the money into court unless under such circumstances as I have mentioned; and if I were to hold that he had no option I think I should be extending the rule. I therefore refuse to make an order for payment into court. The purchaser must have the option of retiring from possession.

(a.) Reported by H. C. ROPER, Esq., Barrister-at-Law.

Warmington, Q.C., asked for interest on the purchase-money according to the terms of the contract.

Theobald argued that that would be inconsistent with the option allowed to him, and that at all events such an order ought not to be made on the motion.

KEKEWICH, J.—Such an order was made in *Tindal* v. *Cobham* and in *Gibson* v. *Clarke*. You are claiming to have the benefit of six months' possession for nothing. The order will be that the defendant elect either to pay the purchase-money into court by the 6th of March—*i.e.*, within one month—or to give up possession on that day; if he gives up possession, then he must pay to the plaintiff interest at 4 per cent. on the purchase-money from the 24th of June, 1890, to the 6th of March.

Solicitors, *Edward C. Hilder; Pontifex, Hewitt, & Pitt.*

Q. B. Div. (Cave and Vaughan Williams, JJ.) Jan. 30; Feb. 4.

JOYCE *v.* BEALL. (*a.*)

Practice—Discovery of documents—Two defendants—Separate defences—Security for costs of discovery—R. S. C., 1883, *ord.* 31, *r.* 26.

In an action against two defendants, who appeared by the same solicitor, but severed their defences, the plaintiff applied for discovery of documents.

Held, that, the defendants being sued jointly in substance as well as in form, the plaintiff was not bound under ord. 31, *r.* 26, *to pay into court more than one sum of* £5.

Appeal from chambers.

In this case the plaintiff sued two defendants who appeared by the same solicitor but severed their defences. The plaintiff paid £5 into court to the "security for costs account" and applied in chambers for an order against both defendants to file an affidavit of documents. The master refused to make the order, holding that two sums of £5 each must be paid in, there being two defendants with separate defences. The plaintiff appealed to A. L. Smith, J., in chambers, and he referred the question to the court.

Witt, for the plaintiff.—By ord. 31, r. 26, the right to demand payment into court is confined to £5 only. There is a discretion in the court or a judge to order an additional sum to be paid in: *Campbell* v. *Lord Poulett*, 28 SOLICITORS' JOURNAL, 301, W. N., 1884, p. 48; *Eder* v. *Attenborough*, 37 W. R. 507, 23 Q. B. D. 130; *The Liverpool and Manchester Aerated Bread and Café Co.* v. *Firth*, *ante*, p. 269 [1891], 1 Ch. 367, is distinguishable.

Cautley (*Herbert Reed* with him), for the defendant.—Separate affidavits will have to be made by the defendants, and there ought to be separate sums as security for their costs.

He referred to *Smith* v. *Reed*, 28 SOLICITORS' JOURNAL, 84, W. N., 1883, p. 1 6.

Feb. 4.—VAUGHAN WILLIAMS, J.—In this case the plaintiff took out a summons asking that the defendants might be ordered to make and file an affidavit of documents. The summons came on before Master Butler, who refused to make any order, on the ground that the plaintiff had paid into court one sum only of £5; whereas, in his opinion the plaintiff should have paid into court two sums of £5, the defendants having severed their defences. The plaintiff appealed against this refusal to the judge in chambers. A. L. Smith, J., referred the matter to the Divisional Court, considering the point of practice one that should be definitely settled. In my opinion the learned master was wrong. Rule 26 of order 31 provides that "any party seeking discovery otherwise than by interrogatories shall, before making application for discovery, pay into court the sum of £5." It seems to me that the plaintiff in this case is a party so seeking discovery, and I do not see on what ground it can be said that he must pay into court a further sum of £5. It is quite true that rule 26 goes on to say that the party seeking discovery otherwise than by interrogatories "may be ordered further to pay into court such additional sum as the court or a judge shall direct," but this means such further sum as the judge shall in his discretion direct; but the master did not act on this portion of the rule, he did not purport to exercise a discretion in the matter. He simply held, as a matter of practice, that where a plaintiff sues more than one defendant he must, if he requires more than one affidavit of documents, pay an extra £5 in respect of each affidavit which he requires. I see nothing in the order to justify this. There may be an action which really is not one action, but two or more actions amalgamated under the same writ, as, for instance, where a plaintiff sues defendants alternatively, or where a plaintiff sues different defendants for different causes of action—*e.g.*, distinct frauds alleged to be committed by them respectively. In such a case it seems to me that the plaintiff would really be a party to two distinct actions, and the defendants would in such cases be distinct parties; but the mere fact that there are more plaintiffs than one or more defendants than one does not prevent the plaintiffs collectively from being "a party" or the defendants collectively from being "a party," nor do I think that the fact that the defendants sever their defence prevents the defendants collectively being "a party" where they are sued jointly in substance as well as in form. In order to ascertain whether two actions are being brought you must consider whether the alleged causes of action are distinct. This seems to me the only case in which the collective plaintiffs or the collective defendants do not fall within the term "a party," and, therefore, the only case in which the plaintiffs or the defendants can be called upon to make a second deposit of £5, although it may very well be that the number of the plaintiffs or the defendants may be a good ground for the judge, in his discretion, ordering a payment into court beyond the £5. Indeed, if this is not a ground on which the further payment may be ordered, it is difficult to see in what case a further sum can be ordered to be paid into court, because it cannot be that the further sum depends on the length of the affidavit, which is unknown when the order is made. Inasmuch as I understand that in the present case the order was opposed both before us and before the master on the ground solely that a second sum of £5 ought to be paid, I think that this appeal ought to be allowed, with costs, and the order prayed for in the summons made.

CAVE, J.—I am of the same opinion. I only wish to add that since we heard the argument in this case I have spoken to Stirling, J., who authorizes me to say that he did not intend in the *Liverpool and Manchester Aerated Bread and Café Co.* v. *Firth* to decide anything inconsistent with the decision in *Eder* v. *Attenborough*.

Appeal allowed.

Solicitors for the plaintiff, *Greenop & Sons.*

Solicitors for the defendants, *Beall & Co.*

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

Q. B. D. (Stephen and Charles, JJ.) Dec. 1.

REG. v. COMMISSIONERS OF INLAND REVENUE.
Ex parte OHLSON.
REG. v. COMMISSIONERS OF INLAND REVENUE.
Ex parte GARLAND.

Pawnbrokers Act, 1872 (35 & 36 *Vict. c.* 93), *s.* 39—*Certificate—Licence—Person being a licensed pawnbroker at commencement of Act, his assigns or successors—Inland revenue.*

The successor by purchase or assignment of a person who, at the commencement of the Pawnbrokers Act, 1872, *was a licensed pawnbroker is entitled to a licence without the production of a certificate of justices within the meaning of the saving clause of section* 39 *of that Act.*

Cause shown against rule for a *mandamus* calling upon the Commissioners of Inland Revenue to grant licences to certain pawnbrokers.

By the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 37: "Every pawnbroker shall yearly take out from the Commissioners of Inland Revenue an excise licence for carrying on his business, for which licence there shall be charged and paid an excise duty of £7 10s." "A separate licence shall be taken out by such pawnbroker for each pawnbroker's shop kept."

By section 39, "After the passing of this Act a pawnbroker's licence shall not be granted to any person except on the production and in pursuance of the authority of a certificate granted under this Act, save that it shall not be necessary for any person, being at the commencement of this Act a licensed pawnbroker, or for his executors, administrators, assigns, or successors to obtain such a certificate."

By section 40, "Certificates under this Act shall be granted (as regards England) in the Metropolitan Police District by a magistrate sitting at any police court in the metropolis having jurisdiction in the district where the application is made, and in any place within the jurisdiction of a stipendiary magistrate, by that magistrate, and in other places by the justices of the petty sessional division assembled at petty sessions specially convened for that purpose."

By section 43, "An application for a certificate shall not be refused except on the following grounds, or one of them:—

"(1) That the applicant has failed to produce satisfactory evidence of good character.

"(2) That the shop in which he intends to carry on the business of a pawnbroker, or any adjacent house or place owned or occupied by him, is frequented by thieves or persons of bad character.

"(3) That he has not complied with the provisions of the last-preceding section" (section 42) as to giving notices of his intention to apply

The present appellants, Ohlson and Garland, respectively had claimed to have their licences as pawnbrokers renewed without the necessity of obtaining certificates as being "persons who were licensed pawnbrokers at the commencement of the above Act, or their assigns or successors," and therefore within the saving clause of section 39. The commissioners had refused to renew their licences unless a certificate had been in each case first obtained.

Each party now appealed, and their cases were heard together.

Ohlson claimed under the following circumstances:—One Creshull, who was a licensed pawnbroker at the commencement of the Pawnbrokers Act, 1872, carried on business in Holloway. His licence for that business was renewed up to 1882, when he died, and his business was carried on by his widow until transferred to one Lucombe, who married her, and to whom the licence was annually renewed. Since 1872 Lucombe had transferred the business to Hornsey, and in 1887 he assigned the business as carried on at Hornsey to Ohlson. Creshull had also, before 1872, opened another business at Stamford Hill, which had been assigned by his widow to one Pockett. Pockett, in 1886, assigned the Stamford Hill business also to Ohlson, to whom the licence had been annually renewed. Ohlson in both cases had had a licence annually renewed without demand for any certificate, and he now claimed to come within the saving clause of section 39 of the above Act, exempting assignees and successors of any person being a licensed pawnbroker at the time of the passing of the Act.

Garland was himself a licensed pawnbroker in 1872, at the time of the passing of the Act, in partnership with a brother at Kennington, to both of whom the licence had annually been renewed. In 1887 the partnership had been dissolved. Garland now desired to open a new business at Teddington, but a licence was refused unless he produced a certificate. This he claimed to be exempted from, under the same section, as having been a licensed pawnbroker at the time of the Act of 1872. There was no allegation of unfitness against either appellant, either in regard to personal character or in respect of the premises where the business was proposed to be carried on.

Sir E. Clarke, S.G., and *Danckwerts*, for the respondents, the Commissioners of Inland Revenue, showed cause against the rule.—Before 1872 a pawnbroker's licence had by 27 & 28 Vict. c. 56, s. 6, been converted into an excise duty, and anyone might take out such a licence. By the Pawnbrokers Act, 1872, a licence was made to depend upon the fitness of the character of the applicant and the suitability of the premises. The only exception made was in respect of pawnbrokers then existing. That must mean "to any particular business then existing, and to the successors or assignees of that particular business." Otherwise any successor or assignee can open any number of new premises for this business, and, by transferring these to other persons, would obtain exemptions from obtaining certificates, thus making the Act of no effect. [STEPHEN, J.—You would limit section 39 to some hereditary caste of pawnbrokers?] The licence is given for some particular premises. The meaning of "licensed person" in section 39 is a person licensed for carrying on the specified business at the particular premises licensed. It must be limited to "the then existing business."

Woolf, Q.C. (*Finlay, Q.C.*, with him), for the appellant in each case.—The practice of the Inland Revenue has hitherto been to grant licences to these appellants without any demand for certificates. There is a decision on this point by Sir Thomas Henry, as magistrate, in 1874 cited in Turner's Pawnbrokers Acts, 2nd ed., p. 135: *Reg.* v. *Bate*. That decision was acquiesced in by the Inland Revenue, who declined the magistrate's offer to state a case for appeal.

STEPHEN, J.—We must decide the meaning of these words of the saving clause in section 39 of the Pawnbrokers Act, 1872, in favour of the appellants in each case. To construe them in favour of the Commissioners we must read into the section the restrictive words "in respect of the particular business which such person was then carrying on." What carries most weight with me, I will confess, is the fact that for eighteen years the practice of the Inland Revenue has been other than what is now contended for. The fact that a case was requested to be stated

(a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

upon the decision of Sir Thomas Henry soon after the Act was passed is also relevant evidence to support us in our decision. The words of the Act are clear, the practice has been long established. Whatever disadvantages may accrue under such an interpretation must be remedied by Parliament if it can spare the time. This rule must be made absolute.

CHARLES, J.—I am of the same opinion. The practice hitherto of the Inland Revenue Office has been in accordance with the language of the statute. We are asked to read into section 39 of this Act words restrictive of a privilege which, without such words being supplied, is undoubtedly conferred. The section would have to be read as only exempting "a person being at the commencement of this Act a licensed pawnbroker in respect of premises for which the then existing licence is held." There is no justification upon the statute for the introduction of any such limitation. The section confers the privilege granted upon a person "then being a licensed pawnbroker" without any other limitation. In the cases before us, Ohlson was clearly an assignee of Pockett, who was at the time of the Act a licensed pawnbroker, and he is also a successor to Creshull, who also comes within the definition of the Act, and was a person entitled to open new premises, provided he had a new licence, without taking out a certificate. In the second case, Garland was actually a licensed pawnbroker himself at the date of the Act; he has since retired from the particular pawnbroking business for which he was then licensed, but he applies for a licence to open a new business on other premises without obtaining a certificate. He is clearly entitled, under the provisions of section 39, to do so.

Rule made absolute.

Solicitors for the appellants, *J. & C. Attenborough.*

Solicitor for the respondents, *The Solicitor to the Inland Revenue.*

Q. B. Div. (Charles, J.) Nov. 14, 15.

SMITH, HILL, & Co. *v.* PYMAN, BELL, & Co. (*a.*)

Shipping—Advanced freight—Clause in charter-party—"One-third freight, if required, to be advanced, less three per cent. for interest and insurance"—Loss of vessel before requirement of advanced freight—Right to recover advanced freight.

Advanced freight, being a payment made for the taking goods on board and for the undertaking to carry them, and not for the safe carriage of them, may be recovered in an action by a shipowner under a clause in a charter-party that "one-third freight, if required, should be advanced, less three per cent. for interest and insurance," although the demand for such payment was not made until after the vessel had become a total loss.

Further consideration before Charles, J., of a case tried before him at Leeds Assizes.

The action was brought by shipowners on a charter-party, and was to recover the sum of £245, for "advanced freight." The charter-party was in the usual form, and by it the defendants chartered the plaintiffs' vessel, *The Gamma*, to carry a cargo of coals from Hull to Odessa. The charter-party contained the usual clauses, and provided that the freight was to be paid, on unloading and right delivery of the cargo, in cash at current exchange; that the captain or owners should sign charterers' bills of lading, and at the end of the charter-party there was the clause which was now sued upon—namely, "One-third freight, if required, to be advanced, less three per cent. for interest and insurance."

The facts were these:—The vessel left Hull on December 19, at half-past six in the morning, without bills of lading having been presented or signed. About three-quarters of an hour afterwards she grounded in the Humber, and on the same afternoon became a total wreck. Late in the afternoon of the same day, and after the loss had become known, the charterers presented bills of lading to the owners' agents, and thereupon one-third freight in advance was asked for, but payment was refused, upon the ground that the vessel had become a total wreck, that the adventure had come to an end, and that, therefore, no obligation rested on the charterers to pay the advanced freight.

On a previous transaction between the same parties it was proved that—the charter-party being in the same form as in the present case—bills of lading had been presented after the vessel had sailed, and advanced freight required and paid.

Cyril Dodd, Q.C. (*Montague Lush* with him), for the plaintiffs.—The legal consideration for the payment of advanced freight is the receipt of the goods on board and for the undertaking to carry them, and not for the safe carriage of them, and it follows that when the goods are placed on board, then the advanced freight is due and payable. When once it has been paid it cannot be recovered back, whatever happens to the ship, and when it is once agreed to be paid it can be recovered, although the vessel has become a loss: *Byrne* v. *Schiller*, 19 W. R. 161 and 1114, L. R. 6 Ex. 319. *Andrew* v. *Moorhouse*, 5 Taunt. 435, where it was held that it was not recoverable, was a different case from the present. *Kirchner* v. *Venus*, 7 W. R. 455, 12 Moore P. C. C. 361, shows that advanced freight is a payment made for taking the goods on board. *Winter* v. *Haldimand*, 2 B. & Ad. 649; *De Silvale* v. *Kendall*, 4 M. & S. 37; *Allison* v. *The Bristol Marine Insurance Co.*, 24 W. R. 1039, 1 App. Cas. 209, are to the same effect. There would have been no difficulty whatever but for the words in the charter-party, "if required." We have got the right to make the requirement up to the time when in the ordinary course the bills of lading are brought for signature, and we exercised our option at that time as we had a right to do. The words, therefore, "if required," can make no difference in the present case.

Lawson Walton, Q.C. (*Robson* with him), for the defendants.—Advanced freights cannot be required after the vessel has become a total loss, and the object of the voyage frustrated, and the vessel disabled from earning freight. The construction of the clause requires that the option should be exercised within a reasonable time. The loss of the vessel shows that no freight can ever be earned, and therefore no advanced freight can ever be paid or required. The words at the end of the clause relating to insurance show that it was intended that no advanced freight should be payable after an insurance was incapable of being effected: *Jackson* v. *Union Marine Insurance Co.*, 23 W. R. 169, L. R. 10 C. P. 125; *The Kathleen*, 23 W. R. 350, L. R. 4 Adm. 269.

CHARLES, J.—In this case the plaintiffs seek to recover from the defendants the sum of £245, being one-third advanced freight on the screw steamship *Gamma*, payable by defendants to plaintiffs under a charter-party dated the 30th of November, 1888, less three per cent. for interest and insurance.

The facts were very short and they were not in dispute, but they raise a question of law on the true construction of the charter-party. The plaintiffs are

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

the owners of this vessel, and she was chartered by the defendants to proceed from Hull to Odessa with a cargo of coal; she was loaded with coal, and upon the 19th of December she sailed from Hull about half-past six in the morning. Three-quarters of an hour after she sailed she took the ground on some sands called the Middle Sands, and at four o'clock the same afternoon, if not earlier, she broke her back, and this was an end of the voyage so far as the carriage of the cargo was concerned. Certainly after the voyage had come to an end, and the purpose of the voyage had been frustrated by the stranding of *The Gamma* and the injury which she sustained, charterers' bills of lading were brought to the owners' agent with the colliery invoices of the coal, and thereupon one-third freight in advance was asked for and payment was refused, and it was refused upon the ground that the vessel had become a wreck, and, therefore, the adventure having come to an end, the whole commercial object of the speculation was frustrated, and no obligation rested on the charterers to pay the advanced freight. Now with regard to the language of the charter-party itself, the clause with reference to freight is in these words, "The freight to be paid on unloading and right delivery of the cargo, in cash at current exchange, one-third freight, if required, to be advanced less three per cent. for interest and insurance." The practice of the previous voyage was proved before me, and according to that practice and upon the previous voyage, the requirement was made upon the presentation of the bills of lading. An admission was made at the trial before me at Leeds that on the previous voyage bills of lading were brought after the vessel had sailed, and the advance freight was then required to be paid. Bills of lading were brought after the vessel had sailed. That is possible under this charter-party, because the charterers' bills of lading are to be signed by the captain or the owners, and therefore it is immaterial whether they are brought before or after the vessel had sailed. It was also proved that in the present case the bills of lading were made out in the ordinary course, without delay, and that the colliery invoices were also made out in the usual manner, and it seems to me that there was nothing abnormal in the period at which this requirement was made. The owner could scarcely make the requirement till the charterer told him the amount of the whole freight. The matter really stands thus: That there was nothing unusual or abnormal in the mode in which this requirement was made; quite the contrary, it was made in accordance with what had been done on the previous occasion, and I gather, not from the admission, but from the evidence in the case, that the usual course was adopted between the parties—the course which was usual at the port.

But now comes the difficulty. Undoubtedly at the time the requirement was made the vessel had become a wreck, and the whole voyage was frustrated, and it is contended, that being so, that the requirement cannot be lawfully made, and that argument was enforced by the terms of the advance freight clause, that advance freight, if required, was to be paid. The freight, if required, was to be advanced less three per cent. for interest and insurance, indicating, as it was argued, that clearly the requirement must be made when the subject-matter of the insurance is still in existence. To arrive at a solution of this question it is necessary to ask what advanced freight is. Freight, of course, is money paid for the safe carriage of the goods themselves; but advanced freight, although in one sense it is freight, has been decided over and over again to be a payment made for taking the goods on board and for the undertaking to carry, not for the safe carriage of them, and that being the nature of advanced freight it has been held, first, that if it had been paid in advance it cannot be got back again even although the vessel is lost; secondly, that if there had been an absolute obligation to pay it—in other words, an absolute agreement to pay advanced freight, that agreement can be put in action, although before the action the vessel was lost.

Now those two propositions of law really go a very long way, if not the whole way, to decide this case. and the only difficulty that I have felt about it is, that in the present case the charter-party does not impose upon the charterers an absolute obligation to pay advanced freight, but only to pay advanced freight if required. It seems to me that here there was, at the time of entering into this bargain, this obligation to pay advanced freight if required. What right have I, having a regard to the nature of advanced freight, and remembering that it is money paid, not for safe carriage but merely for the undertaking to carry, to read into that clause the words "if required before the loss of the vessel." The only justification for my doing so is to be found in the clause as to deduction for insurance, but upon reflection I think the meaning of that is this: the owner, being relieved from the necessity of insuring the whole freight, inasmuch as the one-third paid to him is no longer a risk, he is to make a deduction of an amount equivalent to the amount he would have had to spend himself had none of the freight been advanced to him. In other words, that it is in the nature of a discount which he makes in order to get safely home the advance freight which he demands. That appears to me to give full effect to the construction of the words "less three per cent. for interest and insurance," and if it does, then there is simply the clause to be read as it stands—one-third freight if required, to be advanced, and there is nothing to show that that requirement must be made before the loss of the vessel itself.

The case, therefore, really appears to me to be covered by the authorities. It is clear that advanced freight is not money which is paid in any respect for safe carriage, but only for the loading of the goods and the undertaking to carry; and it is clear that the advanced freight cannot be recovered if it be paid, although the ship is lost. It is also clear that an unqualified obligation to pay advanced freight can be insisted upon, even although the vessel be lost before it is insisted upon; and so here I think that the claim may be made to pay the advance freight, although the vessel be lost before the requirement in fact was made.

That entitles the plaintiffs to judgment for £245 and the costs of the claim, and as there is a counter-claim for £35 9s. 2d., which was admitted by the plaintiffs in their reply, there will be judgment for the defendants, without costs, for £35 9s. 2d. on the counter-claim, and execution will issue for the balance.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Pritchard & Sons*, for *J. & T. W. Hearfield & Lambert*, Hull.

Solicitors for the defendants, *Maples, Teesdale, & Co.*, for *Lietch, Dodd, Bramwell, & Bell*, Newcastle-upon-Tyne.

IN BANKRUPTCY.

Q. B. Div. (Cave and Vaughan Williams, JJ.) Jan. 19.

Ex parte MCGOWAN.
In re ASHTON. (*a.*)

Bankruptcy—Solicitor—Notice of act of bankruptcy—Notice given to managing clerk—Sufficiency of notice.

Where a solicitor, with the consent of the client, puts his managing solicitor in his place to conduct and manage the matter which the solicitor was retained to conduct, notice of an act of bankruptcy to the managing clerk will be notice to the solicitor.

But, apart from any question of substitution, the mere fact that a man is a managing clerk will not constitute notice to him notice to his principal.

Appeal against an order of his Honour Judge Heywood in the county court at Manchester, by which he declared two deeds executed by the bankrupt on the 19th of November, 1889, to be void as against the trustee in the bankruptcy, on the ground that the title of the trustee related back to a date earlier than that on which the deeds were signed, and that the appellant was not within the protection of section 49 of the Bankruptcy Act, 1883, because he had by means of an agent had notice of an act of bankruptcy.

In June, 1889, a bankruptcy notice was issued against the debtor, who carried on business as a machinist and engineer at Manchester, and in September, 1889, a bankruptcy petition was filed, but, owing to an adjournment for the purpose of the trial of a disputed question, a receiving order was not made until March, 1890.

On the 19th of November, 1889, the deeds sought to be set aside by the trustee were executed by the debtor in connection with the sale of his business to the appellant, that transaction being for the most part carried through by one Wood, the managing clerk to Mr. R. G. Thompson, the solicitor employed by the appellant in the matter, who it was alleged had at the time knowledge of the act of bankruptcy committed by the debtor.

The county court judge found that neither the appellant nor Mr. Thompson had notice of an act of bankruptcy, but that Wood had, and he held that notice of an act of bankruptcy to him was notice to the appellant.

The present appeal was brought from that decision.

Sidney Woolf, Q.C., and *Wharton* (*Austin* with them), for the appellant.—The question is whether the appellant had notice of the act of bankruptcy, and whether it was a sufficient notice. Wood, the managing clerk of Mr. Thompson, was acquainted with the bankrupt, and it was really through him that the appellant came in as purchaser of the business, and it would appear that Wood was to have £100 from the bankrupt for the introduction. Even if Wood had notice of the act of bankruptcy it is not sufficient. He was not an agent to receive notice, and the appellant could not constructively be bound by it.

Bigham, Q.C., and *Sutton*, for the trustee.—Wood was appointed by the appellant to carry out the whole business, and if a person is put forward by the assignee to negotiate the business, whether he be a solicitor, solicitor's clerk, or layman, his knowledge is that of the person who puts him forward. It is true that the appellant retained Mr. Thompson, Wood not being a solicitor, but Wood was the man who managed the whole business. Although a retainer is given to a solicitor, if that solicitor leaves the business to a clerk, the notice coming to the clerk in such cases is notice to the solicitor, and so to the client. Where the clerk in a solicitor's office is conducting the transaction jointly with the solicitor, or exclusively, or has the management of the business so that a duty devolves on him to tell it is sufficient. If he neglects his duty, it is unfortunate for the person who employs the solicitor.

They referred to *Brewin* v. *Briscoe*, 7 W. R. 584; *Pike* v. *Stephens*, 12 Q. B. 465.

Sidney Woolf, Q.C., replied.

CAVE, J.—In this case the county court judge has come to a conclusion which does not commend itself to my judgment. There is certainly more than one ground on which it is impossible to say that the alleged notice was such a one as to affect the appellant in this case. It was said first that the appellant had retained and employed Wood, and had constituted him his agent and *alter ego* so as to make the notice to Wood notice to the appellant. That seems to have been the impression of the county court judge at first, but subsequently he appears to have modified that impression and was more inclined to look on Wood as the *alter ego* or agent of Thompson, and not of the appellant. It is perfectly clear that the appellant did not constitute Wood his *alter ego* or agent in the matter. He had understood that the bankrupt wanted to dispose of his business, and on November 5, 1889, with a view of making inquiry as to the property, he retained Thompson to act as his solicitor in the negotiation. No doubt by that act he did constitute Thompson his agent, and notice to Thompson would have been notice to him; but there was no actual notice to Thompson. With regard to Wood it is clear that the appellant did not constitute him his agent. He went to Thompson and retained Thompson, and although it is true he went with Wood to the bankrupt's, yet Wood went with him as Thompson's clerk who was told to go and help in the inquiries. There is also no ground to come to the conclusion that Thompson had constituted Wood his substitute in the matter. We may accede to the proposition which appears to have been laid down in *Brewin* v. *Briscoe*, that where an attorney with the consent of the client—for I think that is what is meant—puts his managing attorney in his place to conduct and manage the matter which the attorney was retained to conduct, in that case he does put the clerk into the position that notice to the clerk is notice to the solicitor and to the client. In the present case it is abundantly clear that there was no such substitution. Thompson was employed to conduct the business, and although he did not actually do everything himself, yet it is quite clear he did not delegate the whole matter to Wood. On the contrary, he himself made some very important inquiries, and retained control of the matter.

Those two considerations are sufficient to dispose of this case, because if Wood was not the substitute of the appellant or of Thompson, notice to him could not be notice to the appellant or Thompson. It is said that the doctrine of constructive notice is a very difficult one, and I dare say it is, but I have arrived at the conclusion, in which I think I am supported by some members of the Court of Appeal, that the doctrine of constructive notice is one which has been carried far enough, and I am not prepared to hold that the mere fact that a man is a managing clerk, apart from any substitution by the client or his principal to manage the business, would make notice to him notice to his

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

principal or the client. If I am wrong in this, however, there are other points in the present case which render it impossible to uphold the decision of the county court judge. I am not satisfied at all that notice ever was given to Wood. The knowledge was certainly not acquired by him in the business, and the evidence put before us is not evidence on which any great reliance can be placed. It shows, however, that the person who is alleged to have given the notice was by no means desirous that it should be communicated, but that he and Wood were really anxious that the matter should be concealed, and should not come to the knowledge of Thompson and the appellant, in order that nothing might arise to prevent the transaction being carried through, out of which they were both to get some personal advantage.

VAUGHAN WILLIAMS, J., concurred.

Appeal allowed.

Solicitors for the appellant, *Bell, Brodrick, & Gray*, for *R. G. Thompson*, Manchester.

Solicitors for the trustee, *Sampson & Price*, Manchester.

Court of Appeal.

From Chan. Div. Jan. 12, 13, 26.

JENKINS *v.* BUSHBY. (*a.*)

Practice—Trial—Right to a jury—Action in Chancery Division—Trial at assizes—Rules of Supreme Court, 1883, *ord.* 36, *rr.* 6, 7 (a).

The plaintiffs, who were mine owners in Glamorganshire, brought an action in the Chancery Division against neighbouring mine owners for an injunction and an account. They named Glamorganshire as the place of trial, and applied for an order for trial with a special jury. An order was made by Stirling, J., *that the action should be tried by a judge without a jury at the next Glamorganshire Assizes.*

Held, on appeal, that the plaintiffs could not, as a matter of right, claim a trial with a jury, and that ord. 36, *r.* 6, *did not apply; but, as one of the questions to be tried was the question of boundaries, and, considering the importance of a view of the locality for that purpose, that the order appealed from should be varied by directing that the action be entered for trial at the assizes by a judge with a special jury.*

In every case in which there was, prior to the Judicature Acts, a right to a trial with a jury, such right still exists; and where there was no such right, it is not conferred by the rules of 1883, *though, in such cases, the court has power to direct at discretion a trial with a jury.*

Appeal by G. T. Jenkins and T. J. Thomas, the plaintiffs in the action, from an order of Stirling, J., at chambers, ordering that the action, which had been commenced in the Chancery Division, should be tried by a judge without a jury at the next Glamorganshire Assizes. The plaintiffs' claim was for an account of minerals alleged to have been taken by the defendants, H. J. Bushby, C. E. Thomas, and North's Navigation Collieries, 1889 (Limited), from under certain mountain lands of the plaintiffs situate some thirty miles from Cardiff; and the plaintiffs had named Glamorganshire as the place of trial. One of the principal questions to be tried was as to the boundaries, and the plaintiffs had applied for the trial of the action with a special jury, on the ground that a view of the locality would be not only essential but necessary, and that a special jury of the county of Glamorgan, who would be able to view the lands in question, would be the best tribunal.

Ord. 36, r. 4—"The court or a judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which, previously to the passing of the principal Act, could, without any consent of parties, have been tried without a jury."

Rule 5—"The court or a judge may direct the trial without a jury of any cause, matter, or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in their or his opinion conveniently be tried with a jury."

Rule 6—"In any other cause or matter, upon the application [within ten days after notice of trial has been given] of any party thereto for a trial with a jury of the cause or matter or any issue of fact, an order shall be made for a trial with a jury."

Rule 7 (*a*)—"In every cause or matter, unless under the provisions of rule 6 of this order a trial by a jury is ordered, or under rule 2 of this order, either party has signified a desire to have a trial with a jury, the mode of trial shall be by a judge without a jury; provided that in any such case the court or a judge may at any time order any cause, matter, or issue to be tried by a judge with a jury, or by a judge sitting with assessors, or by an official referee, with or without assessors."

Sir E. Clarke, S.G., J. G. Wood, and *D. Lewis,* for the appellants, the plaintiffs.—The action has gone on so far in the Chancery Division, and as the plaintiffs can change the venue to the assizes, it will be more advantageous to try the case with a jury, who can view the *locus in quo.* [They referred to *Attorney-General* v. *Vyner*, 38 W. R. 194, and *Wedderburn* v. *Pickering*, 28 W. R. 239, 13 Ch. D. 769, and section 34 of the Judicature Act, 1873.] The plaintiff has a right to a jury under rule 6, and if he has not such a right this is a proper case to come under rule 7 (*a*).

Graham Hastings, Q.C., and *O. L. Clare,* for the respondents, H. J. Bushby and C. E. Thomas.—We object to a jury, to which the appellant is not entitled under the rules. *Attorney-General* v. *Vyner* was merely a question of fact. Rule 4 is applicable here, not rule 6. In the cases falling within rule 2 there must be a jury, if either party wishes it. [KAY, L.J., referred to ord. 33, r. 1, and ord. 34, r. 2.] The plaintiffs must show special grounds, which they have not done. There is no reason why a different rule should be applied where the trial of an entire cause is asked for from that in which the trial of a single issue is asked for. Rules 3 and 5 comprise all actions which could have been brought in the Chancery Division. In the present case a number of separate points would have to be left to the jury. *The Temple Bar*, 34 W. R. 68, 11 P. D. 6, decides that rule 6 gives no absolute right to a jury where the case would before the Judicature Act have been tried without a jury. The judge has exercised his discretion in a way in which the court will not readily interfere. The plaintiffs' claim involves questions of tenure and manorial rights, which will to a great extent turn upon the manor rolls, as in *Warrick* v. *Queen's College, Oxford*, L. R. 3 Eq. 683, 15 W. R. Ch. Dig. 111, which begin at the year 1570 and will require peculiarly careful consideration. We should be satisfied to have the question tried by a referee, which would be more

(*a.*) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

convenient than a trial by jury, and a referee could have a view, if necessary.

Sefton Strickland, for the other respondents, submitted to the judgment of the court.

Sir E. Clarke, S.G., in reply.—It would not be proper to send this case to a referee: *Ormerod* v. *Todmorden Mill Co.*, 30 W. R. 805, 8 Q. B. D. 664. In rule 6 of order 36 the words "in any other cause or matter" must be read, "In any other cause or matter of which the mode of trial has not been determined by the previous rules." [LINDLEY, L.J., referred to *Timson* v. *Wilson*, 36 W. R. 418, 38 Ch. D. 72.]

LINDLEY, L.J.—This is an action brought by one mine owner against another for an injunction and an account.

The plaintiffs' mine is in Glamorganshire. The plaintiffs issued their writ in the Chancery Division, and named Glamorganshire as the place of trial. The plaintiffs in due course applied for an order that the action might be tried at the next Glamorganshire Assizes by a judge with a special jury. This was opposed by the defendants, who objected to trial by a jury, and Stirling, J., made an order that the action should be tried at the next Glamorganshire Assizes by a judge without a jury. From this order the plaintiffs have appealed. They contend, first, that they have a right to a trial by a jury under ord. 36, r. 6; and, secondly, that if that rule does not apply this case is one in which the judge could have ordered trial by jury under rule 7, and that he ought to have made such an order in this particular case, inasmuch as the question in dispute between the parties is one of boundary, and that a view of the locality is essential for the proper determination of that question. The defendants, on the other hand, contend that rule 6 does not apply, that this case is one which requires prolonged examination of documents, which cannot be conveniently made with a jury, that the case falls within rules 5 and 7, that the judge had a discretion as to the order which ought to be made, and that such discretion was properly exercised, or, at all events, ought not to be interfered with. It becomes necessary, therefore, first to consider whether rule 6 applies, for if it does then it follows that the plaintiffs are entitled to a trial by jury as a matter of right. Now, rule 6 has been frequently considered, and there are decisions by this court upon it—viz., *The Temple Bar*, *Timson* v. *Wilson*, and *Fanshawe* v. *London and Provincial Dairy Co.* There is also the decision of Chitty, J., in *Coote* v. *Ingram*, 35 W. R. 390, 35 Ch. D. 117, which was pronounced after the *Temple Bar case*, and before *Timson* v. *Wilson*. The construction put upon rule 6 has been that the words "in any other cause or matter" do not mean "in any cause or matter other than one in which the mode of trial has been fixed under the preceding rules," but mean "in any cause or matter other than those mentioned or referred to in the preceding rules," and the reason for this construction is that if it were not adopted a great, and wholly unintended, change in the mode of trial would have been made in a very large number of actions brought in the Chancery Division. As pointed out in *Timson* v. *Wilson*, rules 2-7 of order 36 must be read together; they form a code on this subject. Wherever there was before the Judicature Acts a right to a trial by jury, such right still exists; and where there was no such right before, there is none under the rules, although in such cases power is given to the court to direct a trial by a jury if in its opinion that mode of trial ought to be adopted. That this is the true effect of the rules will be seen by going through them one by one.

Rule 2 preserves the right to a jury in the actions there mentioned, and there is no power to try them otherwise, if either party desires a jury.

Rule 3 applies to cases assigned to the Chancery Division by section 34 of the Judicature Act, 1873. In these cases there was no right to a trial by a jury, and no such right is conferred by the rules; but power is conferred on the court to direct a trial by jury even in these cases.

Rule 4 applies to causes or matters which, before 1873, could be tried without a jury, without any consent of parties. It has no application to old common law actions, but it applies to all chancery actions and to old admiralty actions. Rule 4 does not say how these actions are to be tried; that matter is dealt with by rule 7. Rule 4 only authorizes trial without a jury of one or more issues arising in such actions as I have just mentioned. The old Court of Chancery had power to direct such issues to be tried with a jury, but I never heard of any issue being directed to be tried without a jury. Whether the old Court of Admiralty had power to direct issues to be so tried I do not know. The power to direct issues to be tried with a jury in non-jury actions is preserved by rule 7 (*a*).

Rule 5 merely preserves the old practice of the common law courts; there was always power in such actions as is there mentioned to order a trial without a jury. This rule has no application to actions which, apart from it, are properly triable without a jury.

Rule 6 is supplementary to rule 2, and was necessary to preserve the right to trial by a jury in all pure common law actions besides those mentioned in rule 2. Rule 6 is qualified by rule 5, but it has no reference to rule 4, except this—viz., that the causes or matters mentioned in rule 4 are excluded from the operation of rule 6. To construe rule 6 as applicable to all actions except those mentioned in rules 2, 3, and 5 would, as already stated, give a right to a trial by a jury where there was no such right before—*e.g.*, in all chancery actions and in old admiralty actions. Such a construction is quite inadmissible.

Rule 7 applies to all actions in the High Court except those in which either party has a right to a trial by jury and has insisted on such right in the mode prescribed in the rules 2 and 6. Actions decided by the Chancery Division fall within rule 3, and although rule 7 is wide enough to cover them, there is no discrepancy between the two rules. Rule 7 is so worded that in all cases to which it applies, the mode of trial is to be without a jury unless otherwise ordered, and it is for those who ask for trial by jury to satisfy the court that the trial should be by jury rather than without.

Rules 8 to 10 apply to all actions, and are supplementary, and create no difficulty.

This construction of the rules gives full effect to all of them, and is the construction put upon them already by this court in the cases to which I have referred, and my only reason for re-investigating the subject is that I think there is still some misunderstanding about it. Rule 4 is sometimes supposed to authorize a trial of an issue by a jury, whereas, in truth, it is confined to trials of issue without a jury, and other misconceptions have occurred which tend to make the rules obscure. So far, therefore, as the appellants base their appeal on rule 6, I am of opinion that they fail.

The next point is to consider rules 5 and 7. In considering rule 5 judges not accustomed to work with juries are apt to underrate their power of dealing with questions involving an examination of maps, plans, and accounts. No doubt when it is necessary to go through a long disputed account item by item

it is very difficult, if not impossible, to do so with a jury at the assizes; but to suppose that there is any real difficulty in getting a special jury to see and appreciate the results of accounts, or to apply their minds to and appreciate ordinary maps and plans, is to make a great mistake. Questions of boundary, involving an examination of maps, are constantly tried satisfactorily and without difficulty by judges with juries at the assizes. It is obvious that in this case no accounts will have to be taken at the trial, and if the learned judge really thought that this case could not be conveniently tried at the assizes by a judge with a jury, I cannot agree with him.

I pass now to rule 7, which is the rule applicable to this case. As already stated, this rule, when it applies, throws upon the party asking for trial by jury the *onus* of showing some good reason why his request should be acceded to. This is obvious from the rule itself, and this is the construction which has been put upon it. The reason given in this case is that a view of the locality by a jury is all-important. I am of opinion that a view may be very important, and that, as regards mode of trial, the choice really lies, not between a trial by a judge with or without a jury, but between a trial by judge and jury with a view by the jury, and a trial by some referee who can go to the locality. Of these two modes of trial the former at present appears the best. In my opinion the learned judge underrated the importance of a view, and overrated the difficulty of properly trying the case with a jury.

The order appealed from ought to be varied by directing that this action be entered for trial at the Glamorganshire Assizes by a judge and a special jury. The costs of the plaintiffs' summons and this appeal should be costs in the action. I wise to add that it must not be understood that this mode of trial will be obligatory on the judge of assize. If he finds it necessary or expedient to order any other mode of trial consistently with the rules he will be quite at liberty to do so.

LOPES, L.J.—After the very exhaustive judgment of Lindley, L.J., and the way he has gone through these rules, I only desire to make a general observation or two. It appears to me that rules from 2 to 7 of order 36 form a code of regulations as to the mode of trial. The effect of them is this. They make a trial by a judge without a jury the normal mode of trial. They do not take away the right of trial by a jury where it exists before, or give it where it did not previously exist. It appears to me that that, beyond all question, is the general effect of those rules. They do, however, make this change, that where it is desired the trial should be by a judge with a jury, this mode of trial must be asked for. That is a great and important change, because previously to the Judicature Acts and these rules, all common law actions and all actions in the Queen's Bench Division in all cases were tried by a judge and a jury, unless the parties consented. That is the effect of these rules on the case now before us. It was contended by the Solicitor-General that the case comes within rule 6, and that he had an absolute right to a jury. I am clearly of opinion that that is not so. Rule 6 does not apply to this case for the reasons already given by the Lord Justice. Under what rule does it come? It clearly comes under rule 7, and the effect of rule 7 on this case is, that the party who seeks to have the case taken out of what I call the normal mode of trial and tried by a jury, must make out a case for that change.

Does the applicant in the present case make out such a case? It appears to me he does. The question here is a question of boundary, and I have no hesitation in saying that, from what experience I have had of cases of that kind, that it is most frequently desirable that a view should be had. It is of assistance to the jury of such a kind as no other assistance can give. With regard to a view, a view cannot be had except by a jury of the county in which the property is situated. That being the case, I agree with what has been said that a case has been made out by the appellant that this action should be tried in the county of Glamorgan, and that it should be tried there with a special jury.

I quite agree with what was said by Lindley, L.J., that we do not desire to make this a rule obligatory on the judge. If at the hearing he should be of opinion that it would be more desirable to try it by an official referee, it will be right and proper for him to so order. I fully expect, however, when the trial is entered upon that it will be found there will be no difficulty in trying it with a jury, and that the decision of a jury in all probability will be the most satisfactory result that can be attained, having regard to the interests of both parties. I think, therefore, that this application must be allowed.

KAY, L.J.—The real question in this case upon the orders was put by the Solicitor-General in reply very accurately, thus: Does ord. 36, r. 6, except from its operation all causes and matters mentioned in the preceding rules of that order, or only the causes and matters as to which those rules had provided particular modes of trial?

Reading those rules apart from the decided cases, it seems to me that there is very much to be said in favour of the latter of these two constructions. But its adoption would certainly result in the formidable difficulty which was pointed out during the argument by Lindley, L.J. There are very many cases commonly tried in the Chancery Division which are essentially common law actions, such for instance are cases of nuisance, trespass, actions for obstruction of light and air, and the like. These are not specially provided for in rules 1-5, and on this construction, if any of the parties applied to have them tried with a jury, the court could have no discretion, but would be compelled under rule 6 to direct such trial.

In *The Temple Bar case* the Court of Appeal adopted the former of these two constructions, holding that not only the causes and matters, the mode of trial of which was specially provided for, were excepted by the first words of rule 6, but also the causes and matters mentioned at the end of rule 4. That rule provides that the court or a judge may direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which, previously to the passing of the principal Act, could, without any consent of parties, have been tried without a jury.

I doubted at first whether the relative "which" did not refer to the issue to be so tried, but on consideration I am clear that it refers to the cause or matter mentioned in rule 4, because an issue of fact directed before the Judicature Act, 1873, would be tried by a judge with a jury, and the meaning of the rule seems to me to be that where such an issue is directed in a cause or matter, which cause or matter could have been tried without a jury, then the court may direct the issue to be tried in like manner.

The Temple Bar case has been followed in many subsequent decisions. It lays down a useful rule because it gives the court a discretion as to ordering the trial by jury in the class of cases to which I have referred when commenced in the Chancery Division.

But then it is said that in *Attorney-General* v. *Vyner* it was held that where a plaintiff had brought an action to establish a right of highway in the Chanc-

Division, although he had marked his pleadings with a local venue, as in this case, so that the trial would have to be at the assizes, and the judge of the High Court had directed the trial should be without a jury, the Court of Appeal would not interfere with that exercise of his discretion.

Of course, in a question of discretion, authorities are not of much value. No two cases are exactly alike, and the court cannot be bound even if they were, by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion.

Naturally, however, the learned judge in the court below felt much pressed by the decision of the Court of Appeal in *Attorney-General* v. *Vyner*.

There is, however, this material distinction, that in the present case the question is, what is the true boundary between different properties under which there are valuable mines? and I am fortified in my own opinion, as to the importance of trying such a case before a jury who could have a view, by the much greater experience of Lopes, L.J., who thinks it material, if not essential.

I venture to express a hope that the learned judge who tries this case will be able so to deal with the costs as to discourage the bringing of an action of this kind in the Court of Chancery and at the same time fixing a local venue for the trial. This seems to me a revival to some extent of one of the great abuses which the Judicature Act and the statutes known as Rolt's and Cairns' Acts were intended to remedy—viz., of dragging the defendant from one court to another and thereby increasing the delay and cost of the action. I must say that in my opinion such a proceeding by the plaintiff ought to be discouraged.

Solicitors, *Meredith, Roberts, & Mills*, for *Vassall, Parr, Osborne, & Ward*, Bristol; *Helder & Roberts*, for *R. P. Morgan & David*, Neath; *Blunt & Lawford*.

From Chan. Div. Jan. 14, 15, 17, 21.

ATTORNEY-GENERAL *v.* MORGAN. (*a.*)

*Mines—Gold mine—Gold found with other metals—Rights of Crown—Licence to work—*1 *W. & M. c.* 30, *ss.* 2, 4—5 *W. & M. c.* 6, *ss.* 2, 3.

A mine not worked or worth working except as a gold mine, though containing a certain quantity of copper, tin, iron, or lead, is not a "mine of copper, tin, iron, or lead" within the meaning of the Act 1 *W. & M. c.* 30, *or (therefore) a "mine . . . wherein any ore . . . is . . . found . . . in which there is copper, tin, iron, or lead" within the meaning of the Act* 5 *W. & M. c.* 6 *(which two expressions—the latter Act being explanatory of the former—must be taken to mean the same thing). Such a mine is a gold mine, and consequently, being in the United Kingdom, a royal mine, and cannot be worked without a licence from the Crown.*

The effect of section 3 *of* 5 *W. & M. c.* 6 *is to authorize the owners of copper, tin, iron, or lead mines—that is, mines worked for, and deriving their profit mainly from, copper, tin, iron, or lead—to work them as such, though they contain also gold or silver, the rights of the Crown being protected by giving it an option to take the ore containing gold or silver at certain fixed prices, but so that, if the Crown does not choose so to take the ore, the owners may dispose of it for their own benefit. But that section does not mean that, wherever there is any one or more of the four named base metals associated with gold or silver in a mine, and without reference to the question whether or not the mine is worth working for such base metal, the owner is to be entitled to the gold or silver in case the Crown does not exercise its option of taking the mixed ore at the statutory price.*

Decision of North, J. (ante, *p.* 169), *affirmed.*

Appeal from North, J.

This was an appeal by the defendant, Mr. E. Pritchard Morgan, against a decision of North, J. The facts of the case appear from the report below. *ante*, p. 169.

The action, which was commenced in April, 1888, was brought on behalf of the Crown by the Attorney-General for an injunction to restrain the defendant, his agents, servants, and workmen from raising, working, or getting, and from selling or removing, or causing or permitting to be removed, from a mine called the Gwynfynydd Mine, near Dolgelley, in the county of Merioneth, or from other lands in the same county, any gold, or gold ore, silver ore, or quartz or other substances containing gold or silver, the produce of such mine or lands, without the licence of the Commissioners of her Majesty's Woods, Forests, and Land Revenues; and for an account of what had been already obtained, and payment of its value.

An injunction to extend until the trial of the action or further order was, shortly after the commencement of the action, granted by North, J., but the order provided that it was not to interfere with the defendant raising the rock to the surface or extracting the ore from it.

The Morgan Gold Mining Co. subsequently took over the defendant's interest in the Gwynfynydd Mine, which was from that time worked under a licence from the Crown, the company paying royalties. When, therefore, the action came on for trial before North, J., in July, 1890, the only question for determination was whether the defendant ought to pay the costs of the action, which question, however, depended upon the decision of the further question whether in the action the contention of the defendant or that of the Crown was the correct one; or, in other words, whether the owner of a mine, which is worked simply as a gold mine, though the gold is found mingled with the ores of baser metals, is entitled to work the mine without the licence of the Crown, or whether the ancient prerogative of the Crown in respect of "royal mines"—that is, mines in which gold or silver is found—still remains in force, and is unrepealed by the statutes 1 W. & M. c. 30 and 5 W. & M. c. 6. The old law appears from the celebrated "Case of Mines," *The Queen* v. *The Earl of Northumberland*, Plowd. 310, in which it was decided (p. 336) "that by the law all mines of gold and silver within the realm, whether they be in the lands of the Queen or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore." It was also held by a majority of the judges in that case "that if the gold or silver in the base metal in the land of a subject be of less value than the base metal is, as well the base metal as the gold or silver in it belong by prerogative to the Crown, with liberty to dig for it and to put it upon the land of the subject, and to carry it away from thence; and in such case it shall be called a 'mine royal,' for the records do not make any distinction herein, but they are general, and prove that all ores or mines of copper, or other base metal, containing or bearing gold or silver, belong to the King."

The old law being found to discourage the industry of mining for the base metals, the two statutes of William and Mary above referred to were passed.

(*a.*) Reported by R. H. DEANE, Esq., Barrister-at-Law.

The first of those statutes, 1 W. & M. c. 30, repealed by its 2nd section an old Act of 5 Hen. 4, which had made it "felony to use the craft of multiplication of gold or silver." The statute 1 W. & M. c. 30 went on to provide by section 4 "that noe mine of copper, tin, iron, or lead shall hereafter be adjudged, reputed, or taken to be a royall mine, although gold or silver may be extracted out of the same." The second Act, 5 W. & M. c. 6, was entitled "An Act to prevent Disputes and Controversies concerning Royal Mines," and its preamble was as follows:—

"Whereas by a clause in" the Act 1 W. & M. c. 30 "it is amongst other things enacted that no mine of tin, copper, iron, or lead shall hereinafter be adjudged, reputed, or taken to be a royal mine although gold or silver may be extracted out of the same, but, notwithstanding the good provision by the said statute to prevent the discouraging their Majesties' good subjects who have mines of copper, tin, iron, or lead in their soils, from digging and opening the same, many doubts and questions have arisen upon the said statute whereby great suits and troubles have arisen to many owners and proprietors of such mines."

Section 2 provided "that all and every person or persons, being subjects of the Crown of England, bodies politick or corporate, that now are or hereafter shall be the owner or owners, proprietor or proprietors, of any mine or mines within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, wherein any ore now is or hereafter shall be discovered, opened, found, or wrought, and in which there is copper, tin, iron, or lead, shall and may hold and enjoy the same mine or mines and ore, and continue in the possession thereof, and dig and work the said mine or mines or ore, notwithstanding that such mine or mines or ore shall be pretended or claimed to be a royal mine or royal mines; any law, usage, or custom to the contrary notwithstanding." Section 3 was as follows:—"Provided always, and be it enacted and declared, that their majesties, their heirs and successors, and all claiming any royal mines under them, shall and may have the ore of any such mine or mines in any part of the said kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed (other than tin ore in the counties of Devon and Cornwall), paying to the proprietors or owners of the said mine or mines wherein such ore is or shall be found, within thirty days after the said ore is or shall be raised and laid upon the banks of the said mine or mines, and before the same be removed from thence, the rates following (that is to say)—for all ore washt, made clean and merchantable, wherein is copper, the rate of £16 per ton; and for all ore washt, made clean and merchantable, wherein there is tin, the rate of 40s. per ton; and for all ore washt, made clean and merchantable, wherein there is iron, the rate of 40s. per ton; and for all ore washt, made clean and merchantable, wherein there is lead, the rate of £9 per ton; and in default of payment of such respective sums as aforesaid, it shall and may be lawful for the owners and proprietors of the said mine or mines wherein such ore is or shall be found to sell and dispose of the said ore to his and their own uses, every law, statute, or custom to the contrary notwithstanding." By a later Act, 55 Geo. 3, c. 134, the rate for lead ore was altered to £25 per ton; the other rates remaining unaltered.

The judgment of North, J., appears in the report of the case below, *ante*, p. 169. He held (shortly) that the Gwynfynydd Mine was a gold mine and nothing else, and, as such, was not within the scope of the Acts of William and Mary, which were enacted for the benefit of owners of copper, iron, tin, and lead mines only; that the defendant was seeking to use those Acts for the purpose of appropriating without payment the gold and silver in his land which belonged to the Crown, and that he had been in the wrong throughout, and must pay the costs of the action.

The defendant appealed.

The defendant in person.—The law as laid down in the leading authority on the subject of royal mines, *The Queen* v. *Earl of Northumberland*—the Case of Mines—Plowden, 310, at p. 336, was found to discourage subjects in the opening and working of mines, and two statutes were therefore passed in the reign of William and Mary, the effect of which was, as I contend, to create a class of gold mines which do not belong to the Crown. My mines are within those Acts, and, therefore, if the Crown declines to exercise the option given it by the latter Act, of buying the ore at the statutory price, it belongs to me, with the precious metal. If these mines were in a different situation, such as to afford greater facilities for conveying bulky produce to market, it would pay best to work them as mines for base metals, but being, as they are, on the top of a Welsh mountain, fifteen miles from a railway station, the expense of carriage is prohibitive of so working them. The case in Plowden was, no doubt, decided correctly in accordance with the law at that time in force, there being an old statute of Henry IV. which made it felony to multiply gold and silver. That enactment was, however, repealed by 1 W. & M. c. 30, s. 2. Section 3 provided that all the gold and silver extracted should be taken to the mint. Section 4 was intended, in effect, to repeal the decision in the "Case of Mines." During the last fifteen years over a million pounds worth of silver has been produced in the United Kingdom without any claim in respect of it having been made by the Crown. A royal mine now is any mine containing gold or silver, other than a mine of copper, tin, iron, or lead. The mine in question is a mine containing copper and gold and it comes within the purview of the Act 5 W. & M. c. 6. There is always a trace of gold or silver in all base metals. There is barely a quill-full of gold in these mines—the exact amount is 1 oz. 2 dwts. to the ton of ore. The profit in gold-mining is so small that the cost of a licence is practically prohibitive. The Crown was not entitled to this judgment, base metals being present in these mines in appreciable amounts. It is only on account of their locality that these mines are not workable profitably except as gold mines. At the date of the Acts of William and Mary copper was worth only £5 a ton and lead £7, and as, under the Act, the Crown had to pay £16 a ton for the copper ore, if we take the proportion of pure copper in the ore at five per cent., which is a fair merchantable percentage, the Crown would be paying £320 per ton for what was worth only £5. That shows that the intention of the Legislature was to make the price prohibitive of the Crown buying unless there were about five ounces of gold in a ton of the ore. A similar argument arises upon the price, at that time, of lead and the other metals referred to.

Cur. adv. vult.

Jan. 21.—*Sir R. E. Webster, A.G., Napier Higgins, Q.C.*, and *Vaughan Hawkins*, for the Crown, were not called upon.

LINDLEY, L.J.—The question which is raised on this appeal from North, J., is really who is to pay the costs of the proceedings instituted by the Crown against Mr. Morgan for an injunction to stop him working these mines without a licence, because it has become, in fact, u[illegible] to consider whether an in-

junction ought to be granted or not, Mr. Morgan having assigned his interest to a company, who are working the mines under a licence from the Crown. But the question as to the right to an injunction is important for the purpose of deciding who ought to pay the costs, and North, J., came to the conclusion that the Attorney-General was in the right, and ordered Mr. Morgan to pay the costs of the litigation. Therefore, though in a sense this is an appeal as to costs, it really depends on the question of the right to an injunction.

We have heard Mr. Morgan himself, and have come to the conclusion that he is in the wrong.

At common law all gold and silver occurring in any mine in England or Wales belonged to the Crown; and if metalliferous ores contained gold or silver to such an extent as to be worth extracting, and if such ores could not be obtained without interfering with such gold or silver, the whole of such ores belonged to the Crown; and the Crown had the right to work not only gold and silver mines, but also all other mines containing gold and silver worth extracting. This was settled in the great "Case of Mines." Mines containing gold or silver to such an extent as to be worth working for their extraction were called royal mines. The best definition which I know of royal mines is given by Sir John Pettus in his work "Fodinæ Regales" (published in 1670). He says at page 75:—"Although the gold or silver contained in the base metal of a mine in the lands of a subject be of less value than the base metal, yet, if the gold or silver do countervail the charge of the refining it, or be of more worth than the base metal spent in refining it, this is a mine royal; and as well the base metal, as the gold and silver in it, belong to the prerogative of the Crown."

The rights of the Crown in royal mines seriously obstructed the working of many of the most important mines in the kingdom. To remedy the inconvenience produced by this state of the law two statutes were passed in the latter part of the 17th century—viz., 1 W. & M. c. 30, and 5 W. & M. c. 6. The first of these Acts required all gold and silver, when extracted by refiners, to be taken to the mint; but it also enacted, by section 4, that no mine of copper, tin, iron, or lead should be a royal mine, although it might contain gold or silver. This enactment did not affect the right of the Crown to gold or silver in any mine. The Act prevented the Crown from claiming any copper, tin, iron, or lead mine on the ground that it contained gold or silver; and I apprehend that the Act also abrogated the right of the Crown to any copper, tin, iron, or lead ore got from any such mine, on the ground that such ore contained gold or silver. But the gold or silver, if any, remained the property of the Crown; and it is easy to see that owners of copper, tin, iron, or lead mines containing gold or silver might still be very much embarrassed in working their mines, notwithstanding that such mines were no longer royal mines. The second Act, 5 W. & M. c. 6, was passed to remedy this state of things. [His lordship referred to the provisions of the Act, and continued:—] The preamble shows the object of the Legislature. The Legislature assumes that there is some copper, tin, iron, or lead mine worth working by the owner; and then authorizes him to work it, though it contains gold or silver; but the statute protects the Crown by giving it an option to take the ore, with the gold or silver in it, at certain prices. If the Crown does not desire to buy the ore at these prices, then the mine owner can deal with the whole ore as he pleases, though there may be gold or silver in it. Such, in my opinion, is the short effect of this statute, and so it has been hitherto understood by lawyers: see Comyn's Digest, vol. 7, p. 636, "Waife. (H.) Mines," and 1 Blackstone's Com., 284. I can find nothing in the language of the statute which warrants the construction contended for by the appellant, which is that, wherever gold or silver is associated with one of the named metals, the owner of the soil is entitled to the gold or silver unless the Crown chooses to pay the statutory prices for the mixed ore, without reference to the question whether the mine is worth working for the sake of the base metals or not. The object of the statute is not to enable owners of mines to extort money from the Crown, but to protect them from extortion by the Crown. This is plainly shown by the preamble. It is true that the statute does not use the expression "copper ore, &c.," but mentions ore in which there is copper, &c., but the section relating to the payments to be made by the Crown, coupled with the preamble, convince me that what the Crown was to buy or leave alone was copper ore, lead ore, iron ore, or tin ore, as the case might be, and not gold or silver ore containing copper, iron, lead, or tin, which the mine owner would not incur the trouble and expense of working. Again, it may be true, as the appellant alleged, that, when the Act passed, the price of the base metals was less than the statutory price to be paid by the Crown for their ores.

Assuming this to be so, the only effect would be to deter the Crown from interfering with the working of copper mines, &c., unless the gold or silver in them were present in such quantities as to make it worth the while of the Crown to pay the statutory prices for the mixed ore. This would still be in order to protect a person desirous of working the mines for the sake of the base metals contained in them. Even if, therefore, there were any evidence as to the prices to the effect suggested by the appellant, and assuming that, if the court gave him liberty now to adduce such evidence he could adduce it, I should still fail to see how it followed that the Crown could be forced by a mine owner to yield its right to gold or silver unless it would pay the statutory price for ore associated with the gold or silver, but which ore no one would dream of working for the sake of obtaining the base metal, which alone belongs to the mine owner. The mines in question in this case are admitted to be such that no one would work them for the sake of the base metals in them. That being so, the decision appealed from is correct. In the view I take of the true construction of the statute it is unnecessary to consider whether the appellant so dealt with the ore as to entitle him to remove it, on the ground that the Crown had not duly exercised its option to take it. I regard the case, not as one in which the owner of a lead mine is seeking the protection of the statute, but as one in which the owner of a gold mine is seeking to strain the Act for the purpose of depriving the Crown of its well-known rights. The appeal must be dismissed, with costs.

LOPES, L.J.—Mr. Morgan, who has argued his case with great ability, admits that his case against the Crown fails unless he can bring himself within the protection afforded to the subject by the statutes of William and Mary. His contention is that because the mines in question contain some copper, lead, and iron he is protected by the statutes. It seems that before the passing of those Acts every mine from which gold or silver was extracted was regarded as a royal mine. A mine which was discovered in which there was any portion of gold or silver was liable to be claimed as a Crown mine. Valuable mines of baser metals were concealed, and there was universal distrust. Such a state of things called loudly for legislative interference, and the Act 1 W. & M. c. 30 was

passed, declaring that "no mine of tin, copper, iron, or lead" should thereafter be taken to be a royal mine, although gold or silver might be extracted out of the same. This Act had reference to mines of tin, copper, iron, or lead, and no other; it was for the benefit of proprietors of those mines only, and left gold and silver mines in the same position as they were in before the passing of that statute. The provisions of the above statute were, however, not considered sufficiently clear, and another statute was soon afterwards passed to explain the former. The object of that Act and the former Act is to secure to the subject the copper, tin, iron, and lead ores found in his soil, or the value thereof, as fixed by the statute, and at the same time to preserve for the Crown all the gold and silver, if it chooses to take it, paying the value of the baser metals associated with it. The defendant has none of these baser metals of any value in the mine; he is not working the mine for the sake of them, he is working the mine in order to obtain gold, which he seeks to appropriate to himself in contravention of the rights of the Crown. The mine in question is not a copper, iron, tin, or lead mine, it has always been regarded and described as a gold mine. The defendant paid royalty to the Crown for working it. He sold it as a gold mine to a company. The company was called the Morgan Gold Mining Co.; the mine was worked for gold only; and gold only was sold. No business man would think of working it for the sake of the baser metals. They could not be won in respect of quantity, quality, or having regard to locality, so as to make them merchantable. The defendant, therefore, is not protected by these Acts. These Acts have no reference to a gold mine such as this is. It is said that the rates fixed by section 3 of the second Act are prohibitive. To a certain extent I think they are so intended, the object being that the Crown should not be induced to take the ore unless it contained sufficient gold or silver to make it worth while to pay those rates. This was for the benefit of the subject, and secured to him the produce of his mine in all cases where there was not a substantial quantity of precious metal. The appeal must be dismissed.

KAY, L.J., after referring to the Act of 5 Hen. 4, the decision in the *Case of Mines*, and the provisions of the two Acts of William and Mary, continued:—Section 4 of 1 W. & M. c. 30 clearly applied only to mines of copper, tin, iron, or lead. The question is whether the later statutes refer only to mines of that kind, or whether they include all mines, for whatever purpose worked, which contain gold or silver, and which also contain some copper, tin, iron, or lead. The defendant has suggested that the price of copper at the time of this legislation was only about £5 per ton, that ore containing five per cent. of pure copper would be merchantable, and that £16 per ton of such ore (the price mentioned in 5 W. & M. c. 6) would equal £320 per ton of pure copper. Thus, he says, it would not be worth the while of the Crown to take the ore at that price unless it contained in addition 5oz. of gold at least in the ton of ore. This, says the defendant, is nearly five times as much gold per ton as the present mine produces, its yield being not much more than 1oz. per ton of ore. Therefore, the defendant argues, these Acts must have included such mines as this, and, indeed, must have included all gold mines containing copper, because ore containing 5oz. of gold per ton would not only be a gold mine, but an extraordinarily rich one. He supports the argument by like calculations as to the prices of tin, iron, and lead at the date of these statutes. The argument is ingenious. It is based upon the assumption that the quartz rock extracted from this mine is ore. That quartz rock containing only 1oz. of gold per ton of the rock, and a small and unremunerative quantity of base metal, is ore within the meaning of these statutes is, to say the least of it, doubtful. At 12oz. to the pound, 1oz. is not 1-26,000th part of a ton. Moreover, the ore for which the Crown is to pay is ore "washed, made clean, and merchantable," which strengthens the construction that the ore mentioned in the statute must be ore separated from the rock. In Johnson's Dictionary, which was written about the middle of the last century (1755) "ore" is described as "metal unrefined—metal yet in its mineral state." And he quotes from Spenser, who wrote at the end of the sixteenth century, about 100 years before these statutes:—

"Round about him lay on every side
Great heaps of gold that never would be spent.
Of which some were rude ore not purified
Of Mulciber's devouring element."

If "ore" be read "metal in its crude state separated from the rock," the illustration of the defendant entirely fails. Moreover, when the defendant alleges that "ore" (that is, according to his construction, rock) containing five per cent. of copper is merchantable, he means that it is merchantable now with all the improvements of manufacture perfected in these mining days, not that it would have been merchantable at the end of the 17th century. We have no evidence in support of these calculations of the defendant, but in trying the meaning and effect of these statutes I will assume them to be accurate. The first question is the grammatical construction of these Acts, and especially the 5 W. & M. c. 6. It seems to me reasonably clear that the first Act (1 W. & M. c. 30) was only passed to encourage mining for the base metals therein particularly mentioned, and does not refer to a mine which is worked for gold, although such mine may contain a certain quantity of such base metals, or of some of them. The second statute (5 W. & M. c. 6) is expressed to be enacted for the better explanation of the former Act. *Primâ facie*, therefore, it can only refer to the same mines as are mentioned in that statute. No doubt in the enacting part the language is changed to any mine "in which there is copper, tin, iron, or lead." It certainly does not refer to a mine in which none of those metals are found, although such mine might contain gold or silver.

In fair grammatical construction, it appears to me that this statute only applies to mines of copper, tin, iron, or lead—that is, mines which are worked for the purpose of raising one or other of those metals, and the profit of which is mainly derived from such working. I do not think, if the defendant's figures be right, that this grammatical construction is displaced. It only comes to this—the Crown has put such a price upon the ore as makes it certain that a man may safely mine for copper, tin, iron, and lead without danger of interference, unless it contains a very large proportion of gold. It does not follow that he may work a mine for gold because there is with the gold a small quantity of copper, tin, iron, or lead. The Acts are dealing, not with gold mines, but with mines of copper, tin, iron, and lead only. What is such a mine is not determined by them, and there may, doubtless, be imagined a case where the yield is such that the value of the gold and copper per ton of ore is nearly the same, and where it would not pay to work the mines for one of these metals without the other, and it might be difficult in such a case to say whether the mine should be called a copper mine or a gold mine. Probably any court before which the question came [illegible] inclined to give

the mine owner the benefit of the doubt. The case, however, with which we have to deal raises no such difficulty. The value of the base metals in this mine is quite inconsiderable. The mine is worked for nothing but gold. In the quartz rock containing the gold, and, it may be, in combination with the gold to some degree, there are lead and copper, and, perhaps, other base metals, but the mine is not worked for the purpose of recovering any of these, nor, according to the evidence, could it be profitably worked for such purpose. It is, to all intents and purposes, a gold mine, and worked as such. Such a mine is, in my opinion, a royal mine, and is not affected by any of these statutes, and, accordingly, the defendant has from the first been in the wrong. The decision of the learned judge against him was right upon this point, and the appeal must be dismissed, with costs.

Sir R. E. Webster, A.G., pointed out that the price of copper at the time when the Acts of William and Mary were passed was really £5 per cwt., and not £5 per ton, as Mr. Morgan had stated.

Mr. Morgan, while admitting the mistake, said that he had stated the price of lead correctly, which was sufficient for the purposes of his argument.

Appeal dismissed.

Solicitors for the appellant, *Davidson & Morriss.*

Solicitor for the respondent, *Solicitor to Commissioners of Woods and Forests.*

From Chan. Div. Dec. 5, 6.

In re BRITANNIA FIRE ASSOCIATION. COVENTRY'S CASE. (*a.*)

Company — Winding up — Contributory — Contract — Shares—Allotments made without authority—Sham transaction to deceive the public—Companies Act, 1862, *s.* 23.

Directors of a company arranged among themselves to enter on the register as allottees of shares the names of persons handed in by the directors, in order to make it appear that a number of shares in fact unallotted had been allotted, so as to induce the public to apply for shares. In pursuance of this arrangement A., a director, sent to the company a form of application for 200 *shares, purporting to be an application by A.'s son, and signed in the son's name by A., but in fact without the son's knowledge or authority. The* 200 *shares were accordingly registered in the son's name, but no certificates were ever issued, and no application or allotment money ever paid, nor any call ever made or dividend paid on the shares. The son never at any time ratified A.'s act, nor in any way held himself out as the holder of the shares.*

The company went into liquidation, and then A., and subsequently the son, died. After the son's death the liquidator placed the names of A.'s executors on the list of contributories in respect of the 200 *shares.*

Held (reversing the decision of Kay, J.), *that, upon the facts as above stated, no contract to take shares, either for himself or his son, had ever been entered into between A. and the company, and, therefore, that A.'s executors could not be placed on the list of contributories.*

Pugh's case, *L. R.* 13 *Eq.* 566, 20 *W. R. Ch. Dig.* 45, *and* Cox's case, 12 *W. R.* 92, 4 *De G. J. & S.* 53, *distinguished.*

Appeal from Kay, J.

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

On May 13, 1869, a meeting of the directors of the Britannia Fire Association was held, at which Millis Coventry, Webb, and other directors were present.

From the evidence of Webb it appeared that at that meeting the directors, not being satisfied with the number of shares then applied for, came to an arrangement among themselves, not that they should themselves take, or make themselves responsible for, the unallotted shares, but that the unallotted shares should be placed temporarily in the names of some friends of the directors until the public applied for them. In pursuance of that arrangement a resolution was passed at the same meeting that the shares set forth in the allotment book, to the number of 10,000, should be allotted to the several "applicants" whose names were scheduled to the resolution. Among the names of the so-called "applicants" was "Samuel Coventry, of Galatz," and the number of shares stated to have been applied for by, and allotted to, him, was "200." In fact, however, no application whatever for shares had then been made by "Samuel Coventry," but on May 26, 1869, an application for 200 shares, bearing the following signature, "For Samuel Coventry, Galatz, M. Coventry," was sent to the directors. This application, in fact, had been filled up, signed, and sent by Millis Coventry (who was Samuel Coventry's father), without the knowledge or authority of Samuel Coventry.

On May 27, 1869, another meeting of directors was held—Millis Coventry being present—at which the minutes of the previous meeting of May 13 were read and confirmed.

No money was ever paid nor any dividend ever received in respect of these 200 shares, nor any certificates of them ever issued. Prior to the liquidation no notice for calls or otherwise had ever been sent to Samuel Coventry.

On March 7, 1881, a resolution was passed for the voluntary winding up of the Britannia Fire Association. The "Debtors' Call-book" contained an entry to the effect that a sum of £600 was due from "Samuel Coventry" for "arrears of calls" in respect of the "200" shares, being, in fact, the whole nominal value of the shares; against Samuel Coventry's name was appended the following note:—"These shares were put into the name of the holder in order to facilitate the general allotment."

On July 4, 1881, the liquidator of the Britannia Fire Association sent a written application to Samuel Coventry at Galatz for payment of the £600, but no notice was taken of this application.

On November 11, 1882, an order was made in the winding up that no further calls be made on the contributories.

Millis Coventry died in March, 1886, and appointed Edward Coventry and another person executors of his will.

Samuel Coventry, of Galatz, died in September, 1889.

The liquidator of the Britannia Fire Association in February, 1889, put the names of Millis Coventry's executors on the list of contributories of the association, in respect of the 200 shares in question; the executors applied to have their names struck off the list, on the ground that their testator, Millis Coventry, was under no liability in respect of the shares.

Kay, J., held that Millis Coventry, by applying for the shares in the name of a person who knew nothing of the application, had rendered himself responsible as a contributory; and his lordship therefore refused to remove the names of the executors of Millis Coventry from the list.

The executors of Millis Coventry appealed.

Renshaw, Q.C., R. M. Bray, and *J. W. Baines*, for the appellants.—In order to render Millis Coventry's executors liable as contributories it must be shown that Millis Coventry contracted to take the shares himself either as principal or agent; but the evidence shows that the contract was, not that Millis Coventry, but that Samuel Coventry (who was an existing person) was to take the shares; and the company acted on that footing by placing the name of Samuel Coventry on the register as holder of the shares. Millis Coventry might have been liable in damages for breach of an implied warranty of authority from Samuel Coventry to take the shares for him, but that is not the nature of the remedy now sought, which depends on contract: *Lewis* v. *Nicholson*, 18 Q. B. 503; *Ex parte Panmure*, 32 W. R. 236, 24 Ch. D. 363; *Collen* v. *Wright*, 5 W. R. 265, 6 *Ibid.* 123, 7 E. & B. 301, 8 *Ibid.* 647; Lindley on Companies, 5th ed., p. 241. In *Cox's case*, 12 W. R. 92, 4 De G. J. & S. 53, and in *Barrett's case*, 12 W. R. 925, 4 De G. J. & S. 416, the shares were actually taken by the person who was sought to be made responsible for them, but that is not the case here. *Kelner* v. *Baxter*, 15 W. R. 278, L. R. 2 C. P. 174, is opposed to all the other authorities previously cited.

Marten, Q.C., and *Beddall*, for the liquidator.—The evidence shows that the transaction amounted to a contract to make a contract in the name of another. The directors, including Millis Coventry, intended that these shares should be taken by them in fictitious names, and the persons who applied for the shares in the fictitious names are themselves liable as holders: *Pugh's case*, L. R. 13 Eq. 566, 20 W. R. Ch. Dig. 45; *Richardson's case*, 23 W. R. 467, L. R. 19 Eq. 588.

LINDLEY, L.J.—This is an appeal from the decision of Kay, J., refusing to remove from the list of contributories of this company the names of the executors of Millis Coventry, who was a director of the company from the time of its formation until its voluntary winding up. He had as a co-director a Mr. Webb, who has made a deposition in this case, and whose evidence shows what was being done as regards the matter now in question.

The company was formed some time before May, 1869; and it appears that in May, 1869, the shares of the company had not been taken up to an extent which the directors thought expedient and desirable; accordingly they proceeded to consider how the issue of shares might be increased.

Mr. Webb's evidence shows what was done, and that in fact a fraud was committed by the directors. Not having succeeded in getting off the shares, and having in hand a number of unallotted shares, they wanted to make it appear as if those unallotted shares had been allotted; and, accordingly, they put several hundreds of them into the names of their private friends without any authority at all. The object of that is disclosed by the evidence—namely, to make it appear that shares which were in truth unallotted had in fact been allotted; the directors apparently thinking that the shares would be more easily disposed of by transfer. That was a gross fraud; and it seems to me that the directors who took part in it were jointly and severally responsible. Two hundred shares were allotted in the name of Samuel Coventry. The application for them was signed as for Samuel Coventry by Millis Coventry, and the address of the apparent applicant was given as "Galatz," where Samuel Coventry lived. Now Mr. Webb says, not that it was agreed that the directors should take shares, but that they should not take shares—a circumstance which distinguishes the case from *Pugh's case* and *Cox's case*. This is not a case of A. agreeing to take shares for B., but of A. committing a fraud, and not taking shares for himself or anyone else. Now, can we say that there was, upon the facts, any agreement by Millis Coventry to take shares so as to bring the case within *Cox's case*, and that class of cases? I cannot say that. But unless the evidence warrants us in coming to the conclusion that Millis agreed to take these shares, we cannot put him on the list. We must not strain the facts in order to find an agreement were none exists. Looking at the facts as they appear upon the evidence, we cannot say that, according to legal principles, his name, or rather the names of his representatives, should remain on the list of contributories; and, therefore, they must come off. The facts are plain, and do not justify the names being allowed to remain on. We must allow the appeal, and the order of Kay, J., must be discharged; but, having regard to the nature of the transaction, we think that the appellants ought to have no costs either here or below.

BOWEN, L.J.—I am of the same opinion. This is not a case of estoppel; it is a question of contract or no contract, and the law which governs this case is the ordinary common law as to contracts. Section 23 of the Companies Act, 1862, says that every person who has agreed to become a member of a company, and whose name is entered on the register of members, shall be deemed to be a member of the company; but we do not really require that section to tell us that the law of contract is the law we have to apply.

Now what is the position of the liquidator in this case? In order to settle the names of the executors of Millis Coventry upon the list of contributories he has to make out a contract, not between Samuel Coventry and the company, but between Millis Coventry and the company. Here Millis Coventry had no intention whatever of taking or holding the 200 shares. The truth is the intention was not that either Millis or Samuel should be a shareholder, but that Samuel's name should be put in so that he might appear to be a shareholder in order that the public might be induced to buy shares. That the Companies Act provides a remedy in such a case as this I have no doubt, and I am by no means sure—although I will not decide the point until it has been argued—that there is not some evidence here of a criminal conspiracy indictable at law; but the remedy actually adopted has, in my opinion, been misconceived. A so-called agent, who has no authority, purporting to contract, as agent on behalf of a principal, with a person who does not know that the so-called agent is dealing without authority, is answerable to that person in damages for breach of an implied warranty of authority. That is laid down by *Collen* v. *Wright* and that class of cases. That there may have been in the present case a cause of action on that ground against Millis Coventry is quite possible. I reserve the question whether it has been lost by lapse of time or otherwise. But here there was no intention to take the shares; there was no other intention than that Samuel Coventry should appear to be a shareholder. In my opinion the order should be discharged, but without costs, as a gross fraud seems to have been committed.

FRY, L.J.—I also find myself unable to come to the same conclusion as the learned judge below. The question is, whether or not a contract has been entered into by Millis Coventry with regard to the 200 shares. The evidence of Webb, his co-director, to my mind, conclusively shows that there was no such contract. Webb expressly states that the intention of the directors was that they should not take any of the unallotted shares. In my opinion, there was no real contract at all by any of the directors to take these

shares; all they agreed to do was to go through a sham procedure, in order to make it apparent to the public that certain persons who had not contracted for shares had contracted for shares, and so the name of Samuel Coventry was entered on the list of shareholders. There was no real intention on the part either of Millis Coventry or of Samuel Coventry to take shares; but the public were to be induced to believe that they, or one of them, had taken shares. There was no contract with the company. A contract arises from the intention of two minds directed towards a common object, itself indicated by certain terms. Here there was no intention by either party, the company or Millis Coventry, that he should bind himself to take shares; it was a sham transaction, a *fabula acta*, by means of which the public were to be deceived. I agree with what has been said by the other Lords Justices as to the nature of the transaction so far as it appears before us: whether, if Samuel Coventry had been alive, he could have given some explanation, it is impossible to say. The order of the court below must be discharged; but, having regard to the nature of the transaction, there should certainly be no costs.

Solicitors, *Watney, Tilleard, & Freeman; A. J. Nash.*

From Q. B. Div. March 4.

SHEPHERD *v.* BERGER. (*a.*)

Landlord and tenant—Lease—Proviso for re-entry upon non-payment of rent—Distress—Construction.

A lease contained a proviso for re-entry "if and whenever any one quarter's rent hereby reserved, or any part thereof, shall be in arrear for twenty-one days, and no sufficient distress can be had or levied for the same." Three quarters' rent up to the 25th of March being in arrear, the lessor, more than twenty-one days after the last quarter became due, distrained for the arrears of rent, but realized by the distress less than two quarters' rent. The lessor thereupon, on the 25th of May, brought an action to recover possession under the proviso for re-entry.

The Queen's Bench Division having held that the lessor, by distraining, had waived the forfeiture,

Held by the Court of Appeal (reversing the judgment of the Queen's Bench Division), *that, upon the true construction of the proviso, the right of re-entry accrued as often as a quarter's rent was in arrear for twenty-one days and no sufficient distress could be had or levied for the same; and that, as those two conditions existed at the date of the issue of the writ, a right of re-entry accrued at that date, and the plaintiff was entitled to recover.*

Appeal from the Queen's Bench Division.

The action was brought in the Mayor's Court to recover possession of certain premises demised by the plaintiff to the defendant for twenty-one years from March 25, 1889, at a yearly rent of £150, payable on the usual quarter-days. The lease contained a proviso for re-entry "if and whenever any one quarter's rent hereby reserved, or any part thereof, shall be in arrear for twenty-one days, and no sufficient distress can be had or levied for the same, whether the same shall have been legally demanded or not." Three quarters' rent up to March 25, 1890, being in arrear, the plaintiff on April 25 distrained in respect thereof, but the distress realized less than two quarters' rent. The plaintiff thereupon, on May 25, brought this action to recover possession under the above proviso for re-entry. In the Mayor's Court judgment was given for the plaintiff. The Divisional Court (Day and Lawrance, JJ.) held that the plaintiff by distraining had waived the forfeiture, and entered judgment for the defendant.

The plaintiff by leave appealed.

Henn Collins, Q.C., Morton Smith, and *W. H. Griffith,* for the plaintiff.

H. Kisch, for the defendant.

Certain authorities were cited upon points which were argued, but which are not dealt with in the judgment. It is unnecessary to set them out.

Lord ESHER, M.R.—It is unnecessary to decide any question in this case except the true construction of the proviso for re-entry. The plaintiff had a right to distrain when the rent reserved by the lease was in arrear. The plaintiff had that right at law independently altogether of the proviso in question. There being three quarters' rent in arrear, the plaintiff put in a distress for the whole amount. There were goods upon the premises barely sufficient to satisfy two quarters' arrears of rent. The plaintiff having sold the goods distrained, appropriated the proceeds to the first two quarters' arrears of rent. The plaintiff had a perfect right so to appropriate the proceeds, and, in fact, this was the most natural thing to do. The plaintiff's act in bringing the action was conclusive to show that he had so appropriated the proceeds. If the proviso had been that if any one quarter's rent should be in arrear, and no sufficient distress for the same, the proviso might, perhaps, have referred to the time when the distress was put in, and there would have been a single cause of forfeiture on that day, and, as there was sufficient distress to satisfy the quarter's rent, the case would not come within the proviso. That, perhaps, might have been so; I do not say that it would. But the words of the proviso are "if and whenever." The word "whenever" carries the case beyond the time of putting in the distress to any later time. The moment of the appropriation of the proceeds of the distress to the first two quarters' arrears of rent, there remained one quarter in arrear. Accordingly, when the goods were sold there were no goods upon the premises to meet a distress which he might put in for the last quarter. That state of things continued until the writ in the action was issued. At that date, therefore, there was one quarter's rent in arrear, and there was no sufficient distress upon the premises. That being so, under the terms of the proviso the plaintiff had a right of re-entry, and was entitled to judgment. The appeal must, therefore, be allowed.

BOWEN, L.J.—I am of the same opinion. This case turns entirely upon the construction of the proviso for re-entry in the lease, and the fate of the case depends upon two words in that clause, "and whenever." Supposing those words were not there, and the clause ran, "if any one quarter's rent shall be in arrear for twenty-one days, and no sufficient distress," &c., it might perhaps have been contended that, as soon as the quarter's rent was in arrear for twenty-one days, and there was no sufficient distress for the same, a single cause of forfeiture arose immediately, and that it would be necessary for the lessor to show that there was no sufficient distress at that moment to satisfy the quarter's rent. That might have given rise to some difficulty, but that difficulty does not arise in the present case, as the words are "if and whenever." Those words mean if and as often as at any moment of time the two conditions named in the proviso—viz., a quarter's

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

rent being in arrear for twenty-one days, and there being no sufficient distress—exist, a cause of forfeiture accrues. If that is the true construction of the clause, we must take the moment of time when the writ in this action was issued, and see if there was a cause of forfeiture then. At that moment a quarter's rent was in arrear, and no sufficient distress could be had or levied for the same. It is of no avail for the defendant to urge that, if the plaintiff had not distrained just previously for the rent in arrear, there would have been sufficient distress to satisfy the last quarter. The plaintiff had a right to distrain for all the rent in arrear, and he had a right to appropriate the proceeds of the distress to the first two quarters' rent. That left one quarter's rent in arrear, and as there was no sufficient distress, the proviso for re-entry applied. There was, therefore, no answer to the plaintiff's claim for possession, and the judgment of the Mayor's Court must be restored.

FRY, L.J., concurred.

Appeal allowed.

Solicitors for the plaintiff, *Moon & Gilks.*

Solicitor for the defendant, *Joseph Davis.*

High Court of Justice.

Chan. Div. North, J. — Dec. 13.

Ex parte KING'S COLLEGE, CAMBRIDGE. (*a.*)

College—Lands Clauses Consolidation Act, 1845—*Application of purchase-money—Universities and College Estates Act,* 1858 (21 & 22 *Vict. c.* 44), *ss.* 27, 28—*Universities and College Estates* (*Amendment*) *Act,* 1880 (43 & 44 *Vict. c.* 46), *ss.* 2, 4—*Board of Agriculture Act,* 1889 (52 & 53 *Vict. c.* 30), *s.* 2, *sub-section* 1 (b).

The consent of the Board of Agriculture must be obtained to the application of money in court representing college lands taken by a company under the Lands Clauses Consolidation Act, in pursuance of the Universities and College Estates (*Amendment*) *Act,* 1880, *ss.* 2, 4.

Petition.

This was an application by the provost and scholars of King's College, Cambridge, for funds in court to be expended in payment for the erection of some new buildings.

Land belonging to the college had been taken by a railway company under the Lands Clauses Consolidation Act, and the amount of the purchase-money had been paid into court and invested in £19,536 India 3½ per Cent. Stock. The college had entered into a contract for the erection of some additional buildings, and the petitioners desired to have the fund in court applied towards paying the cost of the buildings.

The petition asked for the stock to be sold in four instalments, as the money was required under the contract, and that the proceeds of sale might be paid to the petitioners, they undertaking to apply it towards the cost of the buildings, and also undertaking to repay the same by thirty equal annual instalments.

Under the Universities and College Estates Act, 1858 (21 & 22 Vict. c. 44), s. 27, the universities and any college therein may, with the consent of the Copyhold Commissioners, raise money by mortgage of any land belonging to the college for any term of years, for, among other purposes, the erection of new or additional buildings, and section 28 provides for the repayment of the borrowed money by thirty equal annual instalments.

By the Amendment Act, 1880 (43 & 44 Vict. c. 46), s. 2 (1), the purchase-money of land sold by a college under the above Act shall, with the consent of the Copyhold Commissioners, be applicable in repayment of borrowed money; (2) and the like provisions shall be made by the college for replacing the same as is by section 28 of above Act required. And section 4 extends the provisions of this Act to proceeds of sale of college lands under any other Act of Parliament standing to the credit of any cause or matter in the High Court.

By section 48 of the Settled Land Act, 1882, the Land Commissioners for England are substituted for the Copyhold Commissioners, and by section 2, sub-section 1 (*b*), of the Board of Agriculture Act, 1889, the powers and duties of the Land Commissioners for England were transferred to the board.

Cozens-Hardy, Q.C., and *Gaselee,* for the petitioners.—The preliminary question is whether it is necessary that the consent of the Board of Agriculture should be obtained to the proposed application of this fund. We submit it is not required, as the fund is in court, and not under the control of the board: Universities and College Estates Act, 1858, s. 27, and the Amendment Act, 1880, ss. 2, 4. The proposed application of the money might have been treated as a permanent investment under section 69 of the Lands Clauses Consolidation Act, and for that the consent of the board would not have been required.

Hornell, for the railway company.

NORTH, J.—I cannot hold the consent of the Board of Agriculture is not required, as to do so would be to read section 4 of the Amendment Act of 1880 as if it provided that the provisions of the Act should apply except so far as they necessitate the consent of the Copyhold Commissioners being obtained. I do not feel at liberty so to read it, and I think the consent of the board must be obtained.

Solicitors, *F. and T. Smith & Sons; John White.*

Chan. Div. Stirling, J. — Jan. 15, 31.

STONE v. LICKORISH & BELLORD. (*a.*)

Costs—Taxation—Solicitor-mortgagee acting in person—Redemption action—Profit costs.

A mortgagee-solicitor who acts for himself in a redemption action is only entitled to costs out of pocket, not to profit costs—i.e., *remuneration for personal trouble.*

An objection to the allowance of such costs need not necessarily be taken at the hearing of the action.

Price *v.* M'Beth, 12 *W. R.* 818, *not followed.*

Adjourned summons.

This was an application by the plaintiff, E. B. Stone, to have disallowed certain costs, amounting to about £40, of the defendants, Messrs. Lickorish & Bellord, solicitors, on the ground that they, as mortgagees acting in person, were not entitled to profit costs.

The defendants had acted as solicitors for one J. G. Smith, who had by two deeds, dated the 21st of June

(*a.*) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

(*a*) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

and the 16th of July, 1888, respectively, in consideration of advances made and to be made by them to him or on his behalf, executed a charge in their favour upon two policies of assurance on his life in the Eagle Assurance Co. Smith was subsequently adjudicated bankrupt, and the present plaintiff, who was the assignee from H. W. Johnson, the trustee in the bankruptcy, under a deed dated the 12th of November, 1888, commenced the present action for redemption of the security. Under the ordinary judgment in the action, dated the 21st of February, 1889, an account of principal, interest, and costs had been directed, and the costs to be taxed, and there now remained a question as to the costs of the action, the subject of the present application. Upon taxation the plaintiff objected to the allowance of all the items in the defendants' bill of costs in the action except such as were for out-of-pocket expenses, on the ground that the defendants were mortgagees and acted as their own solicitors in the action, and as such were not entitled to profit costs. The taxing master allowed these costs, and the plaintiff took out a summons, dated the 25th of November, 1890, asking that the objections might be allowed and the matter referred back to the taxing master to vary his certificate accordingly.

The taxing master, in his reasons for disallowing the objections, referred to *London Scottish Benefit Society* v. *Chorley*, 32 W. R. 523, 781, 12 Q. B. D. 452, 13 Ibid. 872, and *National Provincial Bank* v. *Games*, 34 W. R. 601, 31 Ch. D. 582, and stated: "I consider this case comes within the above decisions, being costs of the litigation. I consider this case is also distinguishable from *In re Roberts*, 38 W. R. 225, 43 Ch. D. 52, and *In re Wallis, Ex parte Lickorish & Bellord*, 38 W. R. 482, 25 Q. B. D. 176, and I have so dealt with the bill by allowing the costs of litigation pure and simple to the mortgagees."

C. Macnaghten, for the plaintiff, in support of the summons.

Maidlow, for the defendants.—I raise the preliminary objection that the question is too late, and ought to have been raised at the hearing: *Price* v. *M'Beth*, 12 W. R. 818.

Macnaghten.—*Price* v. *M'Beth* is inconsistent with the present practice. The taxing master may go behind the order for taxation and look at the real position of the parties: *Cradock* v. *Piper*, 1 Mac. & G. 664; *York* v. *Brown*, 1 Coll. 260. These were cases of solicitor-trustees, but the principle is the same in the case of solicitor-mortgagees. I ask your lordship to inquire into the present practice.

Maidlow.—In *In re Wallis, Ex parte Lickorish*, I argued that *Sclater* v. *Cottam*, 5 W. R. 744, had been overruled inferentially by *London Scottish Benefit Society* v. *Chorley*, but the Court of Appeal declined to hear any argument as to a case being overruled inferentially or impliedly. [STIRLING, J.—The point seems to be whether *Price* v. *M'Beth* has been acted upon; it is hardly consistent with *Sclater* v. *Cotham*.] The principle I support was carried out in *In re Donaldson*, 27 Ch. D. 544, 33 W. R. Dig. 61, where one of some solicitor-mortgagees who were trustees was allowed his profit costs.

Macnaghten.—*Chorley's case* was not a mortgagee's action, it is distinguishable. There may not be any actual decision on the point now in question, but the principle of *In re Wallis* governs this case; it accordingly decides that the defendants are entitled in the present case to out-of-pocket costs only.

Maidlow.—In *Sclater* v. *Cottam* no objection was taken to a solicitor having his costs of the redemption action. In *In re Wallis* we were met with *Sclater* v. *Cotham* only when we came to item 3.

STIRLING, J.—I will make inquiries of the taxing masters as to the existing practice.

Cur. adv. vult.

Jan. 31.—STIRLING, J.—This is a redemption action in which the defendants appear themselves, being solicitors, and the usual judgment was given directing an account to be taken of principal, interest, and costs to be taxed by the taxing master. The taxation has accordingly taken place, and upon that taxation the taxing master allowed the solicitors profit costs. Thereupon objections were carried in to that taxation, and were overruled by the taxing master, and thereupon a summons was taken out by the plaintiff, the mortgagor, to review the master's decision. When the matter was argued in court the first objection taken was that it came too late: that, according to the decision of Stuart, V.C., in *Price* v. *M'Beth*, the objection should have been taken at the hearing.

Now in the report in the WEEKLY REPORTER, and also in Morgan and Davey's Treatise on Costs, there is a reference made by the learned reporter and by the learned authors respectively that that decision is inconsistent with *Cradock* v. *Piper*, where it was established by Lord Cottenham that where trustees had obtained an order for the taxation of costs in the usual form, and those trustees were solicitors appearing by themselves, it was open to the taxing master, although that objection was being taken before him, to go into the question whether they ought to be allowed profit costs or not, and that rule was laid down on the ground that there was a long continued practice of the office to that effect. The Vice-Chancellor in the case of *Price* v. *M'Beth* does not seem to have thought fit to make any inquiry as to what the practice in taxing the costs was; and observing that the decision in *Price* v. *M'Beth* had been questioned in the way I have mentioned, both in the report, and in Morgan and Davey's treatise, I thought it right that I should inquire what the practice of the taxing masters with reference to this matter was, and I have received from the senior taxing master a certificate in this form: "That the practice of the taxing master with regard to the question of law costs to a solicitor-mortgagee in an action of redemption is to entertain an objection, and not to refuse to entertain it because it has not been taken at the hearing of the action." It appears, therefore, that the decision in *Price* v. *M'Beth* does not state what the practice in the taxing office actually has been, and seeing that it is inconsistent with *Cradock* v. *Piper* I think that I am bound to consider the validity of the objection, and not to set it aside because it was not taken at the hearing. The certificate goes on in these words: "I am desired to add that upon the question whether a solicitor-mortgagee is entitled to profit costs in such an action, the taxing masters differ in opinion"; and upon that I thought it right to inquire more particularly to what extent they differ, and the result of my inquiry is this, that previous to the recent decision in *In re Wallis* six of the seven taxing masters, and their immediate predecessors, so far as they were aware, always allowed profit costs, but that the seventh taxing master, who had held office since 1879, has uniformly disallowed them. Since the decision in *In re Wallis* the result has been a further division of opinion, and that three of the six who had previously allowed those costs now disallowed them, while the remaining three adhere to their old practice. Under these circumstances I think it cannot be considered that there is any established practice in the

ing masters' office in reference to the allowance or allowance of these costs, and that the matter must decided on principle.

Now upon the principle to be applied I have the idance of decisions which, though they do not vern the exact points before me, nevertheless proach very near them. In the case of *In re llis* Fry, L.J., divided the costs to which a mortgee was entitled into three heads—(1) the proper ts, charges, and expenses incurred by the mortgee in relation to the mortgage debt or mortgage urity; (2) the costs of litigation properly undertaken the mortgagee in reference to the security; and (3) mortgagee's costs of the redemption action. w, as regards the first two classes the decisions conclusive; as regards the costs of litigation perly undertaken by the mortgagee in reference to the security, the case is governed by the ision in *Sclater* v. *Cottam*, where Kindersley, C., held that the solicitor was only entitled to ts out of pocket, the principle being this: he s entitled to what he had disbursed, but not that which is remuneration for his personal uble. After that decision came the case of *London ttish Benefit Society* v. *Chorley*, where an action s brought against a firm of solicitors who were t mortgagees, it was simply an action for money d and received. It was defended by the solicitors nselves, and the action was dismissed with costs; d then the question arose what costs were to be ven to the solicitors, and it was held by the Court Appeal that they were entitled to profit costs, ough not the same profit costs as if they had peared by different solicitors. In that state of the thorities there came the case of *In re Wallis*, and ere the question was not as to costs of litigation, t as to charges and expenses claimed by the mortgee-solicitors in relation to the mortgage debt. was there held that the mortgagee-solicitors uld only have costs out of pocket. I shall read a w words of the decisions of each of the judges by hom the case was decided. Lord Esher says, "I ink it is consistent with every principle of justice at a man should not be entitled to charge for costs d expenses when he has not incurred any." Fry, J., says, "So far as I am aware no case is to be und in which a mortgagee has been allowed to arge against the mortgagor, as part of his costs, arges, and expenses properly incurred, remuneraon for work done or labour undertaken by himself rsonally. On the contrary, the court has often id, 'Though you may recover as part of your costs, arges, and expenses, payments which you have ade for work done in relation to the mortgage bt or the mortgage security, yet, if you choose to do e work yourself, you cannot charge for it.'" opes, L.J., says, "What are the ordinary terms of demption of a mortgage? Those terms are, the ment by the mortgagor of principal, interest, and s, that is 'costs' in the ordinary sense of the word, not remuneration for services rendered by the rtgagee himself."

he principle, therefore, which seems to me to run ough all these cases is this, that the mortgagee-citor is entitled to costs or expenses which he has urred, but not to remuneration for personal trouble. ciding the case on principle, it seems to me that must apply it in this case, and hold that the icitor-mortgagee is only entitled to out-of-pocket penses which he has incurred, and not to remuneran for personal trouble. I think, therefore, that e objection to the decision of the taxing master st prevail, and that the bill of costs must be sent k to him to reconsider his decision.

I have only further to deal with the costs of this application. This is a mortgagor's action for redemption; by the contract the mortgagee is entitled to costs, charges, and expenses properly incurred, and it has been repeatedly held by the Court of Appeal that a mortgagee does not lose his right to costs by bringing before the court a question as to the amount due to him in respect of principal, interest, or costs, even although he be unsuccessful in his contention. It seems to me that, having regard to the difference of opinion which has prevailed in the taxing office, that this is eminently a case to which I ought to apply this principle, and I therefore make the costs of this application costs in the action.

Solicitors, *Collyer-Bristow, Russell, & Hill*, for *Stone, Simpson, & Son*, Tunbridge Wells; *Lickorish & Bellord*.

Chan. Div. Kekewich, J. — Feb. 20.

In re PORRETT. (*a*.)

Practice—Solicitor—Bill of costs—Taxation—District registry—Power of district registrar of Liverpool to entertain a petition of course for delivery of a bill of costs—Removal to London—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 62—*R. S. C.*, 1883, *ord.* 35, *rr.* 6, 6a *sub-rule* 2, 16; *ord.* 62, *r.* 18.

A district registrar at Liverpool has power, on a petition of course, to make an order on a solicitor for delivery and taxation of his bill of costs.

The clients carried on business at Liverpool, the solicitor resided and practised in Sheffield, and the work had been done in London and Sheffield.

Held, that, on the balance of convenience, the taxation ought not to be removed to London.

Motion.

The question in dispute was whether a district registrar at Liverpool had power, on a petition of course, to make an order on a solicitor for delivery and taxation of his bill of costs.

The solicitor, Mr. David Hunton Porrett, resided and had his office at Sheffield, and he had been employed by the Animal Products Co. (Limited), whose registered office was situated at 24, Benson-street, Liverpool, to collect debts due to the company. In that capacity he had done work for them in London and Sheffield, but he had not delivered any bill of costs for his services. He had agents in London but not in Liverpool.

The company presented a petition of course in the Liverpool District Registry, and on the 3rd of February, 1891, one of the district registrars made an order (which was served on the 10th) directing Porrett to deliver to the company within fourteen days a bill of costs of all matters of business in which he had been employed as their solicitor, and referring it to one of the district registrars at Liverpool to tax and settle the said bill.

The solicitor now moved to discharge this order.

Bardswell, for the motion.—The district registrar had no power to make an order of course. The power to entertain petitions of course is by ord. 62, r. 18, transferred to the registrars of the High Court; and ord. 35, rr. 6 and 6*a*, sub-rule 2, do not extend this power to district registrars; rule 6*a*, sub-rule 2, only refers to petitions which require to be answered. Even if they did, the registrar ought to have referred the matter to your lordship according to the directions

(*a*.) Reported by H. C. ROPER, Esq., Barrister-at-Law.

given by your lordship to the district registrars of Liverpool and Manchester: Ann. Pr., 1890-91, p. 605. The order ought to have been drawn up, passed, and entered by the registrars of the High Court. If this practice is to prevail, solicitors may be brought to Liverpool from all parts of England and great inconvenience will result. In the alternative we ask for an order to remove the matter to London under ord. 35, r. 16, so that our agents may attend to it.

Warmington, Q.C., and *P. O. Lawrence*, for the company, were not called upon.

KEKEWICH, J.—I cannot disturb this order. The first point depends upon the alteration made by ord. 35, r. 6*a*, sub-rule 2, to which I will presently refer, in ord. 62, r. 18. The order here made was made upon a petition of course—that is to say, a petition which required no answering, and which required no service, that is, it had no respondent in the sense of there being a person on whom the petition had to be served, or who could appear to oppose the petition, and the order was made without the appearance of any respondent. These orders were formerly made on petition of course at the rolls. They have now been transferred to the office of the registrars of the Chancery Division, and the second branch of rule 18 of order 62 deals with that point; the first branch dealing only with petitions which require to be answered. The second part of the rule says that any orders on petitions which, according to the practice formerly prevailing in the Chancery Division, were drawn up, passed, and entered in the office of the secretaries of the Master of the Rolls, shall be drawn up, passed, and entered by or under the direction of the registrars of the Chancery Division. Therefore, an order made on such petitions is a registrar's order, and is not one of the orders that can be made by a chief clerk. An alteration has been made with regard to petitions in proceedings issued out of the Liverpool and Manchester district registries, and with regard to such petitions requiring to be answered, the district registrar has been substituted for the registrars of the Chancery Division; so that such petitions, when presented in the Liverpool and Manchester district registries may be answered at once, instead of being sent up to London to be answered and then remitted to be served.

But ord. 35, r. 6*a*, sub-rule 2, does not deal in any way with orders on petitions not requiring to be answered—that is to say, the petitions dealt with by the second branch of rule 18 of order 62—for it says that "where a cause or matter hereafter commenced in the Chancery Division is proceeding in the district registry of Liverpool, or in the district registry of Manchester, the district registrar shall act in respect thereof, and throughout all the proceedings therein, as a chief clerk of the judge of the Chancery Division to whom the cause or matter is assigned." I need not discuss whether, under that rule, the district registrar could have made an order in the same way as a chief clerk, because the rule goes on to say that he is to act not only as chief clerk, but also as registrar and taxing master, "according to directions to be given from time to time by such judge." Therefore, it is clear that when once you have a cause or matter commenced in the Liverpool District Registry thereupon the district registrar becomes empowered to act as a registrar of the Chancery Division, and comes distinctly within the second branch of rule 18 of order 62, and can make an order which formerly was made by the secretaries of the Master of the Rolls. But Mr. Bardswell pointed out that, however that might be, it is not usual for the district registrar to make such an order as this, and that he ought not to have made it, and that in that sense the order i irregular.

The directions given by me to the district regis trars, though they have not the force of rules, a intended to lay down what is and what is not withi their cognizance, and I am glad to find that they a known to the profession, for it is convenient for the to be informed as to what my officers have directio to do. One of these directions, as stated in th Annual Practice, 1890-1, p. 605, is this:—

"Delivery and Taxation of Costs.—On an applic tion against a solicitor for delivery and taxation of bill of costs and delivery up of deeds, the distri registrar shall hear the application, complete th evidence, and then refer it to the judge."

Upon that it is said that the district registrar ough not to have made this order. Whether I had petitio of course in my mind when I drew up that direction cannot say, but the language of it is distinctly agai Mr. Bardswell's contention. In the first place, t registrar is to "complete the evidence." Now, up a petition of course there is no evidence, and the fore the words "complete the evidence" cannot ha any connection with a petition of course. Th again, the words "delivery and taxation of a bill costs" are mentioned and connected by the copu tive "and," with the words "delivery up of deed which latter words are inconsistent with a petition course. Again, the registrar is directed to hear application; but there is no hearing of a petition course. All that the district registrar can do un that direction is to see that the application is proper form, and that the order goes in a proper fo The whole language, in my opinion, points to so thing where there is not only a discretion, but wh something can be said on both sides. I cannot th that can prevent the district registrar from making order on a petition of course when the judge can nothing himself but say, "Common order," and t the registrar must send the petition up to Lond and so cause useless expense.

Accordingly it appears to me on all these grou that this motion fails upon the question of irre larity, and must be refused.

The other point raised is that this taxation ough have been removed to London. I am always aver referring to my own language in other cases, ex where by so doing I can avoid saying the same th over again, and it is only for that reason that I r to the case of *Neath and Bristol Steamship Co.*, 58 L N. S. 180, 36 W. R. Dig. 42, which is mentioned in Annual Practice (p. 610), and where I endeavoure lay down the rule that there are two classes of c in which the power of transfer, of causes or ma pending in the Liverpool and Manchester dis registries, should be exercised—first, when the c considers that parties have improperly commen proceedings in such registries in order, under altered practice, to advance their litigation; secondly, when the balance of convenience is favour of transferring the case to London.

Now, with regard to the first of these two cl of cases, I have here a petition for taxation by a c pany whose domicile—or at any rate, its place of b ness—is in Liverpool. There is no reason to supp and it is not suggested, that the petition was prese to the Liverpool District Registry in order to ob any unfair advantage. It is true that the compa debtor—or, rather, the gentleman whose bill of c they require to see—lives in Sheffield. It may said that they might have sued him, and that in ordinary course they would sue him, in Sheffield; on the other hand, this is not an ordinary case of su a person for debt. He is their creditor. With any special circumstances to convince me to the c

ary, I do not think that this case comes within the rst class of cases to which I have referred.

Upon the question whether it falls within the other lass of cases there is a little more difficulty. It is said hat it would be more convenient if the taxation were o take place in London. A solicitor living in Sheffield ight or might not go to London more easily than to iverpool. Mr. Porrett has agents in London as all ountry solicitors have. I gather, however, that he ould attend the taxation himself, and that he would ot employ his London agents except as a matter of rm. Therefore I do not think there is very much in e London agency argument. I am not convinced at it is more difficult to get from Sheffield to Liverol than from Sheffield to London; on the other hand, e company's books are in Liverpool, and are, I suppse, constantly required for the purposes of their siness. Consequently it would not be of much nvenience to them to have the taxation proceeded ith in London. Therefore I do not think I ought to sturb this order on the ground of the balance of nvenience.

I therefore refuse this motion, with costs, and Mr. rrett must deliver his bill on or before the 3rd of arch.

Solicitors, *Jaques & Co.; George Thatcher*, for *Fisher, ndys, & Crosfield*, Liverpool.

Q. B. Div. (Cave and Vaughan Williams, JJ.) Jan. 27; Feb. 16.

BOYDELL *v.* MILLAR. (*a.*)

ts—County courts—Action of contract begun in High Court and afterwards remitted to county court—Judgment for less than £50—Change of solicitors—Right of solicitor who had acted in High Court to High Court costs against client—County Courts Act, 1888, *s.* 118.

An action for some £30 for work done was commenced the High Court, and was afterwards remitted to a unty court, where judgment was given for the plaintiff £30 and costs. Before the order to remit was made plaintiff changed his solicitor, and the solicitor who acted for him in the High Court ceased to act for him the action. The registrar of the county court taxed costs of the proceedings in the county court on the unty court scale, but he refused to tax the costs of solicitor who had acted for the plaintiff in the gh Court on the High Court scale. In an action ught in a county court by this solicitor to recover from client the costs incurred by him in the High Court on High Court scale,

Held, that the solicitor was entitled to recover these ts from his client, as such costs did not come within ction 118 *of the County Courts Act*, 1888, *not being ts for work done in any county court.*

Appeal by plaintiff from Clerkenwell County Court.

The plaintiff, who is a solicitor, brought an action ainst a former client in the Clerkenwell County urt to recover a bill of costs, amounting to £16 12s. 2d.

The present plaintiff had acted as the defendant's licitor in a claim for some £35 for work done, which e defendant had against a Mr. McIver. As it was pposed that the claim would not be disputed, and at judgment might be obtained under order 14 if e action were brought in the High Court, the action *Millar* v. *McIver* was brought in the High Court.

McIver did not appear and judgment was signed for default of appearance, but afterwards, on the application of McIver, this judgment was set aside and McIver was allowed to come in and defend on paying the amount of the claim into court, and it was a part of the order that the costs occasioned by the setting this judgment aside should be the plaintiff's costs in any event. After this order an application was made by McIver to have the action remitted to a county court; this application was adjourned, and during this adjournment the present defendant, Millar, changed his solicitor, the present plaintiff, and the present plaintiff ceased to act for Millar in the action, and did not, in fact, act for him in the county court. After this change of solicitors the action was remitted, under section 65 of the County Courts Act, 1888, to Brompton County Court, where it was tried, and where judgment was given for the then plaintiff, Millar, for £30, and costs.

On the taxation of the costs by the registrar of the Brompton County Court, the registrar taxed the costs of the proceedings in the county court on the county court scale at £6, and that sum was paid over by McIver to Millar in respect of the costs of the action. At this taxation the present plaintiff was represented, and a request was made on his behalf that his costs which he had incurred in the High Court before he ceased to act as solicitor in the case should be taxed and allowed to him as against his former client on the High Court scale. The registrar refused to tax or allow these costs, and it was alleged by the present plaintiff that if these costs had been taxed on the High Court scale, as between himself and his client, they would have amounted to £16 12s. 2d., the amount for which the present action is brought.

The present plaintiff then brought this action in the Clerkenwell County Court to recover these costs from his former client; the whole of the costs now sued for were incurred in the High Court.

The county court judge was of opinion that these costs came within section 118 of the County Courts Act, 1888, and that, not having been allowed on taxation by the registrar, they could not be recovered. He accordingly nonsuited the plaintiff, but gave leave to appeal.

The plaintiff appealed.

R. M. Bray, for the plaintiff.—The rule in the High Court which provides that if less than £50 is recovered only county court costs are allowed, applies only to costs between party and party, and does not prevent a solicitor recovering High Court costs as against his own client. The scales of costs in use in the county court apply to costs incurred in the county court only, and do not touch costs in the High Court, and the scales of costs referred to in section 118 affect only costs incurred in the county court, and do not affect costs incurred in the High Court. If there had been no transfer to the county court, then, although High Court costs may not have been recoverable as between party and party without an order of a judge, such costs as between solicitor and client would have been recoverable from the client. There may be a different scale of costs recoverable as between solicitor and client from what would be recoverable as between party and party: *In re Langlois & Biden*, *ante*, p. 181, 1891, 1 Q. B. 349. Here the plaintiff has done work in the High Court; there is no scale in the county court applicable, and section 118 does not affect the right to recover these costs, as that section refers only to costs incurred in the county court.

S. Lynch, for the defendant.—Ord. 50, r. 7, of the County Court Rules, 1889, deals with the taxation of costs by the registrar in a case where the action has been transmitted to a county court. That rule provides that in taxing the costs incurred in the High

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

Court, the registrar shall tax according to the scales in use in the High Court, except where the plaintiff, in an action founded on contract, recovers less than £50. The plaintiff in that action did recover less than £50, and there was no order of a judge to allow High Court costs, so that there was no power to tax the costs incurred in the High Court at all. Costs between solicitor and client may also be taxed by the registrar, and he is the only proper officer to tax them. The case comes within section 118, and as these costs were not allowed by the registrar, they cannot be recovered. Ord. 50, r. 7, applies to all taxations, to taxations between solicitor and client as well as between party and party.

Bray replied. *Cur. adv. vult.*

Feb. 16.—CAVE, J., read the following judgment:—This is an action in the county court by the plaintiff, who is a solicitor, to recover a bill amounting to £16 against the defendant. At the trial the retainer was admitted, but it was alleged that the costs came within section 118 of the County Courts Act, 1888, and not having been allowed on taxation, as therein provided, could not be recovered from the client. The learned judge was of this opinion and nonsuited the plaintiff.

The action in respect of which these costs were claimed was commenced and certain proceedings were taken in the High Court, but after a time an order was obtained remitting the action for trial to the county court of Brompton. After the order was obtained the plaintiff ceased to act for the defendant and never in fact acted as his solicitor in the county court. Under these circumstances it seems to me to be unnecessary to consider what the plaintiff's position would have been if he had gone on with the action in the county court. He did not do so, and, therefore, I think it is impossible to bring the case within section 118, as none of the plaintiff's charges are for work done in any county court. What, then, was the judge to do? If the defendant had applied to him for an adjournment to enable him to get an order of this court referring the bill to a master for taxation, the judge might very reasonably have adjourned the trial to enable this to be done. If the defendant did not desire this, the learned judge was, it seems to me, bound to try the case himself, and decide upon the reasonableness and propriety of the charges. The case must go back to be tried by the county court judge, unless the defendant desires to have the usual reference to a master to tax, and the defendant must pay the costs of the appeal, and such of the costs below as may have been thrown away.

VAUGHAN WILLIAMS, J., concurred in the above judgment.

Appeal allowed. Order that the case should go back to the judge for a new trial.

Solicitor for the plaintiff, *The plaintiff in person.*

Solicitor for the defendant, *John Evans.*

Prob. Div. and Adm. Div. Admiralty. } Dec. 18.

"THE UMBILO." (a.)

Shipping—Limitation of liability—Practice—Calculation of amount of plaintiffs' liability in the case of steamships measured for purpose of registry since December 31, 1889—*Merchant Shipping (Tonnage) Act*, 1889 (52 & 53 *Vict. c.* 43), *s.* 3.

In a case where the owners of a British steamship, built since March, 1889, *and measured for the purpose of registry since December* 31 *in that year, sought to limit their liability under the Merchant Shipping Acts for the consequences of improper navigation, the court it appearing on the certificate of registry that the gross tonnage of the steamship was stated to be* 1,922·82 *tons, refused, no other evidence as to the gross tonnage of the steamship having been given, to allow the plaintiffs, in calculating the amount of the tonnage of their ship for the purpose of the suit, to deduct from such* 1,922·82 *tons any of the deductions ordered to be made from the measurement of tonnage by the 3rd section of the Merchant Shipping (Tonnage) Act*, 1889, *or any other deductions other than certain deductions which the defendants admitted ought to be made from such amount of* 1,922·82 *tons.*

This was an action of limitation of liability instituted by the owners of the British steamship *Umbilo* for the purpose of limiting their liability under the Merchant Shipping Acts for the consequence of a collision between *The Umbilo* and the barque *Ethel.*

On behalf of the plaintiffs an affidavit was brought in from which, and from a copy of the register of *The Umbilo* annexed as an exhibit to such affidavit, it appeared that *The Umbilo* was a British steamship built in 1890, and registered on the 1st of March in that year, and that the particulars of tonnage stated on her register were as follows:—

PARTICULARS OF TONNAGE.

Gross Tonnage.

Under tonnage deck		1,805·50
Closed in spaces above the tonnage deck (if any		
Space or spaces between decks—		
Poop	21·31	
Side houses	20·77	
Round houses	66.20	
Other closed in spaces (if any) as follows—		
Chart house	3·73	
Excess of hatchways	5·31	
Gross tonnage		1,922·82
Deductions as *per contra*		690·94
Registered tonnage		1,231·88

Deductions Allowed.

On account of space required for propelling power		615·39
On account of spaces occupied by seamen or apprentices, and appropriated to their use, and kept free from goods or stores of every kind not being the personal property of the men. These spaces are the following, viz.—		
Lower forecastle	31·37	
Round and side houses	27·43	
Poop	2·06	
		60·86
Under Act, 1889—		
Master's room	5·14	
Chart room	3·73	
Boatswain's stores	5·41	
		14·78
Total deductions		690·94

The action now came on to be heard before the President (the Right Hon. Sir James Hannen).

Lauristen Batten, for the plaintiffs, contended that the "gross tonnage of *The Umbilo*, without deduction on account of engine room," on which the plaintiffs' liability was limited under the Merchant Shipping Acts, was not the "gross tonnage" stated on the certificate of registry for the convenience of

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

Board of Trade surveyors in working out what the net registered tonnage of *The Umbilo*, but, the contrary, only differed from such net registered nage by the allowance for the propelling power *The Umbilo* under the Merchant Shipping Acts g added to such net registered tonnage, and that sequently as *The Umbilo*, like all other registered tish ships, had been measured for the purpose of istry, the spaces which were, under the 3rd ion of the Merchant Shipping (Tonnage) Act, 1889, cted to be not included in her tonnage ought no e than crew space to be included in the tonnage on ch the liability of her owners was to be calculated. e referred to *The Franconia*, 27 W. R. 128, 3 D. 164; *The Palermo*, 33 W. R. 643, 10 P. D. 21.*

Butler Aspinall, for the defendants.

Cur. adv. vult.

Dec. 18.—HANNEN, P.—This is a suit by the wners of the screw steamship *Umbilo* for the limitaion of their liability in respect of the damage caused the defendants' barque *Ethel* by a collision etween that vessel and *The Umbilo* without the ctual fault or privity of the plaintiffs.

The question in the case is, what deduction should e made from the gross tonnage of *The Umbilo* in comuting the amount to which the plaintiffs' liability hould be limited? By the Merchant Shipping Act mendment Act, 1862, s. 54, it is enacted that the stimated tonnage is to be "in the case of steamships he gross tonnage without deductions on account of ngine room." It was not disputed that the plaintiffs ere entitled, in computing the gross tonnage of their essel, to deduct the space appointed for the berthing f the crew, but the plaintiffs further contended that hey are entitled to certain other deductions under the Merchant Shipping (Tonnage) Act, 1889 (52 & 53 Vict. c. 43). By the 3rd section of that Act it is nacted that "in measuring or remeasuring a ship or the purpose of ascertaining her register tonnage, he following deductions shall be made from the paces included in the measurement of the tonnage . . (1) Any space used exclusively for the ccommodation of the master. (2) Any space used xclusively for the working of the helm and the nchor gear, or for keeping charts, signals, and other nstruments of navigation, and boatswain's stores. 3) The space occupied by the donkey engines and oiler, if connected with the main pumps of the ship." For the defence it was argued that this enactment did ot apply to the computation of the "gross tonnage," pon which the liability of the owner is based, and it ppears to me that this argument is well founded. y the 1st section of the Act of 1889 it is enacted hat "in the measurement of a ship for the purpose of ascertaining her registered tonnage no deduction shall be allowed for any space which has not been first included in the measurement of her tonnage." That is, in her gross tonnage. But, as I have already pointed out, that gross tonnage affords the measure of the shipowners' liability. The deductions claimed by the plaintiffs must, therefore, be reduced by 14·78 tons.

Solicitors for the plaintiffs, *Waltons, Johnson, & Bubb.*

Solicitors for the defendants, *Botterell & Roche.*

* In support of this argument it is not immaterial o notice that the term "gross tonnage" does not ccur in the statutory form of certificate of registry ontained in the first schedule to the Merchant hipping Act, 1854; that the present form of certifiate of registry is a later form issued by the Comissioners of Customs and consented to by the Board f Trade under section 96 of the Act of 1854, and hat the tonnage on which the liability of steamships nder the Merchant Shipping Acts is to be calculated as been the subject of a decision of the Court of ession in *Burrell* v. *Simpson*, 4 Sess. Cas., 4th series, 177, whilst by the effect of sections 21 and 26 of he Act of 1854, and sections 3 and 7 of the Merchant hipping (Tonnage) Act, 1889, the tonnage of any ship neasured for the purpose of registry under those Acts s, except so far as the Merchant Shipping Act, 1867, has introduced a modification, to be deemed the "tonnage" of such ship.

Court of Appeal.

App. Bankruptcy. Jan. 16.

Ex parte MARGRETT.
In re SOLTYKOFF. (*a.*)

Bankruptcy petition—Infant sued on bill of exchange—Necessaries supplied—Indorsee of bill as petitioner—Non-liability of infant—Infants' Relief Act, 1874 (37 & 38 *Vict. c.* 62)—*Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 22.

The indorsee of a bill of exchange cannot sue or present a petition in bankruptcy against a person upon his acceptance, whilst an infant, of the bill, even though the original consideration for the bill were the supply of necessaries to the infant.

Appeal from the dismissal, by Mr. Registrar Linklater, of a petition in bankruptcy.

The petitioning creditor, Margrett, was the indorsee of four bills of exchange, amounting in all to £2,000, accepted by Soltykoff when an infant in consideration of goods, alleged to have been necessaries, supplied to him by the indorser of the bills. The petitioner had sued and obtained judgment upon the said bills as indorsee, and not upon the original contract.

The registrar dismissed the petition, on the ground of the infancy of Soltykoff at the time of the making of the bills.

Against this order the petitioner now appealed.

Bigham, Q.C., and *Kisch*, for the appellant.—Though the cases admittedly appear against the appellant's contention that an infant will be made liable to the indorsee of a bill of exchange, provided the consideration originally given for the bill had been necessaries supplied, they were all decisions at *Nisi Prius*, and should be overruled.

They cited *Trueman* v. *Hurst*, 1 T. R. 40; *Williamson* v. *Watts*, 1 Camp. 552; *Barnes & Co.* v. *Toye*, 13 Q. B. D. 410, 32 W. R. Dig. 97; *Stevens* v. *Jackson*, 4 Camp. 164; *Bateman* v. *Kingston*, 6 L. R. Ir. 328, 28 W. R. Dig. 107.

Finlay, Q.C., and *Herbert Reed*, for the respondent, were not called upon.

Lord ESHER, M.R.—In this case the creditor presented a petition in bankruptcy upon a debt contracted upon certain bills of exchange between the indorser of the bills and the acceptor, the person against whom the petition has been here presented. At the time of such acceptance this person was an infant. The registrar held that, that being so, he could not be made amenable to the petitioner. What was the relation between the parties? Assume that the

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

original consideration for the bills of exchange had been necessaries supplied to the acceptor as an infant, the petitioning creditor did not supply these, nor does he sue on that contract; he sues as indorsee on a bill of exchange, in accordance with the custom of merchants. It is immaterial whether the drawer of the bill had any consideration for it or not. The relation between the parties is simply that of indorsee and acceptor of the bill of exchange.

It has been held for a long time, and through a long series of cases, that an infant cannot make himself liable upon negotiable instruments such as bills of exchange and promissory notes. It is argued that the decisions cited are not binding upon us as having been decided at *Nisi Prius*. Perhaps that is so; but it would nevertheless be wrong of us, even if we desired to do so, to overrule such well-established case law.

I approve of those decisions, and I go further and say that even if an infant be sued in consideration of necessaries supplied upon a bill of exchange or promissory note as such, both the cases and the principle of law show that the infant could not bind himself by such a contract. I mean that if, having supplied necessaries to an infant, the contractor sued and relied upon a bill of exchange or promissory note and offered no other evidence of the contract, the infant could not be made liable on such instruments, either to the party who supplied the necessaries or to anyone else holding the instruments.

The cases and principle of law there laid down are further supported by the Infants' Relief Act, 1874, which necessarily implies that infants are not liable upon such instruments. The Bills of Exchange Act, 1882, is to the same effect. This appeal must be dismissed.

BOWEN, L.J.—I am entirely of the same opinion, and upon the same principle, which may be summarized as follows. The contract here is not a contract upon the original consideration—that is to say, it is not a contract in itself for necessaries to be supplied to the infant. But the Infants' Relief Act, 1874, and the Bills of Exchange Act, 1882, s. 22, confirm by implication the law laid down in the long series of cases.

LOPES, L.J.—I agree. The petitioning creditor was the indorsee of these bills, and sued as such. The question of "necessaries" does not arise at all. I go further and say that, even if there were originally a contract for necessaries between the parties, the infant would not be liable upon a bill of exchange or promissory note. The person who supplied the necessaries would have his other remedy, such as by action for goods sold and delivered. All the authorities, as well as the recent Acts alluded to, bear out this contention.

Appeal dismissed.

Solicitors for the appellant, *Smiles, Binyon, & Ollard.*

Solicitors for the respondent, *Williams & James.*

From Q. B. Div. Dec. 19.

BARROW *v.* ISAACS & SON. (*a.*)

Landlord and tenant—Breach of covenant not to underlet—Proviso for re-entry—Relief against forfeiture—Negligence.

In a lease the lessees covenanted not to underlet the premises or any part thereof without the consent in writing of the lessor, such consent not to be arbitrarily withheld in the case of a respectable and responsible person, and there was a proviso for re-entry in case the lessees did not observe and perform the covenants. The lessees underlet part of the premises without the consent of the lessor under these circumstances: The defendants left the matter in the hands of their solicitor, who had the custody of the original lease. Owing to the negligence of the solicitor and his managing clerk in not examining the original lease, the necessity of obtaining the lessor's consent escaped their attention. It was admitted that the sub-tenants were respectable and responsible persons, and that no injury had been occasioned to the lessor by the omission to ask his consent. In an action to recover possession under the proviso for re-entry,

Held, that there had been a breach of covenant entitling the lessor to re-enter.

Held, further, that the court would not grant relief from the forfeiture: by Lopes *and* Kay, L.JJ., *upon the ground that, assuming this was a case of "mistake" in which equity had jurisdiction to grant relief, the court, in the exercise of its discretion, would not relieve, as the mistake arose through the negligence of the lessees or their agents; by* Lord Esher, M.R., *that this was not a case of "mistake," and that, therefore, the court had no jurisdiction to grant relief.*

Appeal from the judgment of Day, J., in favour of the plaintiff, at the trial of the action without a jury.

The action was to recover possession of certain premises under a proviso for re-entry, upon breach of covenant in a lease. The facts are fully set out in the judgment of Kay, L.J. It is sufficient to state them here shortly as follows:—The plaintiff demised a warehouse to the defendants for a term of years. The lease contained a covenant by the defendants not to assign, underlet, or part with the possession of the premises or any part thereof without the licence and consent in writing of the plaintiff for that purpose first had and obtained, which consent the plaintiff agreed should not be arbitrarily withheld in the case of a respectable and responsible person; and there was a proviso for re-entry in case the defendants did not well and truly observe and perform the covenants. The defendants underlet part of the premises to a tenant, and for this purpose obtained the consent in writing of the plaintiff. Subsequently the defendants underlet another portion of the premises to another tenant, and the defendants' solicitor, to whom the carrying out of the underlease was left, omitted to get the consent of the plaintiff, having forgotten that such consent was necessary. The plaintiff then brought this action to recover possession. It was admitted that the sub-tenant was a respectable and responsible person. It appeared that the plaintiff, upon being applied to for his consent after the execution of the underlease, and after the omission had been discovered, refused to give his consent.

Day, J., held that there had been a breach of covenant entitling the plaintiff to re-enter, and that the defendants had not brought themselves within any ground upon which equity would grant relief from the forfeiture.

The defendants appealed.

Pollard and *Rufus Isaacs*, for the defendants.—The true construction of the covenant is that the lessee will not sublet except to a respectable and responsible person. The consent of the lessor in such a case need not be first obtained. If the lessor subsequently arbitrarily refuses his consent, there is no breach. [They referred to *Treloar* v. *Bigge*, 22 W. R. 843, L. R. 9 Ex. 151; *Lehmann* v. *McArthur*, 16 W. R. 877, L. R. 3 Ch. App. 496; *Burford* v. *Unwin*, 1 Cab. & Ell. N. P. 494.] Further, the words "observe and

(*a.*) Reported by W. F. BARRY, Esq., Barrister at

perform" apply to affirmative, and not to negative, covenants. The present is a negative covenant, and so the right of re-entry does not arise: *West* v. *Dobb*, 18 W. R. 1167, L. R. 5 Q. B. 460; *Hyde* v. *Warden*, 26 W. R. 201, 3 Ex. D. 72; *Evans* v. *Davis*, 27 W. R. 285, 10 Ch. D. 747. Again, assuming that there has been a breach of covenant, equity will give relief against the forfeiture. Equity will give relief where there has been mistake, surprise, fraud, or oversight—*i.e.*, where the breach has not been wilful—and where no damage has resulted from the breach: *Hack* v. *Leonard*, 9 Mod. 91; *Wafer* v. *Mocato*, 9 Mod. 112; *Rose* v. *Rose*, Amb. 331; *Northcote* v. *Duke*, Amb. 511; *Eaton* v. *Lyon*, 3 Ves. 690; *Sanders* v. *Pope*, 12 Ves. 282; *Hill* v. *Barclay*, 18 Ves. 56; *Bracebridge* v. *Buckley*, 2 Price, 200; *Rolfe* v. *Harris*, 2 Price, 206n; *Bargent* v. *Thomson*, 9 Jur. N. S. 1192, 12 W. R. Ch. Dig. 51; *Hughes* v. *Metropolitan Railway Co.*, 25 W. R. 680, 2 App. Cas. 439.

Channell, Q.C., and *Forman*, for the plaintiff, were only called upon to argue whether there had been a "mistake" upon which equity would grant relief.—There has been no "mistake" here. "Mistake" is analogous to "accident." The failure to observe an obligation which the party has undertaken to observe is not within the doctrine of "mistake" upon which equity will grant relief. The defendants left the matter in the hands of their solicitor, and he forgot that the consent of the plaintiff was necessary. The case of recovery of money paid under mistake is not analogous. Forgetfulness is not "mistake." Mistake does not include the result of negligence: *Gregory* v. *Wilson*, 9 Hare, 683; *Nokes* v. *Gibbon*, 5 W. R. 400, 3 Drew, 681; *Shearman* v. *M'Gregor*, 1 W. R. 302. 11 Hare, 106; *Kelly* v. *Solari*, 9 M. & W. 54; *Brownlie* v. *Campbell*, 5 App. Cas., at p. 952, 29 W. R. Dig. 232; *Townsend* v. *Crowdy*, 8 C. B. N. S. 477, 8 W. R. C. L. Dig. 46; *Peachy* v. *Duke of Somerset*, 2 W. & T. L. C., 6th ed., p. 1245; *Dumpor's case*, 1 Sm. L. C., 9th ed., p. 43. Further, equity will only grant relief in cases of mistake or accident where compensation is a complete satisfaction. The court has never granted relief from forfeiture for breach of covenant not to assign or sublet without licence, as the damage cannot be estimated. The Conveyancing Act, 1881, omits the case of forfeiture for assigning without licence. Until the Conveyancing Act, 1881, equity never granted relief in the case of breach of covenant to insure against fire, as the damage could not be estimated.

They also referred to *Reynolds* v. *Pitt*, 19 Ves. 134; *Bracebridge* v. *Buckley*; *Green* v. *Bridges*, 4 Sim. 96; *Job* v. *Banister*, 2 K. & J. 374; on appeal, 5 W. R. 177.

Pollard, in reply, referred to *Duke of Beaufort* v. *Neeld*, 12 Cl. & F. 248; *Stone* v. *Godfrey*, 5 De G. M. & G. 76; *Earl Beauchamp* v. *Winn*, 22 W. R. 193, L. R. 6 H. L. 223; *Rogers* v. *Ingham*, 25 W. R. 338, 3 Ch. D. 351; *Wilmott* v. *Barber*, 15 Ch. D. 96.

Cur. adv. vult.

Dec. 19.—Lord ESHER, M.R.—The plaintiff demised to the defendants certain premises in London, the lease containing a covenant that the defendants would not underlet the premises or any part of them without the consent of the plaintiff. There was a proviso for re-entry upon breach of any of the covenants. The defendants having underlet a part of the premises without the consent of the plaintiff, the present action was brought claiming possession. It appears that the defendants left the matter as to carrying out the underlease in the hands of their solicitor. The solicitor happened at the time to be away from London, and his managing clerk drew the underlease without looking at the superior lease, and being ignorant of the covenant requiring the consent of the lessor. There was a proviso that the consent of the lessor was not to be arbitarily refused. Some argument was addressed to us as to the distinction between affirmative and negative covenants, which might have raised questions of some nicety, but it is unnecessary to consider those questions, as the proviso of re-entry obviously applies to negative as well as to affirmative covenants. As to the stipulation that the lessor would not arbitrarily refuse his consent, I take it to mean that he would not wholly unreasonably refuse his consent. The premises in question were let to the defendants, who are responsible tenants. The defendants sublet to equally respectable and responsible persons. No reasonable objection could possibly have been made to them as sub-tenants. If the plaintiff's consent had been asked in time he would never have thought of refusing it. He would have had no valid ground for objecting to the sub-tenants, and his refusal would have been wholly unreasonable. The objection of the plaintiff is a mere afterthought arising from some unexplained motive, and the plaintiff's rights have not been prejudiced in any way by the omission to ask his consent. Still, there has been a breach of covenant, and the plaintiff has a right of re-entry. It is impossible to deny that at law the plaintiff has a right to recover possession.

The question however remains whether equity will relieve the defendants from the forfeiture. It is not very easy to ascertain the true doctrine upon which equity will grant relief. Equity relieves on the ground of fraud, accident, or mistake, and I think there should be added this qualification, where there can be complete compensation, or where there is no injury requiring compensation. The present case does not come under the head of fraud; nor does it, in my opinion, come under the head of accident, as it arose from something done or omitted to be done by one of the parties. Does it come under the head of mistake? And, if it does, is it such a mistake as a court of equity would relieve against? I have examined all the authorities, and I can find no definition of the word "mistake." But taking that word in its ordinary sense, is mere forgetfulness mistake? In my opinion it is not. In both there is a certain state of mind in the person. In the case of forgetfulness there is merely a passive state of mind—the person has forgotten. He has not, as in the case of mistake, thought one state of things to exist whereas in fact another state of things existed. To my mind mere forgetfulness is not mistake, and I cannot find any case saying that it is, and that it is a ground upon which equity will relieve. On that ground I should be prepared to hold that the court will not grant relief. A further argument was advanced that, even if this were a case of mistake, the court would not grant relief when the mistake was the result of the negligence of the person asking for relief, or of his agent. I am very unwilling to fetter the wide discretion of the court of equity in this respect. The argument is, that though no injury has been caused, equity cannot relieve against the effect of the mistake because there has been negligence. To adopt that argument would be to cripple the salutary powers of the court. In the present case there was negligence on the part of the solicitor's clerk, as indeed the solicitor himself admitted. There was negligence therefore on the part of the defendants' agent, but not on the part of the defendants themselves. Is that invariably to prevent the court granting relief, assuming that no injury has been done, or no injury that cannot be fully compensated for? I should be sorry to lay down such a rule. Suppose, for instance,

notice were necessary, and the defendant wrote out the notice and gave it to an agent to deliver, and the agent negligently laid it aside and omitted to deliver it, would the court of equity be deprived of its power to grant relief though no damage ensued? I decline to say so, and speaking for myself, if this were a case of mistake, I should grant relief. But, as I have said, this is not a case of mistake, but of mere forgetfulness, and the defendants have not brought their case under any head of equity that I can find. The plaintiff therefore has a right to insist upon the forfeiture, and the appeal must be dismissed.

LOPES, L.J.—I concur in the judgment which Kay, L.J., is about to read.

KAY, L.J., read the following judgment:—

The plaintiff is a lessor, who has brought an action of ejectment upon a power of re-entry in the lease for breach of a covenant against assigning or underletting without consent.

The lease, dated the 12th of August, 1881, was of a warehouse in the City to Sir Henry Isaacs and his brother, trading as Messrs. Isaacs & Son, and the power of re-entry is in case the lessees "do not well and truly observe and perform" their covenants. The covenant alleged to have been broken is "not to assign, underlet, or part with the possession of the premises, or any part thereof, without such consent as aforesaid, which consent the lessor hereby agrees shall not be arbitrarily withheld in the case of a respectable and responsible person." "Such consent as aforesaid" is expressed a few lines earlier in a preceding covenant thus: "Without the licence and consent in writing of the lessor, his executors, administrators, and assigns, for that purpose first had and obtained." The grammatical construction, therefore, is that the consent to assign must be first had and obtained, and I think the nature of the case would make this clear without the words "first had and obtained." If it had simply been "shall not assign without the lessor's consent," that would *primâ facie* mean a consent obtained before the assignment. It seems that the original lease was left by Messrs. Isaacs with their solicitor, Mr. Sydney, who kept it in a safe, of which he had the key. Some years ago Messrs. Isaacs underlet part of the ground floor of the warehouse to a tenant named Francis, and on this occasion the plaintiff's consent was applied for and obtained. He went to Sydney's office and signed a written consent. Recently, Messrs. Isaacs were desirous of underletting another portion of the premises to persons named Henderson & Liddell, and instructed Sydney to prepare a proper underlease. He being temporarily absent, the matter was conducted by his clerk, Gamble, who had not got the lease or any copy of it, and who prepared a fresh underlease from a copy of that to Francis, which did not, upon the face of it, notice the necessity of obtaining the plaintiff's consent. Gamble was ignorant of this necessity. Before the underlease was signed, however, Sydney returned, and the completion of the matter was managed by him. He made, in his own writing, certain alterations in the draft, and obtained the execution of the underlease. He had forgotten that the plaintiff's consent was necessary, and omitted to look at the lease to Messrs. Isaacs, which was in his safe, and accordingly the matter was concluded without the consent of the plaintiff being obtained or asked for. Mr. Sydney, in his evidence, said that it was usual in such a case to examine the original lease, but he supposed that Gamble had done all that was necessary. He added, with a frankness which was creditable to him, that no doubt the omission to look at the lease was great neglect. There was, therefore, *primâ facie* a breach of the covenant not to underlet without the plaintiff's consent. The plaintiff did not discover what had been done till October, 1889, when, passing along the street he saw the names of Henderson & Liddell put up on the door. He communicated with Messrs. Isaacs without delay, and they, by letter dated October 30, 1889, applied for his consent to what they had done. This he refused by a letter of the 31st of October, 1889.

The plaintiff admits that Henderson & Liddell are respectable and responsible persons, and it has been argued that, this being so, his consent was not required. I do not agree with that argument. The terms of the covenant are quite clear. If the intended lessees are respectable and responsible persons the consent is not to be "arbitrarily withheld." Those words imply that the consent must be asked for before the assignment, and that it may be withheld even though the intended lessees are proper persons if such withholding is not arbitrary. Many cases may be supposed in which it would not be. Respectable and responsible persons might desire to carry on a trade which would be injurious to the plaintiff, or which would depreciate the property. The plaintiff might have valid reasons for objecting to an underlease of a portion only of the warehouse. The underlessees might wish to use it for some purpose, not being a trade, which would altogether change the character of the premises; and many other reasons for objecting might be suggested.

Another point made was that the proviso for re-entry refers only to the breach of affirmative and not of negative covenants. This is founded on certain *obiter dicta* in *Hyde* v. *Warden*, 26 W. R. 201, 3 Ex. D. 72. Speaking for myself, I should think that, an extremely narrow construction if the word "perform" only, had been used. Perform has not necessarily an active meaning. We say that a man performs his duty by not answering revilings, by being silent when he ought not to speak, and by many other abstentions from acting as well as by active proceedings. But where the words are "observe and perform," as here, there is no reasonable ground for confining those words to the breach of an affirmative covenant.

Then if, as I think, there was a clear breach of the covenant, and a consequent right in the plaintiff to re-enter, is this a case in which equity would relieve against the forfeiture? The plaintiff has been called and has not been able to show that any actual damage has been done, or that he has any valid reason for objecting if his consent had been duly asked. Messrs. Isaacs and Sydney have all deposed that at the time of granting this underlease they had forgotten, though they certainly once knew, that the plaintiff's consent was necessary. Gamble did not know this. It has been argued (1) that this was a mistake which enables equity to relieve against the forfeiture; and (2) that it would be a proper exercise of that discretionary jurisdiction to do so in this case, as no damage has been done to the plaintiff by the underlease. I do not desire to cast the least doubt upon the jurisdiction of the court to relieve in cases of what it calls mistake. What we have to determine is, whether such relief would be a proper exercise of that jurisdiction in this case.

Long ago courts of equity assumed jurisdiction to relieve against forfeiture and penalties where the only object was to secure payment of a definite sum of money, even though there was no fraud, accident, surprise, or mistake. On this principle it relieved against payment of the whole penalty on a money bond before the statutes 4 & 5 Anne, c. 16, ss. 12 and 13, and 8 & 9 Will. 3, c. 11, which enabled courts of law to give the same relief. Also against forfeiture for non-payment of rent, and by 4 Geo. 2, c. 28 its powers in this respect were somewhat restricted by

limiting the time for their exercise to six months after execution in ejectment. At first there seems to have been some hesitation whether this relief might not be extended to other cases of forfeiture for breach of covenants such as to repair, to insure, and the like, where compensation could be made, but it was soon recognized that there would be great difficulty in estimating the proper amount of compensation; and since the decision of Lord Eldon in *Hill v. Barclay*, 18 Ves. 56, it has always been held that equity would not relieve merely on the ground that it could give compensation upon breach of any covenant in a lease except the covenant for non-payment of rent. But of course this left unaffected the undoubted jurisdiction to relieve in cases of breach occasioned by fraud, accident, surprise, or mistake. At present, the only one of these we have to deal with is mistake; and the questions are (1) whether the facts I have described amount to mistake; and, if so, (2) whether in its discretion the court will relieve. Very wisely, as I presume to think, the courts have abstained from giving any general definition of what amounts to mistake. It is an easily arguable question whether mere forgetfulness of such a covenant, even if not negligent, can properly be called mistake.

The case of *Kelly* v. *Solari*, 9 M. & W. 54, however, and the observations of Lord Blackburn in the House of Lords in *Brownlie* v. *Campbell*, 5 App. Cas. 952, establish that in an action to recover money paid by mistake it is sufficient to prove that at the time of the payment the person paying was actually ignorant that the money was not due, although he had the means of knowledge, and it was owing to his own carelessness or forgetfulness that he was, in fact, ignorant. There undoubtedly forgetfulness of the previous payment is treated as mistake. But in those cases the payee is in possession of money which he had no right to receive, and which really belongs to the person who paid it, and no amount of carelessness on the part of the payer can justify the payee in retaining it. I feel great difficulty in saying that if this be mistake at law it would not be considered mistake in equity. It is an entirely different question whether, on the ground of such a mistake, equity, in the exercise of its discretionary jurisdiction, would relieve a man from a forfeiture incurred by his own gross carelessness. *Vigilantibus non dormientibus leges subveniunt.* Equity is bound to consider all the circumstances of each case. To a suitor asking to be relieved from forfeiture, the result of carelessness so gross that it might almost be called wilful, it can hardly be favourably disposed. I have spoken of the right of re-entry of a landlord as a "forfeiture" of the lease, but the use of the word "forfeiture" in cases of this kind is somewhat misleading. This is not like a condition in a will, non-compliance with which causes a forfeiture. It is a contract between landlord and tenant that if the latter does or omits to do certain specified acts the landlord may re-enter. Lord Eldon, in *Hill* v. *Barclay*, 18 Ves. 62, dealing with Lord Erskine's observations as to relieving against breach of a covenant to repair, said:—"A particular case might perhaps occur, such as are put by Lord Erskine in *Sanders* v. *Pope*, in which it would be demonstrable that the landlord would sustain no injury by the relief; but it is taking a prodigious liberty with a contract by which a tenant has undertaken forthwith to repair." I understand that to mean, that it is a very strong proceeding for equity to interfere with the contract of the parties that the landlord may re-enter for breach of covenant, and that it can only do so in very exceptional circumstances.

In *Earl Beauchamp* v. *Winn*, L. R. 6 H. L. 223, the Court of Chancery had refused to rescind an agreement which it was sought to set aside on the ground of mistake common to both parties. The mistake alleged on the part of the earl was that he thought he had merely a right over the surface of a certain common, called East Common, instead of being owner of the soil, as he really was. This depended upon the doubtful construction of an ancient grant in 1799, which was among his title deeds, but which the Lord Chancellor was of opinion he was not guilty of any negligence in not having consulted. The Lord Chancellor said (p. 230): "This is not a case of mistake, therefore, but of ignorance, and ignorance resulting from a party's own omission to avail himself of information within his power." At p. 233 he says: "The cases in which equity interferes to set aside contracts are those in which either there has been mutual mistake or ignorance in both parties affecting the essence of the contract, or a fact is known to one party and unknown to the other, and there is some fraud or surprise upon the ignorant party." At p. 235 the Lord Chancellor adds that if the earl had mistaken his right to the East Common, and that he was in law the owner of the soil, instead of having merely a right over the surface, there was jurisdiction in equity to set aside the agreement. The House came to the conclusion that there was not any mistake, and affirmed the decision. The Lord Chancellor's former words as to the ignorance not being mistake are probably a statement of the argument which had been addressed to the House rather than his own opinion. However, he carefully excepts the case of ignorance arising from negligence of the person who seeks relief.

In the well-known case of *The Duke of Beaufort* v. *Neeld*, 12 Cl. & F. 248, an exchange was made of lands under the Inclosure Act (6 & 7 Will. 4, c. 115), section 35 of which requires the consent in writing of the proprietor. The Duke of Beaufort signed a written consent. The commissioner directed the exchange, and Neeld entered upon the lands exchanged. The duke sent a written notice to the commissioner declaring that his consent had been signed "under a misapprehension." The duke then brought an action of trespass and ejectment, in which judgment was given against him. He then filed a bill to rescind the written consent. During the argument Lord Brougham said, "Equity has not relieved against gross improvidence." Lord Lyndhurst, C., in giving judgment, said that the duke stated that when he signed the consent he did not know that the piece of land in question was included in it, because it was mentioned, not by name, but by a number which referred to a map not then in his possession. But he says it was his duty to make inquiry, and "if he did not choose to exercise due caution in that respect, he cannot turn round and say, 'I really did not know the contents of the paper when I signed it; I signed it incautiously.' He cannot now with propriety say that, so as to free himself from the consequences of his own act." Lord Brougham said: "He need not look if he does not choose; but then, if he does not look, he must bear the penalty of being held to have looked, and if he either shuts his eyes or carelessly sees, he shall not be allowed in a court of law or equity to say 'It is a mistake, I never knew it,' because he might have known it, and he ought to have known it, and if he signs his name and could have looked and did not look, still he is bound by his act." Lord Campbell in the same case said: "But then we come to the consent which was signed by the duke's own hand, and at that time I believe what the duke says, that he was ignorant of what he was doing. Because he is a man of unblemished honour, I have no doubt that everything he says is strictly and correctly

But he has the means of knowing; he wilfully shuts his eyes (I do not say that offensively at all), with the means of knowledge within his power, and it being his duty to have ascertained the fact, can he be heard to say, 'I was ignorant; relieve me from the effects of the mistake which I have made.'" The equitable relief sought in that case was refused partly on this ground. It is a decision of the highest tribunal that equity will not relieve when the mistake arises from the negligence of the suitor who seeks its help.

I am clearly of opinion that Messrs. Isaacs must be held responsible for any negligence of Mr. Sydney. Their plea for relief therefore, explicitly stated, would run thus: "We admit that we were aware of the necessity of obtaining the plaintiff's consent before making the underlease. The lease to us which imposed that obligation was in our possession. We had forgotten this provision of it. The ordinary course of business required that we should examine the lease before granting the underlease. We admit that we neglected to do so, but we say that no harm has been done to the plaintiff, and therefore equity should relieve against the forfeiture." There must have been thousands of cases in which leases have been forfeited owing to non-performance of covenants through *bonâ fide* forgetfulness. Counsel have not cited to us, nor have I been able to find, a single instance in which relief has been given under such circumstances. It is impossible not to see that such relief would be an incentive to negligence. If we were to grant it, hereafter lessees might avoid looking at their leases lest they should be reminded by them of obligations which it would be more convenient to ignore. Many suits would be instituted for relief upon this ground, which, until now, is unknown in the records of the court as one upon which relief would be granted.

The course of legislation upon this subject of forfeiture of leases by breach of covenant is most significant. At first, as I have pointed out, the remedial jurisdiction of equity against penalties was extended to courts of common law. Next, the relief it gave in cases of forfeiture for non-payment of rent was limited in time. Then ensued a long period, in which equity seems to have refused relief in cases of breach of any of the other covenants in a lease. Very hard cases occurred, in which unconscionable landlords insisted on their legal rights; especially hard were these forfeitures for breach of the covenant to insure where no damage had ensued. By 22 & 23 Vict. c. 35, ss. 4-9, extended to courts of common law by 23 & 24 Vict. c. 126, it was enacted that "a court of equity shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire where no loss or damage by fire has happened, and the breach has, in the opinion of the court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the court, in conformity with the covenant to insure, upon such terms as to the court may seem fit." The terms of that enactment making it lawful to give this relief when the breach has been committed "through accident or mistake, or otherwise without fraud or gross negligence," show plainly that equity had not been accustomed to relieve in such cases on the ground of accident or mistake; and, further, they provide that relief shall not be given, even in cases of accident or mistake, when there has been gross negligence. Now, by the Conveyancing Act, 1881, these enactments are repealed, but a *locus penitentiæ* is given to the lessee by requiring, in case of any breach of covenant, that the lessor shall serve upon him a notice specifying the breach and requiring him to remedy it, and to make compensation in money, before exercising his right of re-entry; otherwise the High Court may grant relief upon proper terms. But it is expressly provided that this does not extend to a covenant against assigning, underletting, parting with the possession, or disposing of the land leased. Forfeiture for breach of this covenant is left to be dealt with according to the ordinary law and practice of courts of equity.

Upon the whole, therefore, assuming, what I do not think it necessary to affirm or deny, that the High Court had jurisdiction to relieve in this case if in its discretion it thought fit to do so, for the reasons I have given I am of opinion that to grant such relief would not be a proper exercise of that discretion, and accordingly I think that this appeal should be dismissed, with costs.

Appeal dismissed.

Solicitor for the plaintiff, *W. A. Colyer.*

Solicitor for the defendants, *A. E. Sydney.*

From Q. B. Div. Dec. 10.

MILLER v. DELL. (*a*.)

Statute of Limitations—Conversion—Accrual of cause of action—Title deeds.

The plaintiff's son, having wrongfully obtained possession of a lease of certain premises of which the plaintiff was in possession, deposited it in 1881 *with B. to secure an advance. B. having afterwards become bankrupt, his trustee in* 1889 *transferred the lease to the defendant. The plaintiff demanded the return of the lease, and the defendant refused to give it up.*

Held, that the cause of action against the defendant did not accrue to the plaintiff until the demand and refusal to give up the lease; and therefore that the Statute of Limitations was no bar to the action.

Wilkinson *v.* Verity, 19 *W. R.* 604. *L. R.* 6 *C. P.* 206, *explained.*

Application that judgment should be entered for the plaintiff or for a new trial.

The action was brought for detinue and conversion of a lease. The plaintiff was the owner of certain leasehold property, and agreed with his son to assign the lease to him upon the performance of certain terms and conditions. These, however, were not performed, but the son, having in 1881 obtained possession of the lease, deposited it with a man named Bates, to secure the repayment of a loan made to him by Bates. He at the same time signed a memorandum of deposit which was in the ordinary form, and by which he agreed to execute a legal mortgage of the premises when called upon to do so.

Bates subsequently became bankrupt, and in 1889 his trustee in bankruptcy transferred all his interest under the memorandum of deposit and the lease itself to the defendant. Subsequently the plaintiff demanded from the defendant the return of the lease, but the defendant declined to part with it. The present action was then commenced, and the defendant pleaded the Statute of Limitations.

At the trial, which took place before Charles, J., and a jury, Charles, J., entered judgment for the defendant, on the ground that the plaintiff's cause of action had accrued more than six years before action brought—namely, when the lease was wrongfully deposited with Bates by the plaintiff's son.

(*a*.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

The plaintiff moved for judgment or for a new trial.

Crump, Q.C., and *Morton Smith*, for the plaintiff.—The plaintiff's cause of action was the refusal by the defendant to give up the lease. It is immaterial that he had at one time a good cause of action against Bates. *Wilkinson* v. *Verity*, 19 W. R. 604, L. R. 6 C. P. 206, on which Charles, J., placed reliance, only refers to acts done by the same defendant. The only detinue and conversion in this case was the refusal of the defendant to part with the deed.

They referred to *Spackman* v. *Foster*, 31 W. R. 548, 11 Q. B. D. 99.

R. Bray, for the defendant.—The statute began to run against the plaintiff when his son deposited the lease with Bates. That was a conversion for which a cause of action immediately arose: *Wilkinson* v. *Verity*; *McCombie* v. *Davies*, 6 East, 538.

Lord ESHER, M.R.—In this case the plaintiff has brought an action against the defendant for wrongful conversion of this document. The defendant's acquisition of the lease from Bates' trustee in bankruptcy and his refusal to give it up when it was demanded from him by the plaintiff both occurred well within the six years prescribed by the Statute of Limitations. The defendant, however, relies on the fact that the document was originally wrongfully converted, more than six years before action brought, both by Bates and by the plaintiff's son, who secretly abstracted it from his father's possession, and deposited it with Bates to secure an advance. This was the first wrongful conversion of the document, and it is said that the statute began to run againt the plaintiff from that date. In support of this contention the case of *Wilkinson* v. *Verity* was cited, and on that authority Charles, J., has decided in the defendant's favour. Willes, J., there said that as a general rule when there has once been a complete cause of action arising out of contract or tort the statute begins to run, and subsequent circumstances which, but for the prior wrongful act or default, would have constituted a cause of action are disregarded. In that case the defendant committed an act of conversion more than six years before action brought, and subsequently, within that period, committed another by refusing to give up the converted article when demanded from him by the plaintiff. There were, therefore, two acts of wrongful conversion, but both committed by the same defendant. All that that case decided was that where a defendant in an action for conversion had committed two acts, both of which would give rise to a cause of action in respect of the same subject-matter, and one of those acts was committed more than six years before action brought, but the other was committed within that period, the first and not the second act must be regarded; and, therefore, that the Statute of Limitations was in that case a bar to the action.

It is now sought to extract from that case the doctrine that if one man commits an act of wrongful conversion, and some time afterwards another person commits another wrongful conversion in respect of the same thing, the only cause of action is the first wrongful conversion, and that if that took place more than six years before action brought the action against the second wrongdoer is barred because it is too late to bring an action against the first wrongdoer.

The Statute of Limitations does not give any right to the property. If the real owner of a chattel, of which he had been wrongfully deprived more than six years ago, were, without any assault or trespass, to recover possession of it, the person who had held it for all those years would have no right of action against him, although the real owner's right to sue for it would be barred by the Statute of Limitations. I think, therefore, that Charles, J., misconceived the meaning of the case of *Wilkinson* v. *Verity*, and that there was no authority which entitled him to decide in the defendant's favour. The case of *Spackman* v. *Foster*, in which the facts seem very much like the facts in the present case, is in point, but on a question of even greater difficulty which it is not necessary for us now to decide. This was a lease, a document of title, and the evidence of title. It may be a question whether, even after the expiration of six years, a document of title can be held against the person entitled to the land. That point will, however, some day require consideration, and I do not feel inclined to decide it now. It is sufficient for the present to say that the Statute of Limitations does not apply to this claim, and that the decision of Charles, J., was wrong. This appeal must be allowed, and judgment entered for the plaintiff.

LOPES, L.J.—I am of the same opinion. I think that the Statute of Limitations is no bar to this action. The plaintiff's cause of action against the defendant was the demand by the plaintiff and the refusal by the defendant to give up the lease, to which the plaintiff was clearly entitled. That demand and refusal occurred within the period fixed by the statute. The form of plea given by Schedule B., Form 39, of the Common Law Procedure Act, 1852, is: "That the alleged cause of action did not accrue within six years before this suit." The plaintiff's cause of action against the defendant has accrued within that time, and therefore the Statute of Limitations is no bar. The case would be different if the action had been brought against the plaintiff's son, and the plaintiff would then have lost his remedy by lapse of time. In my opinion there is nothing in the case of *Wilkinson* v. *Verity* to support the decision of Charles, J. I therefore agree in thinking that this appeal must be allowed.

KAY, L.J.—I concur. In my opinion this case is almost identical with that of *Spackman* v. *Foster*. I think that that case is good law, and is entirely in point, and I agree, therefore, in thinking that this decision must be reversed.

Appeal allowed, and judgment entered for the plaintiff.

Solicitors for the appellant, *Sandon, Kersey, & Knight.*

Solicitors for the respondent, *Herbert Nield.*

High Court of Justice.

Chan. Div. North, J. — Dec. 12. 13.

In re WANZER (LIMITED). (*a.*)

Company—Winding up—Sequestration for rent by Scotch landlord—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 163.

An English company leased a shop in Scotland from a Scotch landlord, but, before the first quarter's rent was payable, an order to wind up the company was made and a liquidator appointed, who took possession of the shop. The Scotch landlord thereupon, without obtaining the

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

leave of the court under section 87 of the Companies Act, 1862, took proceedings for a sequestration to secure the payment of the rent of the shop.

Held, on the motion of the liquidator, that the sequestration was void by virtue of section 163 of the Companies Act, 1862; but the court gave leave to the landlord, under section 87 of that Act, to enforce his hypothec for the rent by proceeding with the sequestration, unless security was given for payment thereof, on the terms of paying the costs of the motion.

Motion.

This was a motion by the liquidator of Wanzer (Limited), a limited company, to restrain by injunction a Scotch landlord from taking any further proceedings on a petition for sequestration, commenced and prosecuted by him before the Sheriff's Court at Glasgow; and for a declaration that what was done under the proceedings was void to all intents, and that the landlord might be ordered to withdraw

The Wanzer (Limited), an English company, under an agreement dated the 17th of April, 1890, took a shop, No. 34, Gordon-street, Glasgow, for three years from Whitsunday, 1890, at a rent of £230, payable half-yearly; and soon afterwards they entered into possession.

In the following August, before any rent was due, a petition was presented and an order was made in this country for the winding up of the company, and on the 1st of September the provisional liquidator, who afterwards became official liquidator, took possession of the shop.

On the 16th of October the landlord, having been informed by the liquidator's agent that he was likely to leave the shop, commenced proceedings by petition in the Sheriff's Court of Lanarkshire, at Glasgow. The petition was headed by the name of the landlord, which was a company, and their manager, called the pursuers, against the Wanzer Co. as defenders. It stated that the pursuers, petition the court to sequester the whole of the stock, furniture, and effects which are, or have been, since Whitsunday, 1890, on the premises, and to grant warrant to the officer on the court to inventory and secure the same in security, and for payment to the pursuers of the £115, being the half-year's rent to accrue due at Martinmas, and the other £115 to accrue due at May, 1891, with interest and expenses; and to grant warrant to an auctioneer named to sell the whole or so much of the sequestrated effects as should be sufficient to satisfy the demand, but so that no sale was to take place till the Martinmas rent or the Whitsunday rent, 1891, had become due and remained unpaid. Then, after satisfaction by payment, sequestration might be recalled. Following upon that a document was put in, under which the landlord claimed to have a right of hypothec over the whole of the furniture on the premises. On the same day the sheriff-substitute for the county ordains that the defenders should be served with a copy of the petition, and that, if they intended to show cause why the prayer of the petition should not be granted, they should take certain proceedings, in default of which the petition would be conferred against them, and then "meantime sequestrates and grants warrant to sequester the goods on the premises for the rent of this current year."

The officer of the court then took possession on the same day, and executed a formal document to "inventory and secure" the goods, which were stated "to remain under sure fence and sequestration" to secure the rent, interest, and expenses. Thereupon the official liquidator brought on the present motion, the question for decision being whether the sequestration was not void under the provisions of sections 87 and 163 of the Companies Act, 1862. There were in evidence opinions of Professor Rankine and Mr. Balfour (the Dean of Faculty), of the Scotch bar, on cases submitted to them as to the Scotch law with respect to sequestration, and the effect thereon of sections 87 and 163 of the Companies Act, 1862, which opinions are stated by his lordship in his judgment.

The Companies Act, 1862, which applies to Scotland as well as to England, enacts by section 87: "When an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court may impose"; and by section 163, "where any company is being wound up by the court, or subject to the supervision of the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents."

Napier Higgins, Q.C., and *C. E. E. Jenkins*, for the motion.—The Scotch sequestration is void by virtue of section 163 of the Companies Act, 1862, which includes such sequestration by a Scotch landlord as has taken place in this case. The landlord could only proceed after obtaining leave of the court under section 87 of that Act: *In re Exhall Coal Mining Co.*, 13 W. R. 219, 4 De G. J. & S. 377; *Lloyd* v. *Lloyd & Co.*, 25 W. R. 872, 6 Ch. D. 339; *In re South Kensington Co-operative Stores*, 29 W. R. 662, 17 Ch. D. 161; *In re Brown, Bayley, & Dixon*, 30 W. R. 5, 18 Ch. D. 649; *In re Oak Pitts Colliery Co.*, 30 W. R. 759, 21 Ch. D. 322; *In re Lancashire Cotton Spinning Co.*, 36 W. R. 305, 35 Ch. D. 656. A mortgagee of a company can generally obtain such leave of the court for the purpose of pursuing his remedy in case of the winding up of the company, but this is not extended to a landlord: *In re Exhall Coal Mining Co.; In re Lancashire Cotton Spinning Co.*

Cozens-Hardy, Q.C., and *Chadwyck Healey*, for the Scotch landlord.—A sequestration by a Scotch landlord is not within the meaning of section 163 of the Companies Act, 1862. A Scotch landlord has greater rights than an English landlord for the purpose of obtaining security for the payment of rent, and a proceeding by him for that purpose does not come within that section. But if it does, then we ask for the leave of the court, under section 87 of that Act, to enable the landlord to enforce the special right given to him by the Scotch law.

They referred to *Lloyd* v. *Lloyd & Co.*

Napier Higgins, Q.C., replied.

NORTH, J., after stating the facts, and reading the 163rd section of the Companies Act, 1862, proceeded as follows:—The first question is, is this a proceeding for a sequestration under that section which covers Scotch proceedings as well as English? Upon that point I do not find a definite opinion expressed by any witness for the landlord that it is not a sequestration. I find in the opinion given by Professor Rankine that, in answer to a question as to whether there was any case since the Companies Act, 1862, in Scotland, applying to a trustee or liquidator claiming under the 163rd section, he says "No"; and after referring to another statute, which I do not think is very material, he adds: "And that poinding of the ground, a diligence which proceeds on the same principles as landlords' sequestration, has been held not to be struck at by the 163rd section of the Companies Act, 1862, on the ground (which is equally applicable in the present case) that it operates no new

preference, but simply makes available a preference already existing." He does not say that, according to Scotch law, a sequestration in respect of landlords' rent does not come within that section; and the opinion also given on the same side by Mr. Balfour does not do so either. He says:—"I also agree with Mr. Rankine in thinking, for reasons similar to those given in regard to poinding of the ground in the case of *Athole Hydropathic Co.* v. *Scottish Provincial Assurance Co.* (13 Court. Sess. Cas., 4th series, 818), that a landlord's sequestration is not the putting in force of an execution against the estate and effects of the company within the meaning of section 163 of the Companies Act, 1862, and that, consequently, the memorialists' process of sequestration is not void under that section." But he does not say that the Scotch law is that the word "sequestration" there does not include a landlord's sequestration for rent. It is very difficult to see why it should not. He does say—in fact both these learned gentlemen say—that a proceeding by way of poinding the ground, under a heritable bond, is not an execution, and upon that ground is not within that section; and far be it from me to say that poinding of the ground under such a bond is an execution; but this is not the question I have to decide.

Then it is suggested that the word "sequestration" is an English word, used in an English Act, and that it must have the same meaning that it would have in England, and as in England there is no sequestration by a landlord in respect of his rent, therefore sequestration here cannot apply to such a case. I do not follow that. Sequestration is a word large enough to apply to all sequestrations; this is called a proceeding in sequestration, and how it can be said that such a sequestration is not a sequestration I do not quite understand. Then look at the words in company with which it is found. It is "any attachment, sequestration, distress, or execution." Now a distress is the remedy that a landlord has by law to take possession of property, and to levy the rent that is due to him out of it. I do not say the two proceedings are the same. I think that it is clear they are not. The Scotch hypothec that a landlord has is distinguishable in some points from a right of distress; but they are both *in pari materiâ*, and it is very difficult to see on what ground a Scotch landlord is to have a different right given to him in respect of sequestration for rent from that which an English landlord has in respect of distress, unless upon the ground that I will consider presently.

Then there is another thing to be borne in mind. Under the Bankruptcy Act in Scotland in 1856 the landlord's right was intended to be unaffected by that Act. That is expressly provided in section 119, which says, "Nothing in this Act contained shall affect the landlord's right of hypothec." But there are no such words in the Companies Act of 1862, which was passed only five or six years later; and one would expect that, if the landlord's right of hypothec was to be excepted, we should find something of that sort in the Act itself.

Then it is suggested that the landlord's proceeding is not a sequestration upon this principle; that the sequestration given to a landlord by the Scotch law does not create any new preferential right, but merely renders available a right already existing. I cannot understand how, for that reason, a sequestration for rent can be said not to be a sequestration. It may be a very good reason why, if such a sequestration is within section 163, the court, under section 87, should give leave to proceed; but that is a totally different thing. In my opinion, the word "sequestration," used in the 163rd section, does apply to the landlord's right of sequestration to secure rent, given to him by the Scotch law, and does render it void to all intents.

But I have said this with respect to the 163rd section alone. That does not end the case, because, according to decisions which are binding upon me, the 163rd section and the 87th section are to be construed together; and, therefore, "void to all intents" is to be read, as qualified by the 87th section, as meaning "void to all intents, unless the court shall otherwise direct"—that is to say, unless the court authorizes the institution of the proceedings which lead up to the sequestration, or authorizes their continuance if already instituted before the sequestration takes place.

Then we must turn to the 87th section, which enacts: "When an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with, or commenced against, the company, except with the leave of the court, and subject to such terms as the court may impose." The question upon that section is, whether this action in Scotland is a proceeding within the meaning of the section. This is not a question of Scotch law. I am satisfied that it is a proceeding; and although it is not a question of Scotch law, I have the satisfaction of having Mr. Balfour's opinion to the effect that, if a Scotch court had construed this section, they would hold that this section was a proceeding within the meaning of the 87th section.

Therefore, it comes to this, that the proceeding is one which is not to be commenced or proceeded with without the sanction of the court, and the court has not given any sanction. That being so, the 163rd section applies, and the liquidator is entitled to the order that he asks for.

But, then, that does not end the case, because it would still be open to the landlord to apply to the court for leave to proceed under the 87th section, and Mr. Hardy has asked me now to consider that application as made, if I am against him on the first point, as I am.

Then it is necessary to consider whether, if the application had been made, leave would have been granted. That leads me to consider what is the precise position of the landlord in Scotland with respect to proceeding by way of sequestration for his rent. Now, as to that, I think it proved on the evidence that the effect of the Scotch law is to give the landlord "a real security without possession," as it is called, upon the property demised, and the stock, in respect of his rent; and there is this peculiarity about it in Scotland that does not exist in England; that it is a right to do this by way of anticipation before the rent is due. In that respect it differs altogether from the English right of distress, which can only be put into force after the rent has actually become due. In Scotland it may be done before the rent becomes due, and in this case that was the course adopted, for, the first rent becoming due on the 11th of November, this proceeding is taken a month before that time.

In my opinion this is a case in which by Scotch law the landlord has a security given to him for rent to become due; and, in my opinion, he is by Scotch law a secured creditor.

Then the question is, what the result of that is; and I am reminded of the cases in which a mortgagee is allowed, pretty much as a matter of course, if the relief he asks for is not conceded, to commence proceedings after the winding up, or after the winding up to continue proceedings commenced before, for the purpose of realizing his security. It is said that the mortgagee's right depends upon this, that he is only taking proceedings to recover his own property; whereas the landlord in Scotland has r

whatever in the furniture and stock of his tenant; but has merely a right to be enforced by a judicial proceeding. In my opinion, that does not affect the case. He has a security which he has a right to enforce, which the Scotch law gives him, and it seems to me more like the position of a debenture-holder than anything else, although it is not exactly the same as that. I think, therefore, that if the landlord had, before commencing these proceedings, asked for leave to take proceedings by way of sequestration, the court would have given him leave to do so.

The question is, whether I should give it now. I am prepared to do so upon terms. Down to this time the landlord has been entirely in the wrong, because he has commenced and prosecuted proceedings which, in my opinion, he had no right to do, and in respect of which proceedings costs have been incurred. But I do not think it necessary to put the landlord to commence fresh proceedings, as I should now give him leave to do if he asked for it. I am prepared to put him now in the same position as if there was a motion pending before me at his instance to obtain leave to continue his proceedings for a sequestration; but I can only give him that leave upon the payment of the costs of the liquidator in the proceedings in which, down to this time, the landlord has been entirely in the wrong.

Solicitors, *Munns & Longden; Belfrage & Co.*

Chan. Div. Stirling, J. } Nov. 5, 6; Jan. 14.

In re PARKER.
WIGNALL *v.* PARKE. (*a.*)

Charitable uses—Interest in land—Mortgage of borough "rents, rates, and waterworks"—"Undertaking"—Mortmain Act (9 *Geo.* 2, *c.* 36).

A corporation, by virtue of their powers under two private Acts, and under the Local Government Supplemental Act, 1861, *to secure the sum of* £150 *paid by the testatrix for the purposes of these Acts, mortgaged to her, "her executors, administrators, and assigns, such proportion of the rents, rates, and waterworks which, by the said Acts, . . . the corporation are authorized to charge, levy, purchase, and make, . . . as the principal sum doth or shall bear to the whole sum which is or shall be borrowed."*

Held, that this was a mortgage of the undertaking as a going concern.

Held, also, that the mortgage did not create an interest in land within the Mortmain Acts, and that the mortgage debt was, in consequence, pure personalty.

The principles of Walker *v.* Milne, 11 *Beav.* 507; Gardner *v.* London, Chatham, and Dover Railway Co., 15 *W. R.* 325, *L. R.* 2 *Ch. App.* 201; Holdsworth *v.* Davenport, 25 *W. R.* 20, 3 *Ch. D.* 185; Attree *v.* Hawe, 26 *W. R.* 871, 9 *Ch. D.* 337; *and* In re Yerbury's Estate, Ker *v.* Dent, 62 *L. T. N. S.* 55, 38 *W. R. Dig.* 217, *followed and applied.*

Adjourned summons.

Rachel Parker, the mortgagee, made her will dated the 19th of August, 1880, and appointed the plaintiffs, B. Wignall and J. Wells, her executors, and thereby directed that her debts should be paid out of her real estate, and bequeathed all sums of money which might be due to her at her decease, and all other her funds and securities for money, unto the London Missionary Society and the British and Foreign Bible Society in equal shares, and devised all her real estate unto her nephew, the defendant, R. J. Parke.

The testatrix died on the 31st of January, 1883, and her will was duly proved by the plaintiffs above named. At her death she was seised of certain real estate, and was entitled to personal estate, consisting of cash and certain securities, including a sum of £150 secured by a waterworks mortgage of the borough of Preston. In the administration of her estate the question arose whether the money secured by the waterworks mortgage was or was not pure personalty, to pass under the bequest for charitable purposes, and the matter now came before the court upon an originating summons taken out by the executors.

The waterworks mortgage was in the following terms:—

"BOROUGH OF PRESTON.—WATERWORKS MORTGAGE.

"By virtue of the Preston Waterworks Act, 1853, the Local Government Supplemental Act, 1869.—The mayor, aldermen, and burgesses of the borough of Preston, in the county of Lancaster, in exercise of the powers of the said corporation, and in consideration of the sum of one hundred and fifty pounds, hereinafter called the principal sum, paid to the treasurer of the said corporation by Rachel Parker, of . . . herein called the mortgagee, for the purposes of the said Acts, or one of them, do grant and assign to the mortgagee, her executors, administrators, and assigns, such proportion of the rents, rates, and waterworks by the said Acts, or any of them, which the said corporation are authorized to charge, levy, purchase, and make, and also of the general district rate in the same Acts, or one of them, mentioned, as the principal sum doth or shall bear to the whole sum which is, or shall be, borrowed under the powers of the said Acts, or any of them, upon the credit of the said rents, rates, and waterworks, or of the said general district rate, by any of the said Acts authorized to be charged, levied, purchased, and made. And do also grant and assign to the mortgagee, her executors, administrators, and assigns, such proportion of the general district rate by the Public Health Acts, 1848 and 1875, or either of them, or any Act incorporated therewith, authorized to be made, as the principal sum doth or shall bear to the whole sum which is, or shall be, borrowed upon the credit of the said general district rate by the said last-mentioned Acts, or any of them, authorized to be made, to hold the said premises hereby assigned unto the mortgagee, her executors, administrators, and assigns, until the whole of the principal sum, with interest for the same after the rate of three pounds ten shillings per centum per annum, shall be fully paid and satisfied to the mortgagee, her executors, administrators, and assigns."

The principal moneys were to be paid on the 1st of December, 1885, and the mortgage was dated the 30th of November, 1882.

The following are the material sections of the various statutes, the effect being either stated or the sections set out *verbatim;* the first Act hereinafter mentioned being the Act authorizing the local board of health, now represented by the Corporation of Preston, to purchase and take over the works of the then existing Preston Waterworks Co.

16 & 17 Vict. c. xlviii., sess. 1852-1853, (Preston Waterworks Act, 1853), (local and personal).—The preamble recites the proposed purchase by the local board of Preston from the company of the proprietors of the Preston Waterworks of the undertaking of the company, a company incorporated by an Act of 2 Will. 4, and authorized to raise money by an Act of 6 Vict. c. 32 (local and personal). It recites that by the Public Health Act, 1848, and the Public Health Supplemental Act, 1850, No. 2, the local board of

(*a.*) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

health for the borough of Preston had been constituted for the district comprising the said borough exclusively, and that it was expedient that further and better provision should be made for the supply of water, and that the necessary powers for that purpose should be vested in the said local board; and further recited that it was expedient that the agreement for the purchase of such undertaking should be carried into effect, and that the supply of water should be placed under the control, regulation, and management of the said local board, and that the board should be authorized to alter, extend, and enlarge the said waterworks, the property of the said company.

Section 3 incorporates "the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Consolidation Act, 1847, so far as the same are not repugnant to the provisions herein contained."

Section 4.—". . . Be it enacted, that it shall be lawful for the said local board, subject to the provisions and restrictions in this Act, and the Acts incorporated therewith contained, to make and maintain the said waterworks, together with all proper reservoirs," &c.

Section 12.—"That the local board shall, when the undertaking and works of the company shall come into their possession, and at all times thereafter, supply to every dwelling-house within the said borough entitled to demand a supply, as hereinafter mentioned, at the request of the owner or occupier thereof, water for domestic purposes upon the rents, rates, and assessments, and in manner herein provided . . ."

By section 39 the rates which the local board are entitled to levy for the supply of water for domestic purposes are specified.

By section 41 the rates and rents are to be paid in advance.

Section 43.—"It shall and may be lawful for the local board to make any rate for the purposes of this Act, or of any Act incorporated therewith, prospectively to raise money to pay interest, charges, and expenses to be incurred thereafter, or retrospectively to raise money to pay interest, charges, and expenses which may have been incurred at any time within six months before the making of the rate."

By section 45 the charges for water for flushing sewers, &c., are to be included in the general district rate.

Section 51.—"It shall be lawful for the local board to borrow, for the purposes of this Act, upon the security of the rents, rates, and works authorized by this Act to be charged, levied, purchased, and made, or on the security of the general district rates authorized to be made by this Act, or by the Public Health Act, 1848, or on all or any of the said securities, such sum as shall be necessary for paying to the said company the purchase-money for their undertaking, and any further sum or sums of money, not exceeding the sum of £80,000, over and above or exclusive of such sum as shall be necessary for paying to the said company the purchase-money for their said undertaking; and the provisions of the Commissioners Clauses Act, 1847, with respect to the mortgages to be executed by the commissioners, shall be applicable to the borrowing of such sum or sums of money by the board, and shall be read and construed as if the words 'the local board of health for the district and borough of Preston' had been in every case inserted instead of the word 'commissioners.'"

Section 53.—"It shall be lawful for the said local board, and they are hereby required in estimating the amount required to be raised by means of general district rates for the purposes of the said borough, under the provisions of the Public Health Act, 1848, and in making such rates, to include the money required for the purposes of this Act in one and the same assessment, as the money authorized to be levied by the Public Health Act, 1848, by means of a rate or rates, called "general district rates," therein mentioned, and to collect the same as part thereof, in like manner as if the same were expressly charged by the said Act upon such rate or rates."

By section 54 the local board is required to keep a separate account to be called "the water account," and by section 55 all moneys borrowed under the Act are to be charged on the water account.

By section 56 provision is made for the establishment of a sinking fund for the payment off of the moneys so borrowed.

By section 58 the local board is empowered to appoint officers and servants, and to impose penalties upon them; and section 59 provides for the application of such penalties.

The Commissioners Clauses Act, 1847 (the following sections of which closely resemble the analogous sections of the Companies Clauses Act, 1845,) provides, by section 75, a form of mortgage which has been closely followed in that now forming the subject of decision.

Sections 86 and 87 provide, where interest or principal is in arrear, for the appointment of a receiver of "the rates or sums liable to the payment" of such interest or principal.

By the Preston Improvement Act, 1869 (32 & 33 Vict. Vict. c. lxxxvii.), (local and private), the board was authorized to construct additional waterworks. Section 2 incorporated the Lands Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Acts Amendment Act, 1860, so much of the Waterworks Clauses Act, 1847, as relates to the construction of waterworks and the accommodation of lands adjoining the waterworks, the Waterworks Clauses Act, 1863, and the provisions of the Commissioners Clauses Act, 1847, with respect to the mortgages to be executed by the commissioners.

Section 14 enacts: "The local board may defray the expenses of constructing the waterworks out of any moneys which they are already authorized to borrow for the completion of the works for supplying water to Preston, and they may exercise for the purposes aforesaid such borrowing powers accordingly; and all moneys received or expended by them under this Act for waterworks purposes shall be included in 'the water account' referred to in the 54th section of the Act of 1853."

By section 15 the then existing provisions as to the sinking fund for moneys borrowed for waterworks purposes were repealed, and by section 17 new provisions were made for this purposes.

Section 21 provides for the making of regulations by the local board for preventing the waste, &c., of water by persons supplied, and section 22 contains provisions for the imposition of penalties in such cases.

The waterworks undertaking of the Corporation of Preston consists of reservoirs, machinery, and mains situate outside the borough, and main water pipes and appliances connected therewith laid and fixed within the borough. The water rents payable to the corporation are assessed upon the rateable value of the properties supplied, and are collected by the officials of the corporation.

Sefton Strickland, for the first respondent, the devisee and next of kin.—The mortgage is charged upon the land, and includes the real estate, as well as the tolls, in express terms. *Chandler* v. *Howell*, 25 W. R. 55, 4 Ch. D. 651, has not been overruled: see *In re David*, 38 W. R. 162, 43 Ch. D. 27.

M. Ingle Joyce, for the legatee [illegible].—*In re David* is to be distinguised; there was [illegible]n

the tolls in that case: *In re Thompson, Bedford* v. *Teal, ante*, p. 50, 45 Ch. D. 161. "Rents" only means water rates, and it has been decided that water rates are not an interest in land. The waterworks are the "undertaking." *Holdsworth* v. *Davenport* 25 W. R. 20, 3 Ch D. 185, stands, except as affected by *Chandler* v. *Howell*, which is not consistent with *Attree* v. *Hawe*, 26 W. R. 871, 9 Ch. D. 337: *In re Yerbury's Estate, Ker* v. *Dent*, 62 L. T. Rep. N. S. 55, 38 W. R. Dig. 217. I rely on section 12 and section 54 of the Preston Waterworks Act, 1853. A receiver could not be appointed to carry out the statutory duties: *Gardner* v. *London, Chatham, and Dover Railway Co.*, 15 W. R. 325, L. R. 2 Ch. App. 201.

W. D. Rawlins, for the applicants, the trustees.

Strickland, in reply, referred to section 2 of the Preston Waterworks Act, 1853, as incorporating the whole of the Waterworks Clauses Act of 1847.

Cur. adv. vult.

STIRLING, J.—The question raised by this summons is whether a borough of Preston waterworks mortgage for £150, part of the estate of the testatrix, Rachel Parker, ought to be treated as pure personalty so as to pass under a bequest for charitable purposes. The mortgage is dated the 30th of November, 1882, and is in the following form:—[His lordship read the mortgage.] It is objected that it creates a charge on the "rents" and "works"; no question arises as to a charge on the rates under the Public Health Act. The Preston Waterworks Act, 1853, is the earliest in date of the statutes in pursuance of which the mortgage purports to be given, and also the most important for the decision of the present case. [His lordship read the preamble to that Act, and read or stated the effect of sections 3, 4, 12, 39, 41, 43, 45, 51, 53, 54, 55, 56, 58, and 59.] The Commissioners Clauses Act, 1847, by section 75, prescribes a form of mortgage, which has been closely followed in that now before me. Sections 86 and 87 provide, where interest or principal is in arrear, for the appointment of a receiver of the "rates or sums liable to the payment" of such interest or principal, and these clauses closely resemble the analogous sections of the Companies Clauses Act, 1845. [His lordship read or stated the effect of the preamble, and sections 2, 14, 15, 17, 21, and 22 of the Preston Improvement Act, 1869.]

The question raised is, in substance, whether such a mortgage falls within what was laid down by the Court of Appeal in *Attree* v. *Hawe*.

Previously to that case there had been a great conflict of opinion as to whether debentures given by railway companies and other public bodies fell within the provisions of 9 Geo. 2, c. 36. In *Walker* v. *Milne*, 11 Beav. 507, Lord Langdale held that mortgages by a canal company, containing an assignment of the undertaking and the rates arising by virtue of the Act incorporating the company, did not create interests in land within the meaning of the statute of George II., saying (p. 518): "These securities are framed by authority of the Act of Parliament, plainly with a view to the concern continuing, and not with a view of coming to a court of equity to have it broken up and possession taken by the court." On the other hand, Knight-Bruce, L.J., when Vice-Chancellor, in *Ashton* v. *Lord Langdale*, 4 De G. & Sm. 402, declined to follow *Walker* v. *Milne*, and held that such mortgages did charge hereditaments—viz., the tolls, if not the land itself by the use of which the tolls are obtained.

In 1867 was decided *Gardner* v. *London, Chatham, and Dover Railway Co.*, which threw much light on the nature of an ordinary debenture of a railway company containing an assignment of "the undertaking of the company, as defined by the special Act, and the tolls and sums of money arising upon or out of the undertaking by virtue of the Act relating thereto." It was contended that, under such an assignment, the debenture-holders were entitled to a receiver of the proceeds of surplus lands, but the Court of Appeal held otherwise. In arriving at this conclusion it became necessary to consider what one effect of such a debenture was. Lord Cairns (then Lord Justice) says, in his well-known judgment (15 W. R., at p. 329, L. R. 2 Ch. App., at p. 217): "The tolls and sums of money *ejusdem generis*—that is to say, the earnings of the undertaking—must be made available to satisfy the mortgage; but in my opinion the mortgagees cannot, under their mortgages, or as mortgagees—by seizing, or calling on this court to seize, the capital, or the lands or the proceeds of sales of land, or the stock of the undertaking—either prevent its completion or reduce it into its original elements when it has been completed." Turner, L.J., agreed with the reasons on which this judgment was founded.

In this state of the authorities, Malins, V.C., held, in *Holdsworth* v. *Davenport*, that a debenture of a waterworks company, containing an assignment of the undertaking, and the rents, rates, and sums of money arising by virtue of the several Acts relating thereto, did not create an interest in land within the meaning of the statute of George II. His lordship said (p. 1·0):—"I think all questions are now removed by *Gardner* v. *London, Chatham, and Dover Railway Co.*, which decided that a mortgage-debenture made by a railway company in the form given in Schedule C. of the Companies Clauses Consolidation Act, 1845, does not give the debenture-holder a specific charge upon the surplus lands of the company, or the proceeds of the sale of them, so as to entitle him to an order for a receiver of the sale moneys or *interim* rents. Therefore a mortgagee has only a right to take the tolls, and it follows that he has not an interest which is within the Mortmain Act." On the other hand, in *Chandler* v. *Howell*, Hall, V.C., declined to follow *Holdsworth* v. *Davenport*, and held that a mortgage by commissioners of the town of Aberystwith containing an assignment of "works, rents, and rates," authorized to be created, reserved, made, and collected by an Act of Parliament, did create an interest in land. In *In re Mitchell, Mitchell* v. *Moberly*, 25 W. R. 903, 6 Ch. D. 655, Bacon, V.C., held that a debenture-mortgage made by a railway company in the form given in the schedule to the Companies Clauses Consolidation Act, 1845, was pure personalty, expressing his preference for the decision of Malins, V.C., in *Holdsworth* v. *Davenport*, to that of Hall, V.C., in *Chandler* v. *Howell*, if those decisions were irreconcilable, which, however, he does not appear to have thought they were. *Attree* v. *Hawe*, which related not to debentures, but debenture-stock, came, in the first instance, before Hall, V.C., who followed his own decision in *Chandler* v. *Howell*. In the Court of Appeal James, L.J., says (p. 347):—"It is to be observed that in the cases of *Walker* v. *Milne, Gardner* v. *London, Chatham, and Dover Railway Co.*, and *Attree* v. *Hawe* all the judges rely on this, that a different construction of the security would enable the mortgagee to break up and destroy that which was intended by the Legislature to be maintained as a going concern. The head-note to the report of *Attree* v. *Hawe* in the *Law Reports* says that *Chandler* v. *Howell* was overruled; it was not, however, expressly overruled, and the learned counsel for the appellants say, in their argument, that '*Chandler* v. *Howell* might well stand with a reversal of the present decision.'" The Court of Appeal did, however, expressly approve of the decision in *Walker* v. *Milne*, and it is to be, I think, inferred from the judgment

that their lordships approved of the decision of Malins, V.C., in *Holdsworth* v. *Davenport*.

The question in the present case, therefore, appears to me to reduce itself to this, whether, notwithstanding difference of language, the mortgage given by the Corporation of Preston to the testatrix is not, in substance, a mortgage of the general undertaking, similar to those which formed the subject of discussion in *Gardner* v. *London, Chatham, and Dover Railway Co.*, and of decision in *Holdsworth* v. *Davenport*. If it be not, then it is an assignment of specific items of property included under the terms "rents, rates, and waterworks" which by the Acts, or any of them, the corporation are authorized to "charge, buy, purchase, and make," and consequently of the works themselves and the site thereof. In opposition to this view of the construction it may be observed that the assignment is to the testatrix, "her executors, administrators, and assigns," not to "her heirs." It would seem, then, that the framers of the mortgage did not imagine they were dealing with anything in the nature of real estate.

A more serious objection is that upon this construction the mortgagees would have it in their power to seize the works and break them up. Can such an intention be attributed to the Legislature? These works have been placed in the hands of a public body, the Corporation of Preston, for an important public purpose, which some, at least, may consider of not less importance than that for which a railway company is incorporated—viz., the providing of an adequate supply of water within the populous and growing borough of Preston. On the corporation is imposed (section 12 of the Preston Waterworks Act, 1853) the obligation of supplying to every dwelling-house within the borough water for domestic purposes. To enable them to discharge that duty they are empowered, not merely to collect rents as the price of the water supplied, but (section 43) to impose rates for the purposes of the Act. They are to appoint officers and servants for the purposes of the Act (section 58), and (sections 21 and 22 of the Preston Improvement Act, 1869) to make and enforce regulations for preventing the waste, misuse, or undue consumption or contamination of the water. It seems to me that the Legislature plainly contemplated that the waterworks should, notwithstanding the mortgages authorized by section 51, continue as a going concern under the control and management of the corporation and upon their responsibility, and that it would be inconsistent with that object if such a construction were placed on the section just referred to, and the mortgages given in pursuance of it.

I think, then, that the words "rents, rates, and works" authorized by the Act to be charged, levied, purchased, and made are to be read and construed in the same way as the words "the undertaking authorized and the rents and rates arising by virtue of the Act." In coming to this conclusion I am fortified by the decision of Chitty, J., in *In re Yerbury's Estate*.

On behalf of the respondents, much reliance was placed on the case of *In re David* and on section 55 of the Act of 1853. As regards *In re David*, it is to be observed that the mortgage there in question contained an assignment simply of the several rates, tolls, rents, and other moneys arising and accruing by virtue of the Acts. There was no assignment of the undertaking nor anything equivalent to such an assignment. There was therefore wanting that which formed the basis of the judgments in *Walker* v. *Milne*, *Gardner* v. *London, Chatham, and Dover Railway Co.*, and *Attree* v. *Hawe*; and it was held that, under the circumstances, the mortgage created a specific charge on certain tolls which formed part of the subject-matter of the security. In this case, on the construction of the Preston Waterworks Act, 1853, and the mortgage, I come to a different conclusion. As regards section 55, it is one which (so far as appears by the reports) was not found in the Acts of Parliament under which were issued the securities which formed the subject of decision in *Walker* v. *Milne*, *Gardner* v. *London, Chatham, and Dover Railway Co.*, *Holdsworth* v. *Davenport*, and *In re Mitchell*. I think the case of *In re David* affords the answer to the arguments founded on it. The provisions of the Swansea Harbour Act, 1854, resembled those of the Act of 1853; and in particular section 108 contained a provision under which moneys to the credit of the Swansea Harbour Fund were to be applied, firstly, in paying interest on borrowed moneys. It was said, however, by the Lord Chief Justice and by Fry, L.J., that these provisions merely operated as directions to the trustees of the fund as to the mode in which the fund was to be applied, and did not affect the construction of the mortgages.

In the present case, with respect to section 55, it seems to me that is a direction to the corporation as to the mode in which the moneys to the credit of the waterworks account are to be dealt with. In support of that view, I may make two observations. Firstly, those moneys to be placed to the credit of that account include, not only "rents" and "rates" within the meaning of section 51, but also all (section 54) "sums of money to be recovered under the provisions of the Act"; and consequently sums (such for example as the penalties and forfeitures referred to in section 59) not included in the mortgages. Secondly, the expenses of carrying the Act into execution are made and charged on the moneys in question no less than the principal money borrowed, and the interest thereon; and although the interest is made a first charge, still, as between payment of principal and payment of expenses, the corporation would have the like discretion as is vested in the directors of a railway company, according to the judgments of Lord Cairns in *Gardner* v. *London, Chatham, and Dover Railway Co.*, and James, L.J., in *Attree* v. *Hawe*. In my opinion the mortgage debt is pure personalty, and the summons must be answered accordingly.

Solicitors, *H. B. Clarke & Son*, for *Gordon*; *Hunter & Macmaster*, Bradford; *Brownlow & Howe*, for *Edelston*, Preston; *Hollams, Sons, Coward, & Hawkesley*.

Chan. Div. } Feb. 20.
Kekewich, J. }

M'MAHON v. NORTH KENT IRONWORKS (LIMITED). (a.)

Company — Receiver — Debenture — Principal not immediately payable—No interest unpaid.

Where debentures include all the property of the company, and the company is insolvent, the debenture-holders are entitled to the appointment of a receiver of the property and assets of the company, although the principal secured by the debentures is not immediately payable, and there is no interest in arrear.

Motion.

This was an application by debenture-holders for an order appointing a Mr. Young receiver of the company's property, although the money secured by the debentures was not immediately payable.

Each of the debentures provided that the company

(a.) Reported by H. C. ROPER, Esq., Barrister-at-Law.

would "on the 1st day of January, 1892, or on such earlier day as the principal moneys hereby secured become payable, in accordance with the conditions indorsed hereon," pay to the registered holder £100, and that the company would in the meantime pay interest at five per cent.; the company thereby charged, by way of floating security, all its property, whatsoever and wheresoever, both present and future, including its uncalled capital for the time being, with the principal moneys and interest thereby secured.

The conditions provided that the debentures should rank as a first charge, and be a floating security; that the principal moneys thereby secured should "immediately become payable (*a*) if the company makes default for six calendar months in the payment of any interest hereby secured, and the registered holder hereof before such interest is paid by notice in writing calls in such principal money; or (*b*) if an order is made, or an effective resolution is passed, for the winding up of the company."

None of these events had happened, and the principal was, therefore, not immediately payable. Nor was there any interest in arrear. The company was admittedly insolvent, and its works were closed. A creditor's winding-up petition had been presented, and adjourned to enable the company to pass resolutions for a voluntary winding up. The motion was made in an action brought by a debenture-holder on behalf of himself and all other the debenture-holders to enforce their securities.

Marten, Q.C., and *Eve*, for the plaintiffs.—We are entitled to the order under the circumstances, although the money is not immediately payable: *In re Panama, New Zealand, and Australian Royal Mail Co.*, 18 W. R. 441, L. R. 5 Ch. App. 318.

K. H. Heath, for the company, did not oppose the motion.

KEKEWICH, J.—In my opinion, upon principle, the application is right, though I am not aware of any direct authority upon the point. As a matter of principle a mortgagee has a right to the protection of his security if it is in jeopardy. Accordingly I appoint Mr. Young receiver of the property and assets of the company comprised in the plaintiffs' security until judgment or further order.

Solicitors, *Slaughter & May; C. T. Whinney.*

Q. B. Div. (Pollock, B., and Charles, J.) Jan. 28.

BUDD *v.* LUCAS. (*a*.)

Trade-mark—Merchandise Marks Act, 1887 (50 & 51 *Vict. c.* 28), *s.* 2, *sub-section* 1 (d); *s.* 5, *sub-section* (1) (d)—*False trade description—Invoice of goods.*

A false trade description, contained in an invoice delivered with goods, may be an application of a false trade description within the meaning of section 5, *sub-section* (1), *of the Merchandise Marks Act*, 1887, *although such invoice may not be physically attached to the goods.*

Case stated by justices.

The appellant, a licensed victualler, ordered six barrels of beer of the respondent, a brewer, and, in pursuance of such order, the respondent caused to be delivered to the appellant six casks of beer, and the respondent's carman, immediately after delivering them into the appellant's cellar, delivered to him an invoice in which the casks were described as six "barrels," a barrel meaning, according to the usage of the beer trade, thirty-six gallons. One of the six casks delivered would not contain thirty-six gallons, being too small to contain that quantity. The cask had no mark upon it except a number and the name of the respondent's predecessors in the business. The justices refused to receive evidence of previous deliveries by the respondent of casks of insufficient size, and held that the delivery of the invoice was not an application of a false trade description within the meaning of the statute, but stated a case on the application of the appellant.

The questions for the opinion of the court were:

(1) Whether the delivery of the invoice with the casks was an application of a false trade description within the meaning of the Merchandise Marks Act, 1887?

(2) Whether the justices were right in excluding evidence as to previous transactions between the parties?

(3) Whether, assuming that the first question was answered in the affirmative, the respondent was criminally responsible for the acts of his servants?

Poland, Q.C., and *Graham*, for the appellant.—(1) The statute does not require that the description should be physically attached to the goods. The delivery of the invoice is a sufficient application of the trade description. (2) The evidence as to previous transactions was wrongly rejected: *Reg.* v. *Francis*, 22 W. R. 663, L. R. 2 C. C. R. 128. (3) Although the master may not be liable for independent wrongdoing by his servants, he is responsible for having supplied them with casks of deficient capacity.

Channell, Q.C., and *Lyttleton*, for the respondent.—The description on the invoice is not an application of a false trade description within the meaning of the statute, which aims only at actual false marking of the goods. The full title of the Act shows that the word "apply" was intended to refer only to a physical application. Under any circumstances, the respondent is not liable in the absence of a personal intent to defraud.

Poland, Q.C., replied.

POLLOCK, B.—This case raises a question of very great importance as to the true construction of the Merchandise Marks Act, 1887. The earlier Merchandise Marks Act, that of 1862 (25 & 26 Vict. c. 88), no doubt, dealt with trade-marks, and with nothing else. But the present Act is much wider in its scope: it deals with many things that are not trade-marks, or anything like them. For instance, section 20 renders a person liable to a penalty who falsely represents that goods are made by a person holding a royal warrant. A representation may be within that section although made by word of mouth. Again, in this Act is, for the first time, to be found the expression "trade description," which is treated as something distinguishable from trade-marks or other marks, and is defined to mean "any description, statement, or other indication, direct or indirect," as to the quality or quantity of the goods. Then the definition of the term "apply" in section 5 seems to suggest that it is not to be confined to a physical application, for it provides that a person shall be deemed to apply a trade description to goods who (*inter alia*) "uses" it "in any manner calculated to lead to the belief that the goods in connection with which it is used are described by that trade description." No doubt the description must be used in connection with goods; but I think we should be cutting down the intention of the Act if we were hold that the delivery

(*a*.) Reported by G. K. PALEY, Esq., Barrister-at-Law.

of an invoice or other description of the goods at the time of, or immediately after, the delivery of the goods themselves, was not a use in connection with the goods within the meaning of the section. Our answer to the first question submitted to us must, therefore, be that the delivery of the invoice with the cask may have been an application of a false trade description. Whether it was so or not depends upon certain questions of fact which it is for the justices to decide.

Upon the second question, the justices were clearly wrong. There can be no doubt that the evidence tendered was admissible upon the issue of the intent to defraud.

With regard to the last question, all we can say is, that, in our opinion, there is nothing in the present Act to alter the general rule of law, that a master is not criminally responsible for the unauthorized acts of his servants. There are, no doubt, certain Acts of Parliament, such as the Licensing Acts, which do introduce an exception in that respect into the general rule, but this is not one of those Acts.

CHARLES, J.—I am of the same opinion. To the question whether the delivery of the invoice along with the casks was an application of a false trade description within the meaning of the Act, we cannot, in the present state of the case, give a categorical answer. All that we can say is, that it may have constituted the offence with which the respondent is charged. No doubt there was not any physical application of a trade description to the goods, but I do not think that that is necessary. To my mind it is clear, from the language of section 5, sub-section 1 (*d*), that something more is contemplated than an actual physical connection; and, if so, then I think that the delivery of the invoice with the goods might be a use of a false trade description of the goods delivered. With regard to the other questions, I agree with my brother Pollock.

Case remitted to justices.

Solicitors for the appellant, *Sharpe, Parker, Pritchard, & Sharpe*, for *Hughes & Masser*, Coventry.

Solicitors for the respondent, *Cope & Co.*, for *Wright & Hassall*, Leamington.

Q. B. Div. (Wright, J.) Jan. 15.

MONTGOMERIE *v.* UNITED KINGDOM MUTUAL STEAMSHIP ASSOCIATION. (*a.*)

Insurance—Marine insurance—Mutual insurance association—Insurance effected by member—Right of action by person interested, though not a member.

The defendants, a mutual marine insurance association, granted a policy of insurance in the form of a deed poll to a member of the association, who obtained it on behalf of the plaintiff and others, who were part owners of the steamship insured. The policy was granted on condition "that the association shall be liable in the whole only to the extent of so much of the said funds as the said association is able to recover from the members of the said class"; and one of the rules annexed to the said policy was an arbitration clause, that "the sum, if any, to be paid by this club in satisfaction of any claim shall, in the first instance, be settled by the committee and the member," &c., "and payment shall only be claimed according to the customary mode of payment in use in this club." By the 4th article of association, which is incorporated with the policy, a member is defined as "a person who, on behalf of himself or any other person or persons, insures or enters for protection any ship or ships, or share or shares of a ship, in the association"; and the memorandum of association stated that the association was established for "the insurance of ships of members and of ships which the members may be entitled to insure in their own names." The plaintiffs, as part owners of the ship insured, brought an action in their own names on the policy against the defendants.

Held, that the action was not maintainable, as the terms of the policy excluded liability on the part of the defendants to any person other than the "member" with whom the contract was made.

This was a case tried before Wright, J., without a jury. The action was brought by the plaintiff and others, who were part owners of a ship called *William Hartmann*, to recover a loss on the said ship under a policy of insurance granted by the defendants to the firm of Perry, Raines, & Co., which was a "member" of the defendant association.

The facts and arguments sufficiently appear in the judgment.

Sir C. Russell, Q.C., Barnes, Q.C., and *Joseph Walton*, for the plaintiffs.

Cohen, Q.C., and *James Fox*, for the defendants.

WRIGHT, J.—The action is brought on a policy in the form of a deed poll, by which the United Kingdom Mutual Steamship Assurance Association (Limited) covenanted with Perry, Raines, & Co. to pay losses in certain events. Perry, Raines, & Co. are described as having become a member of the association, and as having entered for insurance in class 1 a steamship, *The William Hartmann*; and the covenant is in consideration of the premises and of the observance by the insured of the rules and regulations. The agreement is that the members having ships entered in the class shall, according to the provisions of the articles of association, and the rules indorsed on the policy, and subject to a proviso, be liable to make good losses upon the ship which may attach to the policy. The proviso is: "In accordance with the articles of association and the rules of the class, this policy and the other policies of the association and class are granted on this condition, and it is hereby specially agreed that the association, under all their policies of insurance of the said class, shall be liable in the whole only to the extent of so much of the said funds as the said association is able to recover from the members of the said class." The question is, whether the plaintiff Montgomerie and the other plaintiffs, who are not named in the policy as covenantees, are entitled to maintain an action in their own names against the United Kingdom Mutual Steamship Association for the amount of the loss which happened to *The William Hartmann* in the year 1883.

There is no doubt whatever as to the general rule as regards an agent, that where a person contracts as agent for a principal the contract is the contract of the principal, and not that of the agent, and *primâ facie*, at common law, the only person who may sue is the principal, and the only person who can be sued is the principal. To that rule there are, of course, many exceptions. First, the agent may be added as the party to the contract if he has so contracted, and is appointed as the party to be sued; secondly, the principal may be excluded in several other cases.

He may be excluded if the contract is made by a deed *inter partes*, to which the principal is no party. In that case, by ancient rule of common law, it does not matter whether the person made a party is or is not an agent. This, however, does not apply here, as

(*a.*) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

this instrument is a deed poll. Another exception is as regards bills and notes. If a person who is an agent makes himself a party in writing to a bill or note, by the law merchant a principal cannot be added. Another exception is that by usage, which is treated as forming part of the contract or of the law merchant, where there is a foreign principal, generally speaking the agent in England is the party to the contract and not the foreign principal, but this is subject to certain limitations. Then a principal's liability may be limited, though not excluded. If the other party elects to sue the agent, he cannot afterwards sue the principal. Again, where the principal is an undisclosed principal, he must, if he sues, accept the facts as he finds them at the date of his disclosure, so far as those facts are consistent with reasonable and proper conduct on the part of the other party. Again, if the principal is sued he is entitled to an allowance for payments which he may have made to his agent if the other party gave credit originally to that agent. Also, and this is very important, in all cases the parties can by their express contract provide that the agent shall be the person liable, either concurrently with or to the exclusion of the principal, or that the agent shall be the party to sue either concurrently with or to the exclusion of the principal.

These principles apply to marine insurance with very little modification, the chief modification of which I am aware being with reference to satisfaction. In matters of insurance, apparently in the interests of the assured, a person may become a principal by ratification although the agent did not insure and did not purport to insure on his behalf expressly or by name, if the agent, in fact, insured on behalf of those who might be interested, though the party was not at that moment ascertained; and a principal on whose behalf an insurance was actually made can ratify the insurance even though at the time of ratification he knows that the subject of insurance—the vessel or whatever it may have been—has been lost. I do not know of any other exception, unless it be that a deed poll in the case of an insurance can be sued upon, not merely by the covenantee or other person who is named in it, but by the person interested on whose behalf the insurance was made. *Primâ facie*, therefore, the plaintiffs are entitled to sue in this case, but they may be excluded by the terms of the contract and the real question is whether that is the case here.

Now it was held in *United Kingdom Mutual Steamship Assurance Association* v. *Nevill*, 35 W. R. 746, 19 Q. B. D. 110, on this very form of contract that the principal, in this case the plaintiff Montgomerie, is excluded from being sued for the premiums, and there appears to be a presumption that rules of that kind are what may be shortly described as correlative. If the plaintiff Montgomerie could not have been sued for the premium, or what is equivalent to the premium, namely, his contribution to the funds of the association, there appears to be a presumption that he and his co-plaintiffs would not be entitled to sue for that which is the consideration for the contribution, namely, the moneys insured.

As Lord Blackburn said in the case of *Elbinger Actien Gesellschaft* v. *Claye*, L. R. 8 Q. B. 313, at pp. 316, 317, 21 W. R. Dig. 209, "The right to sue and liability to be sued upon a contract are reciprocal." He points out certain exceptions and afterwards says: "I must say, I think, that the two things are correlative. A man cannot make a contract in such a way as to take the benefit unless also he take the responsibility of it."

The question then is, Have the parties so contracted that Montgomerie and his co-plaintiffs cannot sue, the alternative being that the action should have been brought in the name of Perry, Raines, & Co.? I have come to the conclusion that the parties have so contracted. I think that the rules annexed to the policy and the articles of association which are incorporated with the policy show plainly that it was the intention of the parties that the association should look to the member only for contribution, and should have to deal with, and be entitled to say that they would deal with, the member only in respect of the settlements of losses. Now, the member here is, I think, clearly Perry, Raines, & Co., and, with respect to this particular contract—which was that sued on in *United Kingdom Mutual Steamship Assurance Co.* v. *Nevill*, as distinguished from that discussed in *Great Britain* 100 *A1 Steamship Insurance Association* v. *Wyllie*, 37 W. R. 407, 22 Q. B. D. 710—the rule on which I place particular reliance is the arbitration clause. It was plainly in the contemplation of the parties that all settlements under these policies should be made by arbitration, and, when you have to consider who it is that the parties intended should be entitled to sue, it is natural to look to the clause which provides the machinery under which the proceedings against the company are to be taken. The arbitration clause commences as follows:—"The sum, if any, to be paid by this club in satisfaction of any claim shall, in the first instance, be settled by the committee and the member"—not the party entitled—"if he agree to accept such sum (if any) as may be allowed by the committee in full satisfaction of his claim, shall be entitled to demand payment as soon as the amount to be paid has been so ascertained and settled, and not before, and payment shall only be claimed according to the customary mode of payment in use in this club." It then provides that, in case of difference, the matter in dispute is to be decided by two arbitrators, one appointed by the committee and the other by the member making the claim; and these words follow:—"Provided always, and it is hereby expressly agreed, that no action shall be commenced or other proceedings taken in any court or tribunal for recovery of any claim or demand under or by virtue of a policy in this club unless and until the amount thereof in dispute has been decided by arbitration, and the obtaining such decision is hereby declared to be a condition precedent to the right of any member to maintain any such action or other proceeding." The clause has not been insisted upon as an answer to the action; I refer to it as showing who it is that the parties thought was the proper person to deal with the association.

I now turn to the articles of association which are incorporated into the contract. But it may not be altogether immaterial to observe that the memorandum of association speaks only of "insurance of the ships of members, and of ships which members may be authorized to insure in their own names." This leads to the inference that the distinction was present to the mind of the framer of that document. Though a member may insure on behalf of someone else, it is the member, and not the person on whose behalf he insures, that is intended to be insured by the association. As regards the articles of association, by the interpretation clause "member" means member of the association. By the 3rd article of association, "The association shall consist of the several persons who shall for the time being be insured or protected, or shall have entered, or agreed to enter, ships for insurance or protection." *Primâ facie* that would seem to provide that everyone who had his interest protected by a policy should be in some sense a member of the association. But this is followed by the 4th article: "Definition of members.—Every person who, on behalf of himself, or any other person or persons, insures or enters for protection any ship or

ships, or share or shares of a ship, in the association shall, as from the date of the commencement of such insurance or protection, be deemed to have become a member of the association." It appears to me that this is an express provision that those persons only are to be deemed to be members who have on behalf of themselves or anyone else insured or entered for protection any ship or ships. By the 40th article: "Every engagement or liability of a member of the association in respect of any insurance or protection shall, for all the purposes relative to enforcing such engagement or liability, be deemed to be an engagement or liability by or on the part of such member to the association, and not to any other member or members, and all moneys payable thereunder shall be paid to the association." By the 41st article: "All claims in respect of insurance or protection shall be made and enforced against the association only, and not against any members thereof, but"—now come the words which at first sight appear to me to suggest a different construction—"the association shall not be liable to any member or other person for the amount of any loss, claim, or demand, except to the extent of the funds which the association is able to recover from the members or persons liable for the same, and which are applicable to that purpose." But although *primâ facie* "member or other person" would mean member or other person interested, it appears to me to be consistent with the clause that the words "liable to any member or other person" point to liability to the "other person" through the hands of the member, and it is material to observe that in *United Kingdom Mutual Steamship Association* v. *Nevill*, 19 Q. B. D., at p. 119, Fry, L.J., expressly deals with these words, and, after considering the terms of the policy, points out that in his judgment the words "member or other person" mean member or person succeeding to or representing a member in the same way as personal representatives or a trustee in bankruptcy. I need only now refer briefly to the judgments in that case. Lord Esher, M.R., says, at pp. 115, 116: "I think that in the case of such a contract as this under seal it is not allowable to go behind the instrument to make undisclosed principals responsible, because they are not parties, and have not attached their seals to the contract under seal." I do not think, however, that this consideration is the ground of his decision. In this case, if there had been a deed *inter partes*, it would have been an answer at once that Montgomerie and his co-plaintiffs were not parties to the deed. Lord Esher, M.R., also says, at p. 116: "The association can only sue the member as an assured for what is equivalent to the premium."

It seems to follow that if they cannot sue him as an insurer, neither can they sue the person alleged to be his undisclosed principal as an insurer. If such person can be sued at all it must be as an assured for what is equivalent to the premium. But can he be so sued? He goes on to give judgment to the effect that the principal, corresponding to Montgomerie and the other co-plaintiffs in this case, could not be sued for contributions, and then he says, "I do not think that he is a party to the contract as an undisclosed principal, although he may be a *cestui que trust* in respect of the proceeds the member may receive. Not being a party he cannot sue or be sued on the contract." The only point for decision in that case was whether he could be sued, but the Master of the Rolls does in terms say that he cannot sue. Fry, L.J., appears to take the same view, though I cannot find that either he or Lopes, L.J., actually express an opinion on that particular point. But Fry, L.J., does deal expressly with the words "member or other person," in article 41, in the manner which I have mentioned.

In the case of *Great Britain* 100 *A*1 *Steamship Insurance Association* v. *Wyllie*, and in the case before Mathew, J., of *Ocean Iron Steamship Assurance Association* v. *Leslie*, which is reported in the note to the former case, the question arose upon a Lloyd's policy, which is a totally different form of policy to the deed in this case, and a different conclusion was arrived at. In these cases the decision in *United Kingdom Mutual Steamship Assurance Association* (*Limited*) v. *Nevill* was expressly stated to be entirely consistent with the decision in the *Great Britain* 100 *A*1 *Steamship Insurance Association* v. *Wyllie*, and the decision in the former case was put by the Court of Appeal in the latter case, and by Mathew, J., in *Ocean Iron Steamship Assurance Association* v. *Leslie*, on the ground that the association had contracted themselves out of the right to sue Nevill, who, but for the express contract, would have been liable to be sued for his contribution under the general rule of the law, as it was held in these cases that Wyllie and Leslie could be sued for theirs.

For these reasons I think that the action cannot be maintained by Montgomerie, and the co-plaintiffs against the defendants, and that the defendants are, therefore, entitled to judgment.

Judgment for the defendants.

Solicitors for the plaintiffs, *Stokes, Saunders, & Stokes.*

Solicitors for the defendants, *Parker, Garrett, & Parker.*

Court of Appeal.

From Q. B. Div. Feb. 24; March 9.

PAINE *v.* CHISHOLM. (*a.*)

Practice—Appeal—Costs—Power to give costs on higher scale—Special grounds—Discretion of judge—Ord. 65, *r.* 9.

An appeal lies to the Court of Appeal from the order of a judge allowing costs on the higher scale, on the question whether there are any "special grounds arising out of the nature and importance or the difficulty or urgency of the case," under ord. 65, *r.* 9. *If such special grounds are found to exist, the Court of Appeal has no power to interfere with the exercise of the judge's discretion.*

Appeal from the decision of Stephen, J.

The action was brought for damages for fraudulent misrepresentation in the sale of a public-house by the defendant to the plaintiff. The trial took place before Stephen, J., and a jury, and lasted eight days, about thirty witnesses being called on either side. The jury returned a verdict for the defendant, and Stephen, J., gave judgment accordingly, and also granted, under ord. 65, r. 9, the defendant's application for costs on the higher scale.

The plaintiff appealed.

Crispe and *Minton Senhouse*, for the appellant.

Jelf, Q.C., and *H. E. Duke*, for the respondent.

The following cases were cited on the question of costs:—*In re Terrell*, 31 W. R. 208, 22 Ch. D. 473;

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

Harrison v. *Leutner*, 31 W. R. 837, 24 Ch. D. 594; *Williamson* v. *North Staffordshire Railway Co.*, 32 Ch. D. 399, 34 W. R. Dig. 44.

Feb. 24.—The COURT (Lord ESHER, M.R., and BOWEN and FRY, L.JJ.) dismissed the appeal on the question of fact, but reserved the question of costs for further consideration.

March 9.—Lord ESHER, M.R.—This case is one of considerable importance. The appeal was brought from Stephen, J., and we dismissed the appeal. The further question was then raised whether the learned judge was right in granting the successful party costs on the higher scale. It therefore became a mere question of costs, and we have first to say whether an appeal lies from the decision of a judge giving costs on the higher scale. I think that it does, and on grounds analagous to those on which we held that an appeal would lie on a question of "good cause" under ord. 65, r. 1, when an action had been tried by a judge with a jury. It was then held that an appeal lay on the question whether or not "good cause" existed, but that if once "good cause" were shown to exist the court would not interfere with the exercise of discretion by the judge.

The question now before us turns on ord. 65, r. 9, which is to the effect that costs on the higher scale may be allowed "if, on special grounds arising out of the nature and importance, or the difficulty or urgency of the case," the judge shall so order.

The conditions, therefore, on which the judge may order costs on the higher scale are if there be "special grounds arising out of the nature and importance, or the difficulty or urgency of the case." Those conditions must exist to entitle the judge to exercise his discretion, and if those conditions do not exist he has no discretion which he can exercise. On the question whether there were such special grounds as are contemplated by the rule an appeal therefore will lie, but if those conditions exist the judge would have a discretion with which we could not interfere. We have, therefore, to see whether we agree in this case with Stephen, J., as to the existence of those conditions. For my part, I could wish that the difference between the higher and lower scale were abolished. I think that the granting of costs on the higher scale ought to be regarded with strictness, and rarely exercised. The case of *Williamson* v. *North Staffordshire Railway Co.* is, to my mind, a good instance of the method in which the power given by the rule should be exercised. I can see nothing in the nature and importance of this case to constitute special grounds within the meaning of the rule. It was an ordinary case of fraudulent representation, raising questions of no importance but to the parties themselves. There was no difficulty about it, and it cannot be said that it was in any way urgent. Therefore, none of the conditions mentioned in the rule existed, and there were no special grounds on which the judge could order costs on the higher scale. I think, therefore, this part of the judgment must be corrected, and costs on the higher scale disallowed.

BOWEN, L.J.—I am of the same opinion. The action was a simple one, of a kind which is constantly going on in the High Court, and I confess I should view with alarm the proposition that in such an action costs on the higher scale should be allowed. In some cases costs are in the absolute discretion of the court, and no appeal lies. There are other cases which are on the border line, where the court has vested in it a discretion on certain conditions, and unless those conditions exist there is no discretion. In those cases we have said that we are bound to inquire whether the conditions exist which give rise to the discretion, and that, if they do exist, then no appeal lies from the exercise of the discretion. The most familiar form of these cases is that arising under ord. 65, r. 1. These cases are of two kinds. In the first an executor, administrator, trustee, or mortgagee complains to the court of appeal that he has been deprived of costs, and the court of appeal has held that it will inquire whether he has unreasonably instituted, or carried on, or resisted any proceedings, within the meaning of the rule, in order to see whether the necessary conditions have been fulfilled to give rise to the exercise of the discretion. So also in cases tried with a jury the question arises whether there was "good cause" for depriving a successful party of his costs. In this latter class of cases we have said that, though we could not examine into the exercise of the discretion, we had power to see whether there was good cause or not, upon which alone discretion could be exercised. The present rule is *in pari materiâ*. The judge may allow costs on the higher scale if there are special grounds arising out of the nature and importance, or the difficulty or urgency of the case.

If the case is one in which no special grounds arise in any of those ways we must say that those conditions are not fulfilled. What, then, is the extreme latitude of the words used in the rule. Here is, as I have said, a simple case of fraudulent misrepresentation, requiring no extraordinary industry or skill. In *Williamson* v. *North Staffordshire Railway Co.* Fry, L.J., points out that special grounds must exist, and that costs cannot be granted on the higher scale merely on account of the difficulty of the case. The importance or difficulty of the case is not in itself a special ground. Cotton, L.J., there said: "Although this case is one of importance and difficulty, I do not think that there are in it special grounds arising out of the nature and importance, or the difficulty or urgency of the case," and therefore he refused to give costs on the higher scale.

No definition of special grounds was there laid down, but the question comes to this, whether, in a simple case like the present, there can be any such special grounds as are contemplated by the rule? I think that there can not. I am sorry to have to differ from the decision of the learned judge.

FRY, L.J.—I am of the same opinion. I think the attention of the learned judge was not called to the terms of this rule. The first question is whether an appeal lies. I think that the discretion given by the rule depends on a contingency. Whether that contingency has arisen or not is a subject for appeal. It may be difficult to define the precise meaning of the words "special grounds," but obviously the words were not intended to apply unless there was something peculiar in the case. Then it must be observed that they must be special grounds arising out of the nature and importance, or the difficulty or urgency of the case. I can see no such special grounds here, and therefore I think we must say that the judge had no power to exercise his discretion by giving costs on the higher scale.

Order accordingly.

Solicitor for the appellant, *Edward Clarke.*

Solicitor for the respondent, *B. Burton.*

From Q. B. Div. March 3.

CLINK v. RADFORD & CO. (a.)

Shipping — Charter-party — Construction of cesser clause—Demurrage—Detention at port of loading.

In an action brought by shipowners against charterers for damages for detention at the port of loading, the defendants relied on the cesser and lien clauses as freeing them from responsibility.

Held, that the word "demurrage" in the lien clause did not cover undue detention at the port of loading, and, therefore, that the charterers were not exempted from liability.

Where it is possible, the cesser and lien clauses should be construed as co-extensive.

Appeal from judgment of Pollock, B., at trial with jury.

The action was brought by shipowners against charterers to recover damages for detention at port of loading. The defendants relied on the cesser clause in the charter-party.

By the charter-party the plaintiffs' ship was chartered by the defendants for a voyage from Newcastle, N.S.W., to San Francisco. She was to load "in the usual and customary manner a full and complete cargo of coals." The cargo was to be unloaded "at an average rate of not less than 100 tons per working day, . . . or charterers to pay demurrage at the rate of 4d. per ton register per diem, except in case of unavoidable accident." The cesser clause was in the following terms:—"The charterers' liability under this charter-party to cease on the cargo being loaded, the owners having a lien on the cargo for freight and demurrage."

At the trial the jury found that the ship had been detained by the charterers at the port of loading sixteen days beyond what was usual and customary, and the judge held that the cesser clause had no application to damages for detention at the port of loading, and gave judgment for the plaintiffs.

The defendants appealed.

R. T. Reid, *Q.C.*, and *Spokes*, for the appellants.

Gorell Barnes, *Q.C.*, and *Leck*, for the respondents.

The following cases were cited:—*Bannister* v. *Breslauer*, 15 W. R. 840, L. R. 2 C. P. 497; *Gray* v. *Carr*, 19 W. R. 1173, L. R. 6 Q. B. 522; *Francesco* v. *Massey*, 21 W. R. 440, L. R. 8 Ex. 101; *Lockhart* v. *Falk*, 23 W. R. 753, L. R. 10 Ex. 132; *Kish* v. *Cory*, 23 W. R. 880, L. R. 10 Q. B. 553; *French* v. *Gerber*, 25 W. R. 113, 355, 1 C. P. D. 737, 2 C. P. D. 247; *Sanguinetti* v. *Pacific Steam Navigation Co.*, 25 W. R. 150, 2 Q. B. D. 238; *Dahl* v. *Nelson*, 29 W. R. 543, 6 App. Cas. 38; *Harris* v. *Jacobs*, 15 Q. B. D. 247, 33 W. R. Dig. 199; *Restitution Steamship Co.* v. *Pirie*, 61 L. T. N. S. 330, 38 W. R. Dig. 199; *Gardiner* v. *Macfarlane & Co.* 16 Ct. of Sess. Cas,. 4th series, 658.

Lord ESHER, M.R.—In this case it seems to me that, without going in detail into the cases, some rules have been clearly laid down by them which enable us to decide the point before us. The principal rule that we have to apply is as to the interpretation in a charter-party of what is known as the cesser clause. The rule on which the courts have acted is this: that unless a cesser clause is expressed in terms so plain and unambiguous that it cannot in any way be evaded, the court will always be inclined to construe it as not applicable to the breach complained of, if by so construing it the shipowner would be left without any remedy for a clear breach of the contract. In other words, the court will not assume, unless it is obliged by the unmistakable language of the clause to do so, that the shipowner intended by the cesser clause to give up his undoubted rights without any mercantile reason or recompense. That being so, the question in this, as in all similar cases, will depend on whether it will appear that the shipowner has any remedy over if the cesser clause be strictly construed. If he has not, the court will not construe the cesser clause in its fullest possible meaning so as to leave him absolutely without a remedy, because it could not have been the meaning of the parties that the cesser clause should have such an effect. That is, I think, the rule laid down in all the cases and adopted by the Court of Appeal. That reduces the question to a simple one. Here we have a breach by the charterer in not loading, as the jury have found, within a reasonable time. If the charterer is not liable for that breach, has the shipowner any remedy for it? That depends on whether the word "demurrage" in this charter-party can be applicable to detention at the port of loading. Looking at the whole charter-party, what are the rights and liabilities of the parties at the port of loading? The charterers must load in the usual and customary manner—that is to say, in a reasonable manner—a full and complete cargo. No doubt an unreasonable delay amounts to a breach of the charter-party, but is there any demurrage applicable to that breach. I think that there is none. There is no mention of any demurrage days, nor is any rate for detention fixed, and therefore I think that in that part of the charter-party, at any rate, there is no demurrage which is in any sense applicable to the breach which has occurred. There is no mention of demurrage at all with regard to detention at the port of loading. Then we come to the provisions of the charter-party relating to the unloading of the ship. There is a provision that not less than 100 tons per working day shall be discharged. That indirectly gives a certain number of days within which the unloading must take place. Then comes a provision that demurrage shall be paid at a certain rate per ton. That is to say, that if the time given for discharging the cargo is exceeded, demurrage at a fixed rate must be paid for all subsequent days. That, therefore, is the demurrage applicable to the discharge of the cargo. It is unreasonable, I think, to say that it also applies to detention at the port of loading. The demurrage is confined to delay at the port of discharge, and has no reference at all to the port of loading. Then what does the word "demurrage" in the cesser clause mean? Surely it refers to demurrage as used in this charter-party—that is to say, demurrage at the port of discharge. No lien, therefore, is given for any damage caused by delay at the port of loading. Therefore, if the cesser clause is to be construed so as to release the charterer from liability for delay at the port of loading, the shipowner would be left without any remedy for the undoubted breach which has occurred. That being so, in accordance with the rule I have stated, the court must say that the cesser clause has no application to the present action, and that the plaintiff is entitled to succeed. An additional reason for holding that the lien has no application to these damages is found in the fact that it is exceedingly inconvenient to apply a lien to an unascertained and unascertainable amount. As I have said, I think it unnecessary to go through all the cases, but I wish to strike once more at that of *Bannister* v. *Breslauer*, and to say that if that decision conflicts with the view which I have expressed, that case cannot, in my opinion, be supported.

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

BOWEN, L.J.—I am of the same opinion. We have to construe the cesser clause in this charter-party. There is no doubt that if the parties so choose they may frame a cesser clause in such a way as to emancipate the charterer from all liability without giving the shipowner any lien to compensate him for what he has given up. A cesser clause deals with the cesser of liability and the creation of a lien, and the principle which has been followed by the courts in construing such clauses is one which is obviously reasonable to all commercial minds. Any reasonable man would expect that the lien given by the clause would be commensurate with the liability abandoned by it. That is the principle on which the courts have acted, and which, I think, appears in all the cases. It certainly has been constantly recognized in the long chain of valuable judgments on the subject delivered by the Master of the Rolls.

Applying that principle to the case before us, one would not expect to find the shipowner placing himself at the mercy of the charterer without receiving any equivalent. The question is therefore reduced to a very simple one of construction. If the lien that is given by the clause is to be commensurate with the release of liability, we must examine the extent of the lien in order to ascertain the extent of the liability. The lien is for demurrage. Is the word "demurrage," according to its true construction, to include damages for detention at the port of loading? "The word 'demurrage,'" said Cleasby, B., in *Lockhart* v. *Falk*, "no doubt properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified in or to be collected from the instrument, but it has also a popular or more general meaning of compensation for undue detention." It is, in fact, an elastic word, and can be stretched. Cleasby, B., goes on:—"When the charter-party contains no clause allowing demurrage at a specified rate it has been held that the word 'demurrage' in the exception clause applies to detention, and that the charterer is discharged as soon as the cargo is on board." That was the case in *Bannister* v. *Breslauer*. We have, therefore, to look at the charter-party in order to see in which sense it is to be construed. *Primâ facie* the lien is only created as a convenient means of obtaining payment of liquidated sums, or sums which are capable of being ascertained, and although by agreement it may be extended to unliquidated sums, that is an inconvenient course to pursue. All the cases, with the exception of *Bannister* v. *Breslauer*, are cases in which there was in the charter-party some practical means of assessing the damages due for the delay. *Bannister* v. *Breslauer* can only be supported (if at all) on the ground that no other meaning could be given to the word "demurrage" in that particular charter-party. The present charter-party contains provisions as to demurrage—in its strict sense—at the port of discharge, but there is no provision relating to demurrage at the port of loading. Therefore, in my opinion, the word "demurrage" in the cesser clause must be construed in its strict sense, which is the more convenient and natural sense, and must be limited to matters which come under the term as previously used in the charter-party. It follows, therefore, that the cesser clause has no application to the present action.

FRY, L.J.—I am of the same opinion. It seems to me that the rule to be applied is well ascertained. The cesser and lien clauses must, unless there is express reason to the contrary, be read as co-extensive. If not, we should have a liability destroyed, and no lien created in compensation. If that were so, what would be the use of the stipulation as to loading. It would, I think, to any mind be unreasonable to hold the contrary; the court will not, unless it is driven to it, so construct a cesser clause. The clause must, if it is reasonably capable of bearing the meaning, be read as creating a lien co-extensive and commensurate with the liability which is released by it. As Amphlett, B., said in *Kish* v. *Cory*, "There are two ways, and two ways only, in which that injustice could be remedied—either to say the charterers' liability to cease does not go beyond the freight and demurrage properly so called which was subject to the lien, or to say that demurrage where mentioned in the lien clause includes what may properly be called detention." The next point is as to the meaning of the word "demurrage" in the cesser clause. The word has two significations, as has already been said. It is plain to my mind that the word in the cesser clause is the same as the word in the charter-party; that is to say, it relates to demurrage strictly so called, demurrage at the port of discharge, and not demurrage at the port of loading. Except when driven by stress of circumstances, the court will never apply a lien to unliquidated damages. This cesser clause lends itself easily to the more restricted meaning of the word "demurrage." The clause speaks of demurrage "under this charter-party." Those words must be addressed to payments made in accordance with the terms of the charter-party, and not to unliquidated damages arising from a breach of its provisions.

Appeal dismissed.

Solicitors for the appellants, *Radford & Frankland.*

Solicitors for the respondents, *Lowless & Co.*

From Q. B. Div. Nov. 20, 21; Dec. 19

SERRAINO v. CAMPBELL. (a.)

Shipping—Bill of lading—Usual excepted perils—"All other conditions as per charter"—Charter-party containing further excepted peril—Exception of loss occasioned by negligence.

By a bill of lading goods were to be delivered, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted, unto order or assigns, they paying freight for the said coals, and all other conditions as per charter, with average accustomed." The charter-party contained a clause specifying the same exceptions as the bill of lading, with the following addition:—"Negligence clause as per Baltic Bill of Lading, 1885." This negligence clause excepted strandings and collisions, and all losses and damages caused thereby, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners. The vessel stranded in consequence of the negligence of the master or crew, and the goods were lost. In an action by the indorsees of the bill of lading against the shipowner for the loss of the goods,

Held (affirming the judgment of Huddleston, B.), *that the words in the bill of lading, "all other conditions as per charter," incorporated only such conditions as were to be performed by the receiver of the goods, and did not incorporate the negligence clause; and that the shipowner was therefore liable.*

Russell v. Niemann, 17 *C. B. N. S.* 163, 12 *W. R. C. L. Dig.* 121, *approved.*

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Appeal by the defendants from the judgment of Huddleston, B. (*ante*, p. 112).

The question was whether the words in a bill of lading, "all other conditions as per charter-party," incorporated into the bill of lading a clause, contained in the charter-party, excepting loss occasioned by negligence.

French, *Q.C.*, and *Joseph Walton*, for the defendants.—The negligence clause is incorporated into the bill of lading by the words of reference. The result of the authorities is that the words "all other conditions as per charter" introduce into the bill of lading all the conditions of the charter-party which are not inconsistent with the rest of the bill of lading: *Gray* v. *Carr*, 19 W. R. 1173, L. R. 6 Q. B. 522; *Porteus* v. *Watney*, 27 W. R. 30, 3 Q. B. D. 534; *Gullischen* v. *Stewart*, 32 W. R. 763, 13 Q. B. D. 317; *Gardner* v. *Trechmann*, 15 Q. B. D. 154, 33 W. R. Dig. 190. The negligence clause is not inconsistent with the exceptions specified in the bill of lading; it merely adds one more excepted peril. The case of *Russell* v. *Niemann*, 17 C. B. N. S. 163, 12 W. R. C. L. Dig. 121, cannot be held to be good law since the decision in *Gray* v. *Carr*. The remarks of Lords O'Hagan and Blackburn in the unreported case of *Taylor* v. *Perrin*, approving of *Russell* v. *Niemann* were merely *obiter dicta*.

They also cited *Delaurier* v. *Wyllie*, 17 Court Sess. Cas., 4th series, 167, and *Hamilton* v. *Mackie*, 5 Times L. R. 677.

J. G. Barnes, *Q.C.*, and *Lawson Walton*, *Q.C.*, for the plaintiffs.—The true effect of the words of reference is to introduce into the bill of lading only those conditions which are to be performed by the consignee. This was the meaning of the decision in *Gray* v. *Carr*, and all the other cases are consistent with it. It has never before been suggested that *Russell* v. *Niemann* had been overruled. The negligence clause is inconsistent with the bill of lading, which is a contract to carry, unless prevented by certain excepted perils. It cannot have been the intention of the parties to the bill of lading to vary their contract by introducing another excepted peril.

They also cited *Smith* v. *Sieveking*, 3 W. R. 411, 4 W. R. 25, 4 E. & B. 945, 5 E. & B. 589.

Cur. adv. vult.

Dec. 19.—Lord ESHER, M.R.—In this case the plaintiffs, who are consignees of cargo by indorsement of a bill of lading, sue the shipowner for non-delivery of the cargo according to the terms of the bill of lading. The defence is that the goods were lost owing to a cause which brings the case within one of the exceptions. As a matter of fact, the ship stranded owing to the negligence of the master or some of the crew. The words on the face of the bill of lading specifying the exceptions are—"the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted." On the construction of that alone, it is clear that a stranding of the ship through the negligence of the master or crew does not come within the exceptions. But then follow these words, and on them the defendant relies: "unto order or assigns, they paying freight for the said coals, and all other conditions as per charter, with average accustomed." The shipowner says that these words bring into the bill of lading an exception in his favour to be found in the charter-party. The charter-party incorporates the negligence clause of the Baltic Bill of Lading; that is to say, among the exceptions contained in the charter-party is stranding, although caused by the negligence of the master or crew. The question is, can the defendant say that this exception is brought into the bill of lading?

Those words, "all other conditions as per charter-party," have been the cause of much litigation. A meaning was put on them in *Gray* v. *Carr*. It was there contended that the effect of the words ought to be limited by reference to the preceding words, "he or they paying freight," and that they were only applicable to matters *ejusdem generis* with the payment of freight. But the decision came to this, that the words brought into the bill of lading all the conditions in the charter-party which were to be performed by the receiver of the goods. The cases which have followed are merely instances showing a practical mode of carrying out that decision. First, all the conditions of the charter-party are to be read into the bill of lading; then, if some of them are too large, so as not to be applicable to a bill of lading at all, they are to be struck out. These cases have not enlarged the doctrine of *Gray* v. *Carr*, but have in some respects limited it.

Further, I think that the decision in *Gray* v. *Carr* followed the interpretation put on these words by Willes, J., in *Russell* v. *Niemann*. I think that that learned judge did not mean to limit the application of the words to such matters as the payment of freight, but that his meaning was the same as that of the majority of the court in *Gray* v. *Carr*—viz., that the words applied to all conditions to be performed by the consignee. And I have come to the conclusion that that is the construction which we ought to put on the words.

Now an exception of perils caused by negligence is not a condition to be performed by anybody. No exception of perils is a condition to be performed by anybody. Therefore these words do not incorporate any exception of perils; and the negligence clause, which is one of the exceptions of perils in the charter-party, is not introduced into the bill of lading. This exception in the charter-party seems to me to be absolutely useless, and I can only conclude that when the shipowners granted bills of lading in this form, they neglected to see the effect of what they were doing. The bill of lading specifies certain excepted perils, and the words of reference to the charter-party not applying to excepted perils at all, the exception of perils is not enlarged. The defendant is therefore liable to the plaintiffs for the loss of this cargo. I think that our decision is in accordance with *Russell* v. *Niemann*, and that that case is not overruled by or inconsistent with *Gray* v. *Carr*. The appeal must be dismissed.

LOPES, L.J., delivered the following written judgment:—

The plaintiffs in this case are indorsees of a bill of lading and owners of goods carried in the defendants' vessel to be delivered at Trapani, in the island of Sicily, shipped by Messrs. Fisher, Renwick, & Co. The goods were lost by the negligence of the defendants, the vessel having stranded at Mazzara.

The charter-party, which was in the ordinary form, was signed by Fisher, Renwick, & Co. "as agents for the charterers." It contained in print the usual exceptions, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage," and in writing at the end, "Negligence clause as per Baltic Bill of Lading, 1885."

It was contended on the part of the defendants that the plaintiffs were parties to the charter-party, Fisher, Renwick, & Co. being their agents, and, therefore, that the plaintiffs, as principals, were bound by

all the terms of the charter-party; but, if they were not actual parties to the charter-party as principals, they were to the bill of lading, which, it was contended, incorporated all the provisions of the charter-party, including the Baltic clause. There was no evidence to show that Fisher, Renwick, & Co. were agents, apart from the fact that they so described themselves. The contract between Fisher, Renwick, & Co. and the plaintiffs was contained in letters and telegrams discussing the price, and concluded with a letter of December 12, in which Fisher, Renwick, & Co. wrote:—"Referring to telegrams exchanged between us, we confirm sale to your good selves of a cargo of large Newcastle steam coal at 19s. 6d. per ton c. i. f. Trapani"; and the invoice was made out by Fisher, Renwick, & Co. as vendors to the plaintiffs as purchasers.

This makes it clear beyond doubt that the contract was a contract of sale and purchase, and that Fisher, Renwick, & Co. were principals to the charter-party, and that the plaintiffs were not directly bound by it.

It was, however, contended that the bill of lading incorporated all the provisions of the charter-party, including the Baltic clause. The bill of lading provided that the goods shipped by Fisher, Renwick, & Co. were to be delivered at the port of Trapani, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted, unto order or assigns, they paying freight for the said coals, and all other conditions as per charter, with average accustomed." The question is whether "all conditions as per charter" imported into the bill of lading the Baltic clause.

The Baltic clause provided that "strandings and collisions, and all losses and damages caused thereby," were to be excepted, "even when caused by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner."

As a general rule it may be laid down that when bills of lading are in the hands of strangers to the charter-party, either as original shippers, or as indorsees to whom the property has passed, they show the contract under which the goods are being carried; and the shipowner's claims, exemptions, and lien on the cargo given by the charter-party are not preserved as against such shippers or indorsees, except so far as those terms of the charter-party are expressly incorporated in the bill of lading.

In *Russell* v. *Niemann* one of the questions was whether the exception contained in the bill of lading was expanded by the exception in the charter-party. The exception in the bill of lading was "the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted." The exception in the charter-party was "the act of God, enemies, fire, restraint of princes, and all and every dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage excepted." After the exception in the bill of lading were the words, "paying freight for the said goods and all other conditions as per charter-party." Willes, J., in giving judgment said, "We now proceed to give judgment on the second point, which is whether the exception contained in the bill of lading is expanded by the exception in the charter-party. That depends on whether the words "and other conditions as per charter-party" include all the stipulations and conditions contained in that instrument, or whether they are not limited to conditions *ejusdem generis* with that previously mentioned—viz., payment of freight, conditions to be performed by the receiver of the goods. It is a mere question of language and construction, and we think it enough to say that the latter is the construction which we put upon those words." Here is a distinct decision of Willes, Byles, and Keating, JJ. If this case has not been overruled, and there is no other case inconsistent with it, it remains law and governs this case. It was suggested that *Gray* v. *Carr* is inconsistent with it. It is not in any way inconsistent. *Russell* v. *Niemann* was cited in argument, but was not referred to in any of the judgments. *Gray* v. *Carr* was in the Exchequer Chamber, and was decided in 1871, *Russell* v. *Niemann* in 1864. It is scarcely conceivable that Willes, J., who concurred in the judgment given by Brett, J., describing it as a judgment written with such full and accurate acquaintance with the mercantile and maritime law applicable to the subject that he would not attempt to add anything to it, should have forgotten his previous decision, which had been cited before him, or meant to overrule it, or thought the case he was then deciding inconsistent with it. *Russell* v. *Niemann* is entirely in accordance with *Gray* v. *Carr*.

The question in *Gray* v. *Carr* was whether the shipowner's lien was preserved as against the bill of lading holder, whether the contract in the bill of lading which the holder is presumably bound to perform incorporated the terms of the charter-party as to the loading, as well as those which related to matters subsequent to the shipment. Great differences of opinion were expressed as to the effect of a bill of lading which made the goods deliverable "unto order or to his or their assigns, he or they paying freight and all other conditions or demurrage (if any should be incurred) for the said goods, as per the aforesaid charter-party." The question was whether this entitled the shipowner, as against the bill of lading holders, to the benefit of a clause in the charter-party by which the owners were to have "an absolute lien on the cargo for all freight, dead freight, demurrage, and average," in respect of certain demurrage which had been incurred at the port of loading before the bill of lading had been granted. The Queen's Bench and a majority of the Exchequer Chamber held that the clause entitled the shipowner to a lien for the demurrage at the port of loading, and that by the terms of the bill of lading this right was preserved against the consignees. On the other hand Willes and Brett, JJ., held that the words would be satisfied by making them apply to damages in the nature of demurrage for delay at the port of discharge. It will be observed that this decision in no way touches the decision in *Russell* v. *Niemann*, where it was held that the words "all other conditions as per charter-party" did not include all the stipulations contained in the charter-party, but were limited to conditions *ejusdem generis* with those previously mentioned—viz., conditions to be performed by the receiver of the goods.

It cannot be said that the Baltic clause is such a condition. It is not a condition to be performed by the consignees. The words "all other conditions" must be construed with reference to the preceding words "paying freight for the coals," and include only such conditions as are *ejusdem generis* with the payment of freight, conditions to be performed by the receiver of the goods.

It seems to be unnecessary to refer to the other cases cited. Suffice it to say that none of them are inconsistent with *Russell* v. *Niemann*. I will only add that *Russell* v. *Niemann* was recognized and approved of in the case of *Taylor* v. *Perrin*, a case unreported, but the shorthand writer's notes of which I have seen. Lord O'Hagan describes *Russell* v. *Niemann* as a perfectly well-decided case. Lord Blackburn says: "The case which has been referred to, *Russell* v. *Niemann*, in which Willes, J., gave judgment, as it appears to me, perfectly correctly,

decided that the reference to the charter-party is meant to bring in those conditions which would apply to the person who has taken the bill of lading and is taking delivery of the cargo, such as the payment of demurrage, the payment of freight, the manner of paying, and so on, but is by no means to be taken to incorporate all the conditions of the charter-party."

I am of opinion that this case is governed by *Russell* v. *Niemann*, and that the judgment of the learned judge was right, and that this appeal should be dismissed.

KAY, L.J., delivered the following written judgment:—We have to construe a bill of lading, dated December 20, 1887, which expresses that certain steam coals have been shipped on *The John Banfield*, then in the river Tyne, and bound for Trapani, which were to be delivered there in good order, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted, unto order or assigns, they paying freight for the said coals, and all other conditions as per charter-party." The question is, what is the effect of these last words?

"They paying freight and all other conditions" *primâ facie* signifies they paying freight and performing or observing all other conditions. "They" are the consignees, or their assigns, to whom this bill of lading is given. It is a contract between the shipowners and the consignees. The actual difficulty arises thus. The charter-party (amongst other conditions) contains one as to excepted risks in much larger terms than the exception of risks in the bill of lading. It is a contract between the defendants and Fisher, Renwick, & Co. that the ship shall load coal in the Tyne and proceed to Trapani, and deliver the coal there to the order of Fisher & Co., or their assigns, for a freight at a specified rate per ton, "the freighter to pay all customary dues and duties on the cargo and the ship and all other charges (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, during the said voyage, always excepted)." The charter-party (amongst other things) provided that the liability of Fisher & Co. as to all matters and things in every respect, as well before and after as during the shipment, is to cease as soon as the cargo is shipped, and then follow these words, which create the difficulty, "Negligence clause as per Baltic Bill of Lading, 1885."

The Baltic Bill of Lading contains this negligence clause: "Strandings and collisions, and all losses and damages caused thereby, are also excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners." But for this addition the excepted risks in the charter-party and in the bill of lading which has to be construed would be in the same terms, save that the words "during the voyage" are added in the charter-party. The additional exception of strandings and collisions occasioned by negligence is not among the risks expressly excepted in the bill of lading. Is this additional exception imported into the bill of lading by the words, "and all other conditions as per charter-party"? If the clauses as to excepted risks in the charter-party are to be written into the bill of lading, in addition to the clause on that subject already there, that would be to repeat the clause already in the bill of lading, and to add this further clause, "excepting certain risks occasioned by negligence." Can it, by any fair mode of construction, be said that the referential words, "all other conditions as per charter-party," oblige us to do this?

Apart from authority, I should say, that as the bill of lading has expressed what risks are to be excepted, which means that the goods shall be delivered to the consignee unless prevented by some of these excepted risks, this express contract could not be altered by such general words of reference, which cannot fairly be construed to incorporate into the bill of lading conditions in the charter-party relating to matters already expressly provided for in the bill of lading.

Even grammatically this reading may be the only true one. It is "other conditions." Other than what? Other than freight, certainly. But why not also other than the matters expressly provided for in the bill of lading? Suppose it had expressly provided for freight at a less amount than in the charter-party, would these words introduce the extra amount stipulated for in the charter-party?

A contract must be read without bias in favour of either of the parties to it. But where one of those parties has introduced a stipulation for his own benefit, it is an equally well-settled rule that, if the meaning be doubtful, the other party to the contract shall have the benefit of the doubt. The same rule is expressed in other words by saying that if the shipowner meant to add to the risks specifically enumerated in the bill of lading, he was bound to make this quite clear on the face of the contract; see per James, L.J., in *German* v. *Chapman*, 26 W. R. 150, 7 Ch. D. 276.

The plaintiffs are the owners of the cargo and the indorsees of the bill of lading. They sue the shipowner for damages because the cargo was lost by stranding of the ship owing to negligence of the officers and crew, the damages claimed being the value of the cargo, less freight. If the view I have indicated be the true construction of the bill of lading, they must recover, because the negligence clause, though in the charter-party, is not imported into the bill of lading.

It was suggested at the bar that the charterer and consignee were really the same person; but counsel did not insist upon this, and I do not think it could be maintained. But the argument has been that the matter is settled against the consignee by authority which is binding upon us.

The precise question arose in *Russell* v. *Niemann*, where the bill of lading excepted certain specified risks, and then contained the words, "paying freight for the said goods and all other conditions as per charter-party." The charter-party excepted the same risks and others, and the question was, whether the further exception of other risks was introduced into the bill of lading. The court, consisting of Willes, Byles, and Keating, JJ., held that it was not; the judgment of the court upon this point, delivered by Willes, J., being that the words "all other conditions as per charter-party" were "limited to conditions *ejusdem generis* with that previously mentioned—viz., payment of freight—conditions to be performed by the receiver of the goods."

It is urged that this decision has been overruled. No case expressly overruling or dissenting from it has been cited; and in 1883 Lord Blackburn, in his speech in the House of Lords in an appeal in *Taylor* v. *Perrin*, gave to it the sanction of his high authority. However, that was not one of the actual grounds on which the case in the House of Lords was decided, and, therefore, is not binding as a judgment of the House of Lords, and we have accordingly to consider the cases which, though they do not profess to overrule *Russell* v. *Niemann*, are said to be inconsistent with it. In all of them it is treated as a question construction of the particular bill of lading. The

contest in many of them was whether the consignee was liable for demurrage, the general rule being that he is not, to quote the words of Lord Campbell, "unless the bill of lading makes the goods deliverable on payment of demurrage, or contains equivalant words." In *Wegener* v. *Smith*, 15 C. B. 285, 3 W. R. Dig. 214, the words in the bill of lading were that the goods were to be delivered "against payment of the agreed freight and other conditions as per charter-party." This was held to mean, some payment beyond freight stipulated for in the charter-party, which must be demurrage. In *Smith* v. *Sieveking* Lord Campbell, C.J., delivered the judgment of the Court of Queen's Bench, entirely approving the last case, and holding that demurrage at the port of loading was not payable by the consignee where the words in the bill of lading were "paying for the goods as per charter-party," because by those words "the reference to the charter-party must be considered merely to ascertain the rate of freight," and paying for the goods did not mean paying for the detention of the ship by the charterer. These authorities, and all others that I have consulted, concur in showing that the immediate context of the words in the bill of lading to be construed is of great importance, and that, where the words are placed, as in this case, in a clause which begins, "the consignees paying freight and all other conditions," &c., the bill of lading must be read to refer to conditions to be observed by the consignee.

Gray v. *Carr* was one of the cases most relied on by the appellants. There the words in the bill of lading were "he or they paying freight and all other conditions, or demurrage (if any should be incurred) for the said goods as per the aforesaid charter-party." The words "and all other conditions" were added in writing in a printed form. The shipowner claimed against the consignees named in the bill of lading a lien on the cargo (1) for demurrage at the port of lading, (2) for dead freight—*i.e.*, freight for part of the ship which ought to have been filled with cargo, but was not—and (3) for damages for detention beyond the demurrage days. The majority of the judges in the Exchequer Chamber held that a lien was given by the charter-party for demurrage proper, but not for detention beyond the demurrage days, nor for dead freight, and that the right of lien for demurrage was imported by the bill of lading into the contract between the owner and the consignee. The difficulty as to this was that the charter-party did not provide for demurrage at the port of discharge, but only at the port of loading; and very weighty reasons were given by the present Master of the Rolls against construing the bill of lading so as to make the consignee liable for demurrage incurred before his goods were on board and before the bill of lading was signed. It was pointed out that in *Wegener* v. *Smith* the demurrage claimed had accrued in the port of delivery by default of the consignee: but in *Gray* v. *Carr* demurrage was actually mentioned in the bill of lading; the word is used, and the reference to the charter-party as to demurrage could not have any meaning except to secure to the owner as against the consignee the lien given by the charter-party for the only demurrage there contemplated—viz., demurrage at the port of loading.

However, the principal matter which we have now to consider is whether this case overruled or weakened the authority of *Russell* v. *Niemann*. The decision is certainly not in the least inconsistent with it. *Russell* v. *Niemann* was cited, but none of the judges intimated any disapproval of it, and it seems to me that the two cases may very well stand together.

The next case relied on is *Porteus* v. *Watney* in the Court of Appeal. The words in the bill of lading were:—"On paying freight for the said goods, and all other conditions as per charter-party." The charter-party provided for demurrage at the port of discharge. The ship seems to have been employed as a general ship, and the goods of the particular consignee were in the main hold, under the goods of other shippers who failed to take away their goods in proper time; so that, without any fault of the defendants, three days' demurrage was incurred before they obtained delivery. They were held liable. That is to say, the condition as to demurrage at the port of delivery was imported into the bill of lading by the words "all other conditions." This decision, again, seems to me quite consistent with *Russell* v. *Niemann*. Demurrage at the port of delivery might reasonably, according to that case, be held to be one of the payments to be made by the consignee under the words "paying freight for the said goods and all other conditions as per charter-party," and, though it was a hard case on the particular consignee, that could not be a sufficient reason for saying that he had not so contracted.

In *Gullischen* v. *Stewart Brothers*, under like words, an attempt was made to import into the bill of lading a clause in the charter-party making the responsibility of the charterers cease as soon as the cargo was on board, and thus leaving the shipowner no right of action against the consignee for demurrage at the port of discharge. This attempt was defeated by the judgments of Pollock, B., and Lopes, J., who both held that, in considering what clauses were to be imported into the bill of lading, the cesser clause must be rejected. Their decision was affirmed in the Court of Appeal, Lord Coleridge, C.J., saying:—"Those words are incorporated which are consistent with the liabilities arising upon the bill of lading, and not those which are inconsistent." Lord Esher, M.R., said:—"The clause as to cesser of the charterers' liability is not incorporated." Bowen, L.J., said:—"The bill of lading incorporates certain provisions of the charter-party, but not the clause as to cesser of liability."

In *Gardner* v. *Trechmann* the words were "other conditions as per charter-party"; and it was argued that those words made the consignee liable for an amount of freight stipulated for in the charter-party which exceeded the amount specified in the bill of lading. This was rejected, Lord Esher, M.R., saying that the general reference to the charter-party only brought into the bill of lading "those clauses of the charter-party which are applicable to the contract in the bill of lading; and those clauses of the charter-party cannot be brought in which would alter the express stipulations in the bill of lading." Cotton and Lindley, L.JJ., agreed. The last words I have quoted appear to me to confirm the conclusion at which I have arrived in the present case. They are perfectly consistent with *Russell* v. *Niemann*, which is, as I think, supported by this decision of the Court of Appeal. *Hamilton* v. *Mackie* seems to have decided that these words of reference would not introduce into the bill of lading a clause for reference to arbitration of any dispute upon the charter-party.

I must say that, in my opinion, it is inexpedient to lay down a rigid rule of construction, such as that contended for by the appellants. We have been urged to hold that the authorities which I have examined have determined that all the clauses of the charter-party, or at least all those that can be made to relate to a contract between the shipowner and the consignee, are to be read into a bill of lading containing these usual words of reference, and then those clauses which are inconsistent, which it is argued means contradictory to something in the bill of lading, are to be disregarded. If, for "disregarded," you say "rejected," that is equivalent to not reading them in

at all. I do not agree that this is the true result of the authorities. I hold the true result to be, that in each case the court must decide, from the context and such surrounding circumstances as it is bound to regard, which clauses of the charter-party are to be incorporated into the bill of lading by such words as "all other conditions as per charter-party," and that where, as in *Russell* v. *Niemann* and in the present case, certain risks are expressly excepted in the bill of lading, it is not a legitimate construction of the clause of reference to give it the effect of importing other and larger exceptions because they are contained in the charter-party.

In my opinion the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Stocken & Jupp.*

Solicitors for the respondents, *Coote & Ball*, for *Adamson & Co.*, North Shields.

From Q. B. Div. Dec. 9, 10.

NATIONAL BANK v. SILKE. (a.)

Cheque—Crossing—Negotiability—Words restricting negotiability—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 8, 29, 35, 73, 81.

A cheque payable to order or bearer can only be rendered not negotiable by writing across the face of the cheque a direction, in clear and unambiguous language, that the cheque is not negotiable.

The defendant drew a cheque on his own bank for £450, payable to the order of M., and wrote across the face of the cheque, between two parallel cross lines, the words "The account of M. at the N. Bank." M. indorsed the cheque and sent it to the N. Bank, who were his bankers, to be placed to his credit. At that time M.'s account at the N. Bank was slightly overdrawn. The N. Bank placed the cheque to M.'s credit, but, before they had presented the cheque for payment at the bank of the defendant, M. drew on the N. Bank for, and received payment of, a sum slightly less than the amount of the cheque in question. When the N. Bank presented the defendant's cheque at the bank of the defendant, payment was refused by the direction of the defendant, which had been given to his bank in the meantime.

The N. Bank had applied to M. to repay them the sum they had advanced him on the cheque in question, and, M. not complying, the N. Bank, in its own name, sued the defendant, as the drawer of the cheque, for the amount of the cheque.

Held, that the words written across the face of the cheque did not restrict its negotiability; that the N. Bank were holders of the cheque for value in due course; and, consequently, that they were entitled to recover from the defendant, as the drawer, the amount of the cheque.

Appeal from the decision of Day, J.

The defendant Silke had drawn a cheque on the Alliance Bank, Camden Town branch, for £450, payable "to the order of J. F. Moriarty," and had written across the face of the cheque the words "Account of J. F. Moriarty, National Bank, Dublin." Moriarty, on receiving the cheque, wrote his name on the back of it, and sent it by post to the National Bank, Dublin, who were his bankers, requesting them to credit his account with the amount of the cheque, and the National Bank, on the day they received the cheque, wrote to Moriarty that they had placed the cheque to his credit. On the day Moriarty sent the cheque to the National Bank his account had been slightly overdrawn; and the day after the cheque had been received by the National Bank, but before the bank had sent it to London to be cashed, Moriarty drew on his account at the National Bank for, and received payment of, a sum of £400. When the defendant's cheque was presented by the National Bank at the Alliance Bank, London, payment of it was refused by the direction (given in the meantime) of the defendant. The National Bank immediately informed Moriarty that the cheque for £450 had been returned to them unpaid, and requested him to send them a remittance. Moriarty failing to comply, the National Bank brought this action to recover the sum of £450 from the defendant, as the drawer of the cheque, the plaintiff bank claiming to be *bonâ fide* holders of the cheque for value in due course.

Section 8 of the Bills of Exchange Act, 1882, provides: "(1) When a bill [of exchange] contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable. (2) A negotiable bill may be payable either to order or to bearer. . . . (4) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable."

By section 35: "(1) An indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if a bill be indorsed 'Pay D. only,' or 'Pay D. for the account of X.,' or 'Pay D. or order for collection.' (2) A restrictive indorsement gives the indorsee the right to receive payment of the bill, and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorizes him to do so."

By section 73: "A cheque is a bill of exchange drawn on a banker payable on demand. Except as otherwise provided in this part" [that is, Part III. of the Act, which is headed "Cheques on a Banker"], "the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque."

Day, J., held that the plaintiffs were entitled to recover.

The defendant appealed.

Crump, Q.C., and *T. Willes Chitty*, for the appellant.—The words "The account of J. F. Moriarty, National Bank," written across the face of the cheque render the cheque not negotiable, and prevent Moriarty transferring to anyone else the right to sue on the cheque: Bills of Exchange Act, 1882, s. 8, sub-sections (1) and (4). The effect of that section is to alter the law as laid down in the case of *Bellamy* v. *Majoribanks*, 7 Ex. 389, on which case Day, J., relied. The words of the crossing indicate an intention that Moriarty alone is entitled to the money, and that the National Bank are merely collectors for him. The National Bank are not holders of the cheque in due course within section 29 of the Act of 1882, and have no right to sue on the cheque themselves. [LINDLEY, L.J.—Does section 8 apply to cheques payable on demand?] Yes, that section embraces cheques: *McLean* v. *Clydesdale Banking Co.*, 9 App. Cas. 95, 32 W. R. Dig. 35. Cheques are defined by section 73 to be bills of exchange payable on demand. Section 35 shows there may be restrictive indorsements. The effect of *Bellamy* v. *Majoribanks* was discussed in *Smith* v. *Union Bank of London*, 24 W. R. 194, 1 Q. B. D. 31. [BOWEN, L.J., men-

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

tioned *Decroix* v. *Meyer*, *ante*, p. 2, 25 Q. B. D. 343, and *Crouch* v. *Credit Foncier*, 21 W. R. 946, L. R. 8 Q. B. 374.]

Sidney Woolf, Q.C., and *Houghton*, for the plaintiffs, the respondents, were not called on.

LINDLEY, L.J.—The question in this case is, whether the National Bank is entitled to sue the defendant upon a cheque drawn in this particular form. [The Lord Justice stated the facts, and proceeded:—] It has been contended that the bank cannot maintain this action because they have no right to sue upon the cheque at all; that the words "the account of J. M. Moriarty" written across the cheque restricted its negotiability, and that it was not a transferable or negotiable instrument, and consequently that no one can sue upon it but Moriarty himself. It must be remembered that the Bills of Exchange Act, 1882, which governs this question, contains special provisions relating to cheques. I am not satisfied that a cheque payable to order or bearer can be made not negotiable in any mode except that which is expressly pointed out in section 81 of the Act, that is, by writing the words "not negotiable" across it; but it is not necessary to decide this point now. But I think that those who intend that a cheque drawn to order or to bearer shall not be negotiable, must say so distinctly and unmistakably, for it is of the utmost importance that cheques shall not be embarrassing documents. I doubt whether section 8 is intended to apply to cheques. But assuming (without deciding the point) that section 73 of the Act of 1882 makes section 8 apply to cheques, and that it is possible to draw a cheque payable to order or bearer and at the same time to add words to it restricting its transferability, or indicating an intention that it shall not be transferable, I am clear that those words must be so plain that they cannot be mistaken. Ambiguous words will not do. A cheque drawn to order or bearer must not be made a puzzle. The words used in the present case, "Account of J. F. Moriarty," certainly do not "prohibit transfer" of the cheque. Do they "indicate an intention that it should not be transferable?" I think not. The utmost they can amount to is a direction to the National Bank to place the amount of the cheque to the credit of Moriarty's account for the purpose of enabling Moriarty to draw on his account for the amount of the cheque; but the words were not put on the cheque for the purpose of preventing the document being transferable. Any other construction would be utterly inconsistent with the nature of a document which was made payable to order or bearer.

The only other question is whether the National Bank are holders of the cheque in due course and for value. The answer is plain. The cheque was not sent to them merely for collection; it was sent to them in order that they should place the amount to the credit of Moriarty, so that he might draw upon it, and he did so. I think the argument that the bank were merely his agents to collect the amount is untenable. The bank are *bonâ fide* holders of the cheque for value in due course, and this appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion, and will add nothing on the first point. As to the second point, whether or not the National Bank are holders for value in due course, it is plain from the discussion in the House of Lords in the case of *McLean* v. *Clydesdale Banking Co.*—and, indeed, it was plain enough to commercial men before—that when a cheque is sent to a bank to be placed to the credit of a particular customer, and that bank places the amount to his credit, and allows him to draw upon it, they are holders of the cheque for value and in due course.

FRY, L.J.—I concur, and I will add only a few words on the first point. I am far from certain that section 8 of the Act was not intended to classify bills of exchange under the following heads—viz., in sub-section 1, bills which were not negotiable; in sub-section 2, bills which were negotiable; these being divided by sub-sections 3 and 4 into bills payable to bearer and bills payable to order. If that be so, then a bill payable to order must always be a negotiable bill, and cannot be made otherwise. But, assuming that a bill payable to order can be made not negotiable, still I am clearly of opinion that the words used here do not render the cheque not negotiable. Much clearer words must be used to countervail the effect of the use of the words "to the order." I think the decision of the learned judge in the court below was correct, and that this appeal must be dismissed, with costs.

Solicitors for the bank, *Tatham & Lousada.*

Solicitors for the defendant, *Norris & Co.*

High Court of Justice.

Chan. Div. Chitty, J. — March 17.

In re DODSWORTH.
SPENCE *v.* DODSWORTH. (*a.*)

Practice—Affidavit—Description of deponent—R. S. C., 1883, *ord.* 38, *r.* 8.

The word "gentleman" is a sufficient description of a deponent to an affidavit made for the purpose of proving the balance due on a mortgage, or (semble) *in all cases where the weight of the affidavit does not depend on the* status *of the deponent.*

In re Orde, 31 *W. R.* 801, 24 *Ch. D.* 271, *explained.*

Motion.

This was an *ex parte* motion asking the court to direct the Central Office to file an affidavit. The affidavit was made for the purpose of proving the balance due on a mortgage, and the deponent was simply described as "gentleman."

The Central Office refused to file the affidavit, relyon *In re Orde*, 31 W. R. 801, 24 Ch. D. 271.

Kenyon Parker applied for a direction that the affidavit be filed.

CHITTY, J.—The affidavit must be filed. In *In re Orde* the Lords Justices did not lay down a general rule that when the deponent is described merely as a "gentleman" the affidavit cannot be filed, but only in cases of affidavits of fitness of proposed new trustees. In such cases as those in which the court has specially to consider the weight of the deponent's opinion some better description ought to be given.

Solicitors, *Geare, Son, & Pease.*

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

Chan. Div. Chitty, J. — March 17.

WITHERBY v. RACKHAM. (a.)

Married woman—Reversionary personal estate—Legal chose in action—*Life policy—Assignment—Malins' Act* (20 & 21 *Vict. c.* 57).

Malins' Act applies to a reversionary legal chose in action, *such as a policy of life assurance, as well as to reversionary equitable* choses in action, *of a married woman.*

Summons.

This was a summons by a purchaser under a sale in a foreclosure action to be relieved from his contract under the following circumstances:—

In 1863 a lady, then a widow, insured her life for £2,000. She married again in 1873, and some time afterwards she and her husband assigned the policy to one Rackham by deed duly acknowledged under Malins' Act. On a recent sale of the policy by Rackham's executrix, under the direction of the court, the purchaser took the objection that the Act did not apply to legal *choses in action* such as policies, and applied to be relieved of his contract.

Farwell, Q.C., for the purchaser.—The objection is based on the note to Wolstenholme's Conveyancing Acts, 5th ed., p. 185, where the learned author doubts whether Malins' Act applies to simple *choses in action* of this nature, though he admits that it applies to equitable *choses in action.*

He referred to *Honner* v. *Morton*, 3 Russ., at p. 86, and Lewin on Trusts, p. 23.

Byrne, Q.C., and *Martelli*, referred to the common form grants of probate and administration.

CHITTY, J., stated the facts and continued:—The purchaser takes the objection that the Act does not apply to the assignment of a policy, because it is a legal *chose in action.* It is, of course, a reversionary *chose in action*, as the married woman could not sue on it during her life, but her executors could sue on it after her death.

Now the Act enables a married woman, with the concurrence of her husband, and by a deed duly acknowledged, to dispose of every future or reversionary interest, whether vested or contingent, belonging to her, or her husband in her right, in any personal estate whatsoever to which she shall be entitled under any instrument made after December 31, 1857 (with certain exceptions), and also to release or extinguish any power.

The general object of the Act was to extend the powers which a married woman already possessed over real estate, to reversionary personal estate, not, indeed, to all personal estate, but only to that acquired by an instrument made after December 31, 1857. It is said that the terms "any personal estate whatsoever" are not sufficiently wide to include a *chose in action*, but I cannot follow this argument. The term "personal estate" is well known to the law. The older forms of grants of administration spoke of "all and singular the personal estate and effects," and the most recent forms omit the words "and effects," though I do not think that is of any importance. It is quite clear that the words "personal estate" enable the administrator to take possession of chattels, and to bring actions and recover *choses in action.* Again, in the forms of decrees against executors or administrators, the same term is used, and an account is directed against them of the "personal estate" which has come to their hands. This includes debts and *choses in action.* It is also used where it is necessary to distinguish between pure and impure personal estate. The well-known treatise of Joshua Williams on the subject is called Principles of the Law of Personal Property, but a large portion of the book is placed under the heading "Of Personal Estate generally." Under this heading the author speaks of *choses in action*, distinguishing legal from equitable *choses in action*, and giving examples of each, and, in fact, apart from the doubts expressed by the learned conveyancer, it would be scarcely necessary for me to travel through these instances of the use of the term "personal estate."

During the course of the argument I asked Mr. Farwell whether, in construing the Act, he could make any distinction between legal and equitable *choses in action.* The Act points to no such distinction, but a great many of the interests dealt with would be equitable *choses in action*, such as in the case of a fund vested in trustees. The assignment of such a reversionary interest was the very case that wanted improvement, and it was to get rid of the difficulties with which such assignment was beset that the Act was passed. I cannot see the slightest ground for cutting down the fair and proper meaning of the words "any personal estate whatsoever," which seem clearly to include both legal and equitable *choses in action.* Here the *chose in action* is legal, and may fairly and technically be described as personal estate. I therefore think the married woman in this case had a reversionary interest in any personal estate whatsoever within the Act, and her conveyance bound it. The purchaser's objection is therefore overruled.

Summons dismissed.

Solicitors for the purchaser, *Hartcupp & Davis.*

Solicitors for the vendor, *T. H. Rackham & Co.*, Norwich.

(a.) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

Q. B. Div. (Wills and Vaughan Williams, JJ.) — Feb. 11.

WESTACOTT v. BEVAN. (a.)

Solicitor—Costs—Charging order—"Property recovered or preserved"—Money paid into court by a defendant—Counter-claim—Set-off—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Ord.* 22—*Ord.* 19, *r.* 3.

The defendants in an action paid a sum of money into court, and put in a defence denying liability and a counter-claim arising out of the same matters as the claim. The plaintiff's solicitor obtained a charging order upon the fund in court. The action proceeded, and, in the result, judgment went for the plaintiff on the claim, and for the defendants on the counter-claim.

Held, that the sum recovered on the counter-claim must be set off against the sum recovered on the claim, and the solicitor's charging order limited to the balance due to the plaintiff, that being the only sum "recovered or preserved" within the 28th section of the Solicitors Act, 1860.

Appeal from chambers.

This was a motion by the defendants to discharge or vary a charging order made *ex parte* by Huddleston, B., on the 1st of November, 1890, and confirmed by Pollock, B., on the 12th of the same month.

The plaintiff had executed certain repairs to the defendants' ship, and brought his action to recover a

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

sum of money for the work done, and also damages for trespass in respect of an attempt by the defendants wrongfully to take the ship out of the plaintiff's possession.

In compliance with an order of Lawrance, J., the defendants paid £745 into court, and it was in respect of this sum that the charging orders were obtained. At the same time they put in a defence and counter-claim, in which they denied liability and alleged that the plaintiff's charges were excessive, and that there had been delay in the delivery of the ship to them.

The plaintiff did not obtain payment out of the money in court, but proceeded with the action. At the trial Denman, J., referred the matter (except the question of the trespass, as to which the plaintiff obtained a verdict for £15) to the official referee. He found that £465 was due to the plaintiff upon the claim, and £210 to the defendants upon the counter-claim.

Charles, J. (who took the action on further consideration for Denman, J.) at first ordered that £255 should be paid out to the plaintiff, and the balance of the sum in court to the defendants; but on finding that the charging order had been made, he ordered that no payment out should be made until the court had decided to what extent the charging order affected the fund.

This motion asked that the order of Pollock, B., might be discharged or varied by a direction that the charge of the plaintiff's solicitor for his costs should extend only over the amount (if any) which might thereafter be ordered to be paid to the plaintiff out of the money in court.

E. U. Bullen, for the motion.—The only property recovered or preserved by the plaintiff's solicitor is what the plaintiff will actually receive, the balance of the amount successfully claimed by him after the sum due to the defendants on their counter-claim has been deducted—viz., £255. The defendants have a right to set off the amount as to which they have succeeded, and that right is not affected by the solicitor's lien: *Pringle* v. *Gloag*, 27 W. R. 574, 10 Ch. D. 676; *Lloyd* v. *Jones*, 27 W. R. 655; *Rowland* v. *Williams*, W. N., 1885, p. 169.

H. F. Dickens, contrà.—The plaintiff might have taken this money out of court; it is therefore property "recovered or preserved" within the 28th section of the Solicitors Act, 1860: *Emden* v. *Carte*, 30 W. R. 17, 19 Ch. D. 311; *Moxon* v. *Sheppard*, 38 W. R. 704, 24 Q. B. D. 627. This fund in court would not have existed but for the solicitor's exertions, and his charge is upon the whole fund, whether it all belongs to his client or not. The counter-claim is, in effect, a separate action: *Amon* v. *Bobbett*, 37 W. R. 329, 22 Q. B. D. 543, and the defendants have no right of set-off. [WILLS, J.—But qualifications of that view of a claim and a counter-claim are stated in that case. Lord Esher says they are separate actions "for the purposes of taxation," and Bowen, L.J., "for the purposes of justice."]

He also cited *Shrapnal* v. *Laing*, 36 W. R. 297, 20 Q. B. D. 334.

Bullen, in reply.—This counter-claim is clearly not a separate action, for it arises out of the contract upon which the plaintiff is suing; it is nothing more than a set-off: *Young* v. *Kitchin*, 26 W. R. 403, 3 Ex. D. 127; *Government of Newfoundland* v. *Newfoundland Railway Co.*, 13 App. Cas. 199, at p. 213, 36 W. R. Dig. 46.

WILLS, J.—I am clearly of opinion that the claim of the plaintiff's solicitor cannot be maintained. The result which Mr. Dickens has contended for would be very unfair. He argued that, this £745 having been paid into court with a denial of liability, the plaintiff was entitled to take it out, and that it was, therefore, "recovered" or at least "preserved." I think that this is a fallacy; but if the argument were correct, the solicitor's lien would only attach in respect of the solicitor's costs up to the date of the payment into court, for the subsequent proceeding did not preserve, but jeopardized the fund. But the fund was not at the disposal of the plaintiff; he could only take it by abandoning the rest of his demand. In the case of *Emden* v. *Carte* that difficulty had been cleared out of the way; the plaintiff had abandoned the rest of the claim, and the sum was at his disposal; therefore, the language which was most accurately used in reference to the facts of that case would be quite fallacious if applied to the facts which are now before us. The sum paid into court was not preserved by the solicitor, but was left in jeopardy, and has become in part the property of the defendant. That is an end of that part of the case.

Then it was argued that the claim and the counter-claim are really two independent actions; but in all the cases to which we were referred in support of that view qualifications were introduced which quite take away their applicability to the present case, and we are, therefore, left unfettered by those decisions. This is not a question of taxation of costs, and as for "purposes of justice," I cannot imagine anything more unjust than the result which we are asked to bring about. If we look at the rule upon which counter-claims are founded (ord. 19, r. 3) we find that the court or a judge may, "if in the opinion of the court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof." I should think that in most cases if the counter-claim relates to a matter totally unconnected with the claim that jurisdiction would be exercised. But the cross claim in this action is intimately connected with the claim, and it would be preposterous to deny the defendants' right to set up the counter-claim. The whole dispute is one action, and should have one result. Although, for the purposes alone of giving proper directions to the taxing master, the form of the judgment gives a certain sum to the plaintiff on the claim, and a certain sum to the defendant on the counter-claim, yet the sum recovered is the sum effectively recovered, the result of the whole litigation. I cannot express my opinion in better words than those used by Hall, V.C., in *Robarts* v. *Buck*, 26 W. R. 393, 8 Ch. D. 198, at p. 200, where he says: "The principle is that where a solicitor is employed in a suit or action he must be considered as having adopted the proceedings from the beginning to the end, and acted for better or worse. His client may obtain costs in some matters in the suit or action, and not in others, and the solicitor takes his chance, and may ultimately enforce his lien for any balance which may appear to be in favour of his client." It seems to me that on principle this claim fails, and the lien attaches only to the balance for which the plaintiff really gets his judgment, and which is the sum recovered in the action.

VAUGHAN WILLIAMS, J.—I am of the same opinion. The argument of Mr. Dickens upon the first point which he raised, seems to be based upon a passage on page 174 of the Annual Practice, 1890—1. He contended that when the defendants had paid money into court under order 22 then the lien of the plaintiff's solicitor attached, and that the plaintiff's solicitor is entitled to a charging order upon the whole of the fund paid in, no matter what may be the result of

the action. An argument which would lead to a result so monstrously unjust only requires to be stated to answer itself.

As to the right of set-off, it was admitted that where judgments can properly be set off one against another, a charging order must be limited to the balance; but it was said that where you have, as here, a claim and a counter-claim flowing out of the same matters, the amount recovered by the defendant on his counter-claim cannot as of right be set off against the amount recovered by the plaintiff on his claim. There may be cases in which the claim and the counter-claim are so foreign to each other that set-off does not arise; but here they arise out of the same contract, and there is an undoubted right of set-off. The case of *Mersey Steamship Co.* v. *Shuttleworth*, 32 W. R. 245, 11 Q. B. D. 531, decided that a counter-claim was so much in the nature of a set-off that a plaintiff was not entitled to judgment upon a claim which was admitted until the counter-claim was disposed of. The whole must be treated as one action. It follows that when the claim and the counter-claim arise out of the same matters the charging order must be limited to the balance recovered.

Order varied accordingly.

Solicitors for the defendants, *F. W. & H. Hilbery.*

Solicitor for the plaintiff, *Robert Greening.*

C. C. R. (Lord Coleridge, C.J., Pollock, B., and Stephen, Charles, and Lawrance, JJ.) — Jan. 24.

REG. v. VREONES. (a.)

Criminal law—Attempt to pervert the course of justice—Manufacturing false evidence—No litigation in esse—*Legal tribunal—Body of arbitrators for settlement of disputes.*

A person may be convicted of a misdemeanour for manufacturing false evidence for the purpose of perverting the course of justice, although the evidence be never used in any legal proceedings, and no litigation be in esse *at the date of the offence.*

It is sufficient if the prisoner has done what was in his power to place the false evidence before a judicial tribunal. A body of arbitrators, provided for by a contract for the settlement of disputes arising out of it, is a judicial tribunal for this purpose.

Case stated by Denman, J., for the opinion of the court.

The facts were as follows:—

On December 11, 1889, a corn merchant named Stephens, at Bristol, entered into a contract with Sevastopulo & Co. for the purchase of a cargo of wheat to arrive by s.s. *Whinfield.* The wheat was to be of two different qualities, of which samples called "standard samples" had been given to the purchaser. About half of the cargo was to consist of each quality. The contract contained the following clause:—

"Difference in quality shall not entitle the buyer to reject, except under the award of arbitrators or the committee of appeal as the case may be. All disputes arising out of this contract between the parties hereto shall be referred according to the rule indorsed," and the obtaining an award was to be a condition precedent to the right of either contracting party to sue the other in respect of any claim arising out of the contract.

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

Rule 10, indorsed on the contract, provided that all disputes should be referred to arbitration, and that in the event of one of the parties neglecting to appoint an arbitrator, upon the application of either of them the question in dispute should stand referred to two arbitrators to be appointed by the executive committee of the London Corn Trade Association.

The award of any two arbitrators was to be subject, in case either party should be dissatisfied therewith, to an appeal to the committee of appeal elected for that purpose, and in accordance with the rules and regulations of the London Corn Trade Association in force at date of contract.

The "standard samples" were in this case, as usual, sealed by the seller's broker in presence of the buyer's broker and kept by him, and the money provided for by the contract was paid. A portion of the wheat from which the sealed standard samples were taken was at the same time taken by the buyer and put in a bag by him to be shown to persons who might be inclined to deal with him. This is called the "bought samples."

The Whinfield arrived on March 15, 1890, when, in accordance with the usual practice, a superintendent (in this case the prisoner Vreones) was appointed by the seller, and Brookman, the buyer's under-foreman, by the buyer, to take samples of the wheat as it came up from the hold. These samples were taken according to custom for the purpose of being used as evidence in case any arbitration should take place as to the quality of the cargo, and are called the "arbitration samples."

In the present case ninety of these samples were taken, forty-five of each kind of wheat, and in the ordinary course sealed by the prisoner for the seller and by Brookman for the buyer.

The fraud alleged in the indictment consisted in the fraudulent tampering with these arbitration samples after they were sealed by both parties. It was proved at the trial that the ninety arbitration samples were taken to the house in which Vreones lodged before being sent to London to be kept by the London Corn Trade Association in order to be used in evidence in any arbitration which might be held under the contract. It was proved that the prisoner tampered with these arbitration samples by pulling down a portion of the tops of the bags through the string on the side opposite to the seal, then cleaning the contents from cockles, rye, and small wheat by sifting, picking, and using flannel, to which the cockles adhered, and replacing the wheat, so cleansed, in the bags without breaking the seals, so as to produce a very much better sample than the standard samples and than any of the other samples taken from the bulk. The motive suggested for this conduct was that, in case of any dispute arising as to the quality of the cargo, the purchaser might be defeated by the production of these samples before any arbitrators who might be appointed.

The evidence showed that there was no substantial difference between the cargo and the standard samples so far as the first quality of wheat was concerned, but as regards the second quality it was proved that there was an inferiority which would amount to £112 in value in that portion of the cargo as compared with the standard samples.

No arbitrators were, in fact, appointed, nor did the purchaser take any steps in that direction, the reason assigned being that the arbitration samples as altered, having been found on comparison superior to the standard sample, and to all the samples fairly taken by either or both parties, it would have been hopeless to proceed to arbitration.

The first count of the indictment charged the prisoner for that he, "contriving and intending to

deceive the said arbitrators so to be appointed as aforesaid . . . and by fraudulent and deceitful means to cause and induce such arbitrators to give their award in favour of Sevastopulo & Co., and so to pervert the due course of law and justice," unlawfully altered the character of the samples in the manner above described.

The prisoner was tried at the Bristol Summer Assizes, and convicted. Denman, J., stated this case for the opinion of the court. The question argued was whether the first count of the indictment contained a statement of an indictable misdemeanour.

Charles Mathews, for the prisoner.—The first count of the indictment is bad; there is no averment that this evidence was ever used, nor of the existence of any legal proceedings in which, or tribunal before which, it could have been used. The allegation is merely that the defendant put himself into a position in which he might have committed a misdemeanour in an event which never happened. [Lord COLERIDGE, C.J., referred to Hawkins' P.C., ch. 69, s. 10, Subornation of Perjury: "But it seemeth clear that if the person incited to take such an oath do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury; yet it is certain that he is liable to be punished not only by fine, but also by infamous corporal punishment," and remarked that the prisoner had done all that was in his power to make the offence complete. *Poole, Q.C.*, mentioned *Rex* v. *Crossley*, 7 T. R. 315.] The obtaining of the award was a condition precedent to instituting any legal proceedings, and the act of the prisoner was too remote from such proceedings to be an indictable offence: *Reg.* v. *Heath*, Russ. & Ry. 184. [*Poole, Q.C.*—That case is explained by *Reg.* v. *Fuller*, at page 308 of the same volume.]

Poole, Q.C., and *Bernard Coleridge*, for the prosecution, were not called upon to argue.

Lord COLERIDGE, C.J.—This case raises no doubt a very important question, but when the matter is looked carefully into the difficulties which have been raised vanish. It is in substance an indictment for attempting to mislead a judicial tribunal, which might be, but had not yet been, called into existence, by the manufacture of false evidence, and the question is whether that is a misdemeanour.

Now, I cannot doubt that if the act is completed it is a misdemeanour; that to mislead a court by the manufacture of false evidence is a misdemeanour. Then the question arises whether it is an attempt to mislead, although in point of fact the court was not misled, because the piece of evidence manufactured was not used—whether that makes any difference, or whether it does not still remain a misdemeanour. I am of opinion that it is a misdemeanour, and none the less because the evidence in this case was not used in point of fact. All that the prisoner could do in the matter he did.

There was a contract, and it was contemplated that disputes upon the contract might arise, and the mode of settling these disputes, and the tribunal before which they should come, were provided for in the contract, and a particular kind of evidence, which, if not conclusive (as I think by the words of the contract it was to be), would, at all events, be of the greatest possible weight, was also provided for either by the contract or by the course of practice or usage at the port, and was part of the contract. According to that stipulation, samples were to be taken by both buyer and seller, and those samples were to be carefully taken, and were to be put into sealed bags, and the bags were to be sent up to London, to be used by the tribunal to be appointed according to the terms of the contract. It is admitted frankly by Mr. Mathews—indeed, it is found by the learned judge—that all the prisoner could do to tamper with these samples, and, therefore, to corrupt the evidence, and in that respect to mislead the tribunal in London, was done. He, so to say, sifted the samples, and made those samples which were samples of very imperfect wheat, samples of perfect wheat by taking out, by a process which is described, everything which interfered with the perfection of the samples. Having done that, and having done it in a very clever and ingenious manner without breaking the seals of the bags, he transmitted the bags to the court in London. As a matter of fact, they were not used. It is said that because they were not used the offence was the less complete. I am of opinion that it clearly was not the less complete.

It seems to me upon principle that an attempt to pervert the administration of justice, which this clearly, to my mind, was, whether successful or not, is in itself a misdemeanour; it is a thing for which a man may be indicted and punished. But although I should have held that, without any hesitation upon principle and upon what seemed the good sense of the thing, I find there is abundant authority to show that that has been so held in point of law, not in this exact case, because, as I have said (I am afraid only too often) one never finds a case exactly similar in all its circumstances and quite on all fours, but I have found in Hawkins' Pleas of the Crown and in the case of *Rex* v. *Crossley*, the principle laid down in the case of subornation of perjury, that the attempt to suborn perjury is complete and punishable, although the perjury is never, in point of fact, committed, because the person who has undertaken to swear falsely was not called, or because, when he was called, he did not swear falsely, but swore the truth. The guilt of the person in making the attempt to pervert the course of justice is just the same whether he succeeds in perverting it or no, and Lord Kenyon and Lawrence, J., in the case of *Rex* v. *Crossley*, point out in very forcible language that it would be monstrous to hold otherwise, and make the guilt or innocence of the person who has done and completed the act, to depend upon what the judicial result of his act is, that result being in the power of another person. Lawrence, J., expressly meets the objection, and says that it would have been just the same if the affidavit which was used in that case had not been used at all. I agree that that is not exactly this case, because, upon the swearing of a false affidavit, taking the oath and signing the affidavit, the act of the swearer (the perjurer) is complete and he can do no more. Now, although here the act is not exactly the same, yet in principle it is the same, because the act of the prisoner in this case was completed when he sent the samples in their perverted shape to the tribunal in London which might use them. Therefore, in my opinion, a perfectly good offence is stated in the first count of the indictment, and it is not denied that the evidence abundantly supported the fact of the guilt of the prisoner if he were liable to a criminal indictment. I think he was liable to a criminal indictment, and, therefore, on the first count it appears to me that this indictment should be sustained and the conviction affirmed.

POLLOCK, B.—I have come to the same conclusion. This is an indictment for a fraud or cheat at common law, and if it had been a charge against the prisoner of cheating individuals—or, as it is called, private cheating—I should have felt myself bound to give effect to the forcible argument of Mr. Mathews on two grounds—first, that the act done was in the nature only of an inchoate act; and, secondly, there was no evidence that any person had been actually injured

by that cheat. These two propositions appear to me to be clearly necessary conditions precedent in the case of a private fraud. But the truth is, this is not the case of a private fraud, but comes within the rule of law as laid down in East's Pleas of the Crown, at ch. 18, s. 4, that "all frauds affecting the Crown and the public at large are indictable, though arising out of a particular transaction or contract with the party." And one of the instances he gives there is this:—"There is a precedent of an indictment against a married woman for pretending to be a widow, and as such executing a bail-bond to the sheriff for one arrested on a bailable writ." Now I am quite clear in my own mind that what I have spoken of as a condition precedent—namely, the injuring of the individual being necessary to be proved before the prisoner can be convicted—does not arise in this case, and for a very obvious reason. It may be said that it is a mere naked lie if a person is guilty of some cheat unless you prove that the person to whom the lie is told is injured thereby. In the case of legal proceedings it would be impossible to have a worse case than knowingly to put forward such false affidavit or evidence; and yet it could not be proved for certain to be the cause of injury to a plaintiff or a defendant whose rights would have to be determined by the verdict of the jury or the magistrates, or whatever the form of the tribunal was, before which these parties came. Therefore the real vice and the real offence pointed at is the doing of some act which has a tendency to pervert the administration of justice.

Then a further question arises. The samples which the defendant handled, by a previous arrangement were delivered to an association in London to be used at any trial which might take place before arbitrators. Is that tribunal to be considered in the same light as an ordinary public tribunal for the administration of justice? It is not a Crown court, it is not a civil court, it is not merely a method agreed upon by the parties for the determination of a commercial dispute; it is a tribunal to which special sanction is given by the court, and the acts of which are carried out by the court when a provision is made that the submission to arbitration might be made a rule of court. The only remaining question is whether this act was complete on the part of the prisoner, and that has been so fully dealt with by my lord that I do not propose to add anything myself on that point. I think, therefore, that the first count is good, and that the evidence in support of it establishes the offence charged.

STEPHEN, J.—I am of the same opinion as my lord, and for the same reasons.

CHARLES, J.—I am of the same opinion.

LAWRANCE, J.—I entirely agree.

Conviction affirmed.

Solicitor for the prisoner, *William Webb.*

Solicitor for the prosecution, *The Solicitor to the Treasury.*

Prob. Div. & Adm. Div. Admiralty. } Nov. 10; Jan. 27.

"THE CURFEW." (a.)

Shipping—Demurrage—Construction of charter-party—"Vessel to load always afloat"—"Lighterage, if any, to complete loading at" specified dock, "to be at merchant's risk and expense."

Stipulations in a charter-party of a vessel chartered to load in a specified dock, that the vessel should load always afloat, and that lighterage, if any, necessary to enable her to complete her loading at the dock in question was to be at merchant's risk and expense, do not entitle the merchant to recover from the shipowner lighterage paid in respect of cargo which could, in ordinary course, have been loaded from the quay inside the dock whilst the vessel remained afloat, but was in fact loaded outside the dock from lighters merely because the vessel, if fully loaded inside the dock, must have waited a week before she would have had sufficient water to have passed over the dock sill.

This was an appeal from the decision of the judge of the City of London Court in an action for freight and demurrage instituted on behalf of the owners of the steamship *Curfew* against the Atlantic Patent Fuel Co. (Limited), who in such action claimed a set-off and counter-claim, the particulars of which were as follows:—

	£	s.	d.
1. Balance due for trimming under charter-party of the 14th of March, 1889	26	5	0
2. Cost of taking balance of cargo round from the North Dock (where by the said charter-party she was to load) to the Prince of Wales Dock, where she improperly went . . .	15	1	6
3. Cost of taking thirty more tons of fuel round to the Prince of Wales Dock as aforesaid than she was able to ship	1	6	8
4. Damages for breach of warranty by the plaintiffs that the said ship was expected ready to load about the 10th of April, as provided by the said charter-party, whereas she was not ready to load till the 1st of May, or for not using reasonable despatch in proceeding or getting to the North Dock, so as to be ready to load about the 10th of April, or so that she might be expected ready to load about the 10th of April . . .	171	14	4
	£214	7	6

The charter-party referred to in the above-stated particulars of set-off and counter-claim provided (*inter alia*) that the steamship *Curfew* should sail and proceed to the company's loading berth, North Dock, Swansea, and there load, always afloat, a full and complete cargo of about 2,100 tons Atlantic Patent Fuel, with option to charterers of loading part coal at the railway tips, and that lighterage, if any, necessary to enable steamer to complete loading at North Dock, Swansea, to be at merchants' risk and expense.

The judgment of the judge of the court below was as follows:—

Mr. Commissioner KERR.—In the case of *The Curfew* the plaintiff's claim is for a balance of freight —£42 12s. 9d.—which is admittedly due; and the second item of his claim is for demurrage to the amount of £16 10s., a certain portion of which is due if his contention on the hearing is well founded.

On the hearing three of the hours were abandoned, and I was of opinion that three other hours were improperly wasted, and therefore the claim for demurrage under the second item will be reduced to ten guineas, which the plaintiff is entitled to recover, unless this counter-claim can be sustained.

Now this counter-claim depends upon whether evidence was admissible to explain the terms of the charter-party. The charter-party provided (I recollect two features of it) that the vessel should always

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

be afloat, and that in certain cases lighters should take goods to the vessel, which expenses were to be paid by the merchants, and I was asked to admit evidence to explain these clauses of the charter-party, which, it was contended on behalf of the defendants, I ought not to do. However, upon hearing the parties, I did admit the evidence. If I was wrong in so doing it must be set right in the court of appeal. If I was right in admitting that evidence, then the counter-claim which is set up for the defendants, except for the amount of £1 6s. 8d., cannot be entertained. Even if I was wrong in admitting evidence to explain the charter-party, I think that the fourth item of the counter-claim—namely, £171 14s. 4d.—is in no case maintainable. Whether the £26 5s. and the £15 1s. 6d. were recoverable was the question. I hold that these items are not recoverable, because, upon the evidence received, it was necessary that the steamer should leave the dock. That she was entitled so to do by the arrangement of the parties by that charter-party is explained by the evidence not altering, but explaining these clauses, and therefore the £26 5s., which forms the first item, and the £15 1s. 6d., which forms the second item of the counter-claim, are not recoverable by the defendants. That being so, there will be judgment for the plaintiff for the first item of his claim, £42 12s. 9d., and for ten guineas, making a total of £53 2s. 9d.

There will be judgment on the counter-claim for the defendants as regards the item of £1 6s. 8d., although I quite believe that that item of the counter-claim never would have been started or made against the plaintiff unless an opportunity had been offered of bringing the counter-claim forward, of course, the costs will be given to the plaintiff, who is entitled to recover £53 2s. 9d., less that item of the counter-claim, with costs.

Nov. 10.—The action was now heard before the President and Butt, J., sitting together as a divisional court of the Probate, Divorce, and Admiralty Division.

Sir W. Phillimore and *Pyke*, for the appellants, the Atlantic Patent Fuel Co., defendants in the court below.—*The Curfew* could have been loaded "always afloat" in the North Dock, Swansea, and there is therefore nothing in the charter-party or otherwise rendering the defendant liable to bear the lighterage, the expense of which has been incurred in this case merely for the benefit of the shipowners.

They referred to *Parker* v. *Winlow*, 7 E. & B. 942, 6 W. R. C. L. Dig. 95; *Horsley* v. *Price*, 31 W. R. 786, 11 Q. B. D. 244; and *Pringle* v. *Mollett*, 6 M. & W. 80.

Barnes, Q.C., and *Laing*, for the respondents.—The intention of the parties, as shown by the evidence rightly admitted to construe the charter-party (*Lewis* v. *The Great Western Railway Co.*, 26 W. R. 255, 3 Q. B. D. 208, *per* Bramwell, L.J.), was that the expenses of lighterage of such portion of the cargo as would have loaded *The Curfew* too deep to go over the dock sill of the North Dock at the state of tide existing at the date of her being loaded should be deemed lighterage "necessary to complete her loading at North Dock, Swansea," and be borne by the defendants.

They cited *Shield* v. *Wilkin*, 5 Exch. 304; *The General Steam Navigation Co.* v. *Slipper*, 10 W. R. 316, 1 Mar. Law Cas. 180; *The Alhambra*, 29 W. R. 655, 6 P. D. 68; and *Allen* v. *Coltart*, 31 W. R. 841, 11 Q. B. D. 782.

Phillimore, in reply.

Cur. adv. vult.

Jan. 27.—BUTT, J., now delivered the following judgment of the COURT:—This is an action for balance of freight for carriage of fuel in the ship *Curfew*, and for demurrage of that ship.

The defendants claimed a set-off and made a counter-claim for cost of carriage of a portion of the fuel from the North Dock at Swansea, where it is alleged by the defendants *The Curfew* was to load, to the Prince of Wales Dock, where, as alleged by the defendants, the vessel was improperly taken; and, secondly, for trimming the cargo.

The Curfew was chartered on the 14th of March, 1889, in London, and in the charter-party was described "expected ready to load about the 10th of April," and she was with all convenient speed to sail and proceed to the company's (*i.e.*, the defendants') loading berth, North Dock, Swansea, and there load, always afloat, a full and complete cargo of about 2,100 tons of fuel.

The steamer was to pay "trimming," extra trimming in case of double decks, "and lighterage, if any, necessary to enable steamer to complete loading at North Dock, Swansea, to be at merchants' risk and expense."

The vessel did not, in fact, arrive at Swansea till the 30th day of April. She proceeded to the North Dock, and there loaded a portion of the cargo, but in consequence of the delay in her arrival at the expected time, although she could have taken in the remainder of the cargo remaining always afloat, she could not, by reason of the neap tides then existing, when fully loaded, have passed over the sill of the dock for a week. She therefore left the North Dock incompletely loaded, and went to the Prince's Dock; and the unloaded portion of the cargo had to be sent round to the Prince's Dock.

The first question in the cause is, Who is to bear the expense of sending the fuel round to the Prince's Dock?

The defendants' contention was, that by the terms of the charter-party they were only liable to pay for such lighterage as might be necessary to complete the loading at the North Dock.

The plaintiffs' contention was, that the true meaning of the charter-party is, that if the steamer was unable to complete the loading at the North Dock, then that the defendants were to pay the lighterage necessary to enable the steamer to complete the loading.

The learned judge of the court below considered the language of the charter-party ambiguous, and admitted evidence of the previous correspondence between the parties to show what their intention was in entering into the charter-party, and that evidence being admitted, we agree with the learned judge that it became clear that the plaintiffs' contention was well founded, and that the intention of the parties was, that if the steamer was unable to complete loading at North Dock, the defendants were to bear the expense of completing the loading elsewhere. This appears from the telegram of the defendants' agent to the defendants, in which he says that the terms proposed were "lighterage, if any necessary through inability to take full cargo North Dock, our expense," which was assented to by his principals.

This was the contract that the parties intended to express by the charter-party.

We are of opinion that there is sufficient ambiguity in the language of the charter-party to warrant the admission of evidence to explain the ambiguity: but we are of opinion that the plaintiffs have failed to establish that they were unable to complete the loading of the steamer at the North Dock within the meaning of the charter-party. But for the fact that the vessel did not arrive at Swansea at the time expected—viz., the 10th of April—she would have been

able to complete her loading at the North Dock and cross the sill of the dock with her full cargo; but in order to avoid being detained in the dock a week she left the North Dock before completing her loading, though she might have continued to receive cargo at North Dock remaining always afloat.

We are of opinion that the fear of this detention did not justify the removal of the steamer from North Dock; it did not render the steamer unable to complete her loading while afloat in the dock; it only rendered the performance of the contract by the plaintiffs more onerous to them by reason of the loss of the use of their vessel during the neap tides.

We think, therefore, that the decision of the learned judge below was wrong on this point, and that the defendants established their set-off or counter-claim as to £15 1s. 6d. for the cost of taking the cargo round to Prince of Wales Dock.

The second point is as to the trimming. The charter-party provides that the steamer is to "pay trimming, extra trimming in case of double decks," but no amount is fixed.

The defendants have charged the plaintiffs a rate of 1s. The defendants have paid 9d., but dispute their liability to pay the balance, amounting to £26 5s.

The learned judge has held that the defendants are not entitled to recover this balance. He has not given his reasons for his decision, probably thinking that upon such a question as the proper charge for trimming a cargo at Swansea his simple finding was sufficient. There was ample evidence to justify the learned judge's finding.

In a letter from the defendants to their agent, after the charter-party was entered into, they say, "unfortunately, Swansea trimming is only 9d., and Cardiff 1s., we try to get 1s. here in all cases, and if you gave broker to understand it would be 1s., we will charge it as a matter of course. What we are afraid of is, the owner will not pay more than Swansea trimming."

There was conflicting evidence as to whether 1s. was mentioned, and the learned judge has adopted the view that it was not mentioned. The result is, we think, the defendants' set-off of £15 1s. 6d. should be allowed, but as each party has been practically successful in the appeal, we leave each party to pay his own costs of the appeal. The defendants to pay the costs below.

Solicitor for the appellants, *Greening*.

Solicitors for the respondents, *Botterell & Roche*.

Court of Appeal

From Lancaster Palatine Court of Chancery. } Oct. 30, 31; Nov. 1, 10; Feb. 10.

In re STANDARD MANUFACTURING CO.
Ex parte LOWE AND OTHERS. (a.)

Company—Debenture—Bill of sale—Registration—Bills of Sale Acts, 1854 (17 & 18 *Vict. c.* 36); 1878 (41 & 41 *Vict. c.* 31); *and* 1882 (45 & 46 *Vict. c.* 43), *s.* 17 *—Registration under Companies Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 16), *s.* 45, *and Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 43.

Debentures of a joint-stock company limited which create a charge on the floating real and personal property of the company are, by section 17 *of the Bills of Sale Act*, 1882, *expressly excluded from the operation of that Act, and therefore do not require registration under it.*

The dictum *of* Grove, J., *in* Jenkinson *v.* Brandley Mining Co., 35 *W. R.* 834, 19 *Q. B. D.* 568, *that the words "or other incorporated company" in section* 17 *of the Bills of Sale Act*, 1882, *are limited to companies* ejusdem generis *with mortgage and loan companies, disapproved; but*

Held, that, even if that dictum *were right, any incorporated company which is authorized to raise money on loan or mortgage is, for the purposes of that section,* ejusdem generis *with a mortgage or loan company.*

Although debentures answering to the description given above (which applies to companies' debentures in the ordinary form) are agreements "by which a right in equity" to a "charge or security" on "personal chattels" is "conferred," within the definition of bills of sale in section 4 *of the Bills of Sale Act*, 1878; *yet, upon the true construction of that Act, the mortgages or charges of any incorporated company for the registration of which statutory provision has been made by the Companies Clauses Act*, 1845, *or the Companies Act*, 1862, *are not bills of sale within the scope of the Bills of Sale Act*, 1878.

Read *v.* Joannon, 38 *W. R.* 734, 25 *Q. B. D.* 300; John Welsted & Co. *v.* Swansea Bank, 5 *Times L. R.* 332; Edmonds *v.* Blaina Furnaces Co., 35 *W. R.* 798, 36 *Ch. D.* 215; *and* Levy *v.* Abercorris Slate and Slab Co., 36 *W. R.* 411, 37 *Ch. D.* 260, *approved.*

Decision of Bristowe, V.C., *reversed.*

Appeal from Bristowe, V.C. (Lancaster Palatine Court).

This was an appeal from the judgment of Bristowe, V.C., deciding that certain debentures of a joint-stock company were void as against execution creditors for want of registration under the Bills of Sale Acts, and consequently disallowing the claim of the debenture-holders in the winding up of the company. The company in question, the name of which was the Standard Manufacturing Co., was constituted in 1881, under the Companies Acts, 1862 to 1867, for the purpose of carrying on the business of manufacturing frillings, baby linen, &c. The capital of the company was £12,000, and they had borrowing powers under their articles to the extent of £6,000. Under those powers they borrowed £1,000 in May, 1888, upon the security of twenty debentures of £50 each, ten of which were issued to James Lowe. These debentures were in the ordinary form, the company charging its undertaking and all its property, both present and future, with the payment of the sum secured, and the debentures were expressed to be issued subject to the conditions indorsed thereon. The 3rd clause of such conditions was as follows:—"The charge created by the debentures shall be a floating security, and accordingly the company may in the course of its business, and for the purpose of carrying on the same, deal with the property hereby charged in such manner as the company may think fit, and in particular may sell the same, may pay and receive money, and may declare and pay dividends out of profits." The 4th clause empowered the company at any time to give notice to the debenture-holder that they intended to pay off the debenture, and provided that the principal money secured should become payable at the end of a month after such notice. The 5th clause provided that if the company made default for one month in payment of the interest, the registered holder of the debenture might call in the principal money by notice in writing, and in that case, or in case any of the uncalled capital of the company were called up, or an order made, or special or extraordinary resolution passed, to wind up the company, that the principal money s[illegible] diately become payable. The 6th c[illegible]

(a.) Reported by R. H. DEANE, Esq., Barrister-at-Law.

that the registered holder might at any time call in the principal money upon a month's notice, and that in that case such money should, at the end of the month, become immediately payable, and that in case any debenture-holder should take legal proceedings to enforce his rights against the property of the company, all the principal moneys secured by the debentures of that issue should immediately become payable. The 7th clause provided that the power given to the company by clause 3 was to cease if default was made in payment of any of the principal moneys secured by any of those debentures, or if any such order or resolution as aforesaid was made or passed.

In November of the same year the company borrowed a further £4,000 at 7½ per cent. interest, by the issue of forty debentures of £100 each to the Realization and Debenture Corporation of Scotland. These debentures differed to some extent in form from the previous issue. They charged all the real and personal property, present and future, and the undertaking of the company, with the payment of the sum secured, and declared that the debentures were issued subject to the conditions indorsed thereon.

The 3rd clause of the conditions provided that these debentures should be a floating security, but that no part of the property should, before payment in full of the whole of that issue of debentures, be charged or mortgaged so as to rank *pari passu* with or in priority to the charge created by these debentures, "nor shall any part of the real or leasehold property of the company be sold, transferred, alienated, or otherwise dealt with in any manner without the consent in writing of the corporation first obtained; nor shall any part of the property of the company, other than the said real or leasehold property, be sold, transferred, alienated, or otherwise dealt with in any manner, except in the ordinary course of the business of the company." The 4th clause provided that the company might at any time after November 1, 1890, pay off the debentures at the end of six months after notice given to the registered holder. The 6th clause provided that the principal moneys should become payable immediately on the happening of certain specified events and on demand of payment by the registered holder, and that all right of the company to deal for any purpose whatever with any of the property should thereupon forthwith cease. Some of the events specified were as follows:—Default in payment of interest. Default in payment of principal. The making of an order, or passing of a resolution to wind up the company. The issuing of execution or other process against the property of the company. The 7th clause provided that at any time after the principal moneys became payable, or a petition for winding up was presented, or a resolution to wind up passed, or a judgment for more than £100 became enforceable against the company, the corporation should have power to appoint a receiver of any part of the property, who should have power to take possession of, and sell or demise, any part of the property charged.

These debentures were further secured by a trust deed, but neither that deed nor the debentures themselves, of either issue, were registered under the Bills of Sale Acts.

In the early part of 1889 several creditors obtained judgments against the company, in respect of which executions were issued. The debenture-holders thereupon demanded payment; and in August, 1889, an order to wind up the company was made in the Palatine Court. The question whether the debentures required registration under the Bills of Sale Acts was then raised, and Bristowe, V.C., upon the authority of *Jenkinson* v. *Brandley Mining Co.*, 35 W. R. 834, 19 Q. B. D. 568, decided in the affirmative, and that, not having been so registered, they were void against the execution creditors, who were therefore entitled to priority.

From that decision the debenture-holders now appealed.

Rigby, Q.C., and *Astbury*, for the appellants.—One question is whether these debentures are bills of sale at all. Section 17 of the Bills of Sale Act, 1882, enacts that "nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company." The company issued several series of debentures purporting to create a floating security over the property of the company. The debentures are not "assurances" within the meaning of section 4 of the Act of 1878. In *Jenkinson* v. *Brandley Mining Co.* there is a *dictum* against us by Grove, J., to the effect that the saving clause in section 17 does not except debentures generally from the Act, but only those issued by mortgage, loan, and other incorporated companies, and that the last words must mean incorporated companies *ejusdem generis* with loan and mortgage companies. That *dictum* was unnecessary for the decision of the case, and cannot be sustained. The debentures here were "charged on the undertaking," an expression which has been judicially construed as creating a "floating security." These debentures were within the exception in section 17 of the Act of 1882: *Edmonds* v. *Blaina Furnace Co.*, 35 W. R. 798, 36 Ch. D. 215; *Levy* v. *Abercorris Slate and Slab Co.*, 36 W. R. 411, 37 Ch. D. 260; both of which cases, like the present one, turn on section 17 of the Act of 1882. The Act of 1878 does not apply to debentures of an incorporated company, but, even if it did, section 17 of the Act of 1882 would make it unnecessary to register them as bills of sale: *Read* v. *Joannon*, 38 W. R. 734, 25 Q. B. D. 300.

They also referred to *Topham* v. *Greenside Glazed Firebrick Co.*, 36 W. R. 464, 37 Ch. D. 281; *Ross* v. *Army and Navy Hotel Co.*, 35 W. R. 40, 34 Ch. D. 43; and *In re Pound, Son, & Hutchins*, 38 W. R. 18, 42 Ch. D. 402.

Neville, Q.C., and *Ernest Radford*, for the respondents, the execution creditors.—If all incorporated companies were intended to come within section 17, why did it expressly refer to loan and mortgage companies at all? It is difficult to suppose that when the Legislature said "loan companies" it meant "borrowing companies." A debenture is an acknowledgment of a debt. All that section 17 says is that companies of a specified kind need not register their debentures—that is, loan and mortgage companies and companies of a similar kind. If the company is within section 17 of the Act of 1882 the effect is to prevent that Act, as far as chattels are concerned, from operating on these debentures at all. The result is to leave them liable to registration under the Act of 1878; because if nothing in this Act applies to such debentures, you cannot read section 15, which repeals section 8 of the Act of 1878, as applying to them. There is no reason why the debentures of a corporation should not be subject to registration under the Act of 1878 as well as under the Companies Acts, because under the latter Acts it is only when a man (not being a shareholder) has become a creditor that he can inspect the register. The debentures clearly come within the definition in section 4 of the Act of 1878. [Lord HALSBURY, L.C.—Perhaps it is fair to ask why debentures were not expressly mentioned in the exhaustive catalogue in that section?

BOWEN, L.J., referred to *Holroyd* v. *Marshall*, 11 W. R. 171, 10 H. L. Cas. 191, and *Reeves* v. *Barlow*, 32 W. R. 672, 12 Q. B. D. 436.] Unregistered debentures, though not void as against the liquidator, are void as against creditors: *In re Marine Mansions Co.*, L. R. 4 Eq. 601, 16 W. R. Ch. Dig. 68. Bills of sale given by joint-stock companies are within the Bills of Sale Act, 1882: *In re Cunningham & Co., Attenborough's case*, 33 W. R. 387, 28 Ch. D. 682; *Shears* v. *Jacobs*, 14 W. R. 609, L. R. 1 C. P. 513; *Deffell* v. *White*, 15 W. R. 68, L. R. 2 C. P. 144. [BOWEN, L.J., referred to *Brown* v. *Bateman*, 15 W. R. 350, L. R. 2 C. P. 272.] There their lordships put it on the ground that the title given was an equitable and not a legal one. In *Deffell* v. *White* the question was as to the sufficiency of the registration. If debentures are not within the Act of 1878 at all, there was no need for section 17 of the Act of 1882. In *Ross* v. *Army and Navy Hotel Co.*, 34 Ch. D., at pp. 50-51, Kay, J., said that "a debenture creating an equitable charge would be void against an execution creditor under section 8" of the Bills of Sale Act, 1878, "the exception in section 17 of the later Act of 1882 not applying to the Act of 1878." [BOWEN, L.J., referred to *Ex parte Hubbard*, 35 W. R. 2, 17 Q. B. D. 690.] There was power to take possession under these debentures; that is a test of their being bills of sale: *Ex parte Close*, 33 W. R. 228, 14 Q. B. D. 386; *Ex parte Parsons*, 34 W. R. 329, 16 Q. B. D. 532. In *Ex parte Mackay*, 21 W. R. 664, L. R. 8 Ch. App. 643, it was decided that an agreement for a bill of sale, if relied on as an equitable assignment, required registration under the Act then in force. In *Edwards* v. *Edwards*, 24 W. R. 713, 2 Ch. D. 291, it was held that a covenant by a debtor to charge certain chattels with a debt if it were not paid by a specified day, and to assign such chattels when required to the creditor as security, ought to be registered as a bill of sale. The statutory power of sale was incident to these debentures, which were, therefore, bills of sale within the Act of 1878: *Climpson* v. *Coles*, 38 W. R. 110, 23 Q. B. D. 465. Securities of this kind are inoperative on the property of the company until the money has become payable. There is no charge until then upon any specific chattels. The whole object of giving this kind of security is to leave the company unfettered in dealing with their property: *Tailby* v. *Official Receiver*, 37 W. R. 513, 13 App. Cas. 523, per Lord Macnaghten, on p. 541, paragraph 4.

They also referred to *In re Stockton Iron Furnace Co.*, 27 W. R. 433, 10 Ch. D. 335; *Topham* v. *Greenside Glazed Firebrick Co.*, 37 Ch. D., on p. 293; *Brocklehurst* v. *Railway Printing and Publishing Co.*, 28 SOLICITORS' JOURNAL, 358, W. N., 1884, p. 70; *Ex parte Byrne*, 36 W. R. 128, 345, 20 Q. B. D. 310; and *Swift* v. *Pannell*, 31 W. R. 543, 24 Ch. D. 210.

E. S. Ford, for the liquidator.

Rigby, Q.C., in reply.—The Act of 1878 does not apply, and was not intended to apply, to companies. The preamble to the Act of 1854, and the whole scope and purview of the Acts of 1854 and 1878, show that they were not intended to deal with companies. The words in the definition of "personal chattels" in section 4 of the latter Act, excluding shares or interests in the capital or property of incorporated or joint-stock companies, amount to an express exclusion of companies' debentures from the operation of the Act. The only case in which it has been argued that debentures are within the Bills of Sale Acts is the case of the debenture-holders in *John Welsted & Co.* v. *The Swansea Bank*, 5 Times Rep. 332. If it had been intended to deal with corporations the Legislature would have dealt with the cases of winding up, and would have protected the general body of creditors, and not merely the execution creditors. The *Marine Mansions case*, which was in 1867, shows the scope of the Act of 1854. The Bills of Sale Act, 1878, has nothing to do with the winding up of companies, and debentures do not need registration under it: *In re Asphaltic Wood Pavement Co.*, 32 W. R. 16. There is no case in which the official liquidator has been allowed to challenge a bill of sale. If my contention is not correct it is very strange that no one has ever availed himself of the Act before.

He also referred to *Ex parte Pearson*, 21 W. R. 688, L. R. 8 Ch. 667, and to *Ex parte Hubbard*. [Lord HALSBURY, L.C., referred to *Edwards* v. *Edwards*, *Shears* v. *Jacobs*, and *Deffell* v. *White*; observing that the two latter cases seemed to assume that the Bills of Sale Acts were applicable to companies.]

Cur. adv. vult.

Feb. 10.—BOWEN, L.J., delivered the judgment of the COURT (Lord HALSBURY, L.C., and BOWEN and FRY, L.JJ.) as follows:—The question we have to decide is whether both or either of the debentures before us, which are, in fact, debentures of a joint-stock company limited, and which create a charge on the floating, real, and personal property of the company, are void for non-registration under the Bills of Sale Acts, 1878 and 1882, or either of such Acts. So far as the Bills of Sale Act, 1882 is concerned, it seems to us that such debentures are expressly excepted from its operation by section 17. We do not agree with the observations of Grove, J., and Huddleston, B., in *Jenkinson* v. *Brandley Mining Co.*, that the words, "or other incorporated company" are limited to companies *ejusdem generis* with mortgage or loan companies, whatever these last mentioned companies may be; but even if it were otherwise, we think that any incorporated company which is authorized to raise money on loan or mortgage would be for the purposes of this section *ejusdem generis* with a "mortgage or loan company." We see no reason for doubting that the Standard Manufacturing Co. (Limited) is an incorporated company within that section.

The next question to be solved is whether these debentures, or either of them, are bills of sale (section 4), and bills of sale to which the Bills of Sale Act, 1878, s. 3, applies. That these debentures are "agreements by which a right in equity to a charge or security on personal chattels is conferred" appears to be clear. But we are of opinion nevertheless that, on the true construction of the Act of 1878, the mortgages or charges of any incorporated company for the registration of which statutory provision has already been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not bills of sale within the scope of the Bills of Sale Act, 1878.

It is impossible to follow chronologically the legislation about bills of sale without observing that until the passing of the Act of 1882, the scope of which embraces larger objects, the express and avowed design of the Legislature had been to strike at the frauds perpetrated upon creditors by secret bills of sale. The title of the Bills of Sale Act, 1854, so states, and the preamble of that Act is as follows:—"Whereas frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons to the exclusion of the rest of their creditors, for remedy whereof," &c. Such corporate bodies as were at that time in existence were not bodies in the habit of committing frauds of this sort; and since corporations were not subject to the

law of bankruptcy, that portion, at all events, of section 1 of the Act of 1854, which was for the protection of assignees in bankruptcy, could not be applicable to corporations. Indeed, the definition of "apparent possession," which is of the essence of the Act of 1854, is so framed as to show that corporations were not actively, at all events, present to the mind of the draftsman who drafted the statute. Prior to the Act of 1854 the Legislature had passed, in 1845, the Companies Clauses Act, 1845, which provided, in the case of mortgages and bonds of companies authorized by their special Act to borrow, for a register to be kept of such mortgages and bonds, and enacted that such register might be perused at all reasonable times by any of the shareholders or any mortgage or bond creditor of the company, or by any person interested in such mortgage or bond, without fee or reward.

Between the Bills of Sale Act of 1854 and the Bills of Sale Act of 1878 the Companies Act of 1862 was passed, which, by section 43, provides for the registration by companies of the mortgages and charges specifically affecting their property. At the date of the Bills of Sale Act, 1878, debentures which charged the property of such companies were well known in the commercial world. Having regard to the provisions already made by statute for their registration, such documents could hardly be described as secret or as belonging to the class of documents by which frauds were perpetrated upon creditors by secret bills of sale. They are not really, therefore, within the mischief of the Act of 1878. We cannot think that the Legislature could have intended in the Bills of Sale Act, 1878, to interfere by merely general words with such well-known commercial instruments, and it seems to us that the canon of construction laid down in *Stradling* v. *Morgan*, Plowden, 205a, and cited by the Lord Chancellor in the recent case of *Bell-Cox* v. *Hakes*, *ante*, p. 147, 15 App. Cas. 518, may be invoked with regard to the present controversy—"From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded on the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion." Neither the cause nor necessity for the Bills of Sale Acts, 1854 and 1878, nor a comparison of the various sections, drive us to the interpretation that such documents are included.

We have said that a comparison of the various sections of the Act of 1878 does not lead to any other conclusion. We may even say that such a comparison fortifies the opinion at which we have arrived. Without going so far as to decide that no corporation can, under any circumstances, be within the Bills of Sale Act, 1878, we may point out that the language of sections 4, 10, and 12 shows that the Bills of Sale Act, 1878, was not dealing specifically with corporations, although it may be that the language of section 3 is wide enough to include the bills of sale of a corporation, a view which has tacitly, as we are aware, been assumed in many decided cases to be correct. The language employed in these other sections is certainly not felicitous language to be applied in the case of corporations, and warrants, we think, the observation that the debentures of companies were not actively present to the mind of the draftsman of the Act. The view that debentures like the present are not within the Bills of Sale Act, 1878, was that adopted by Pollock, B., in the case of *John Welsted & Co. (Limited)* v. *The Swansea Bank*, and by the Lord Chief Justice and Wills, J., in the case of *Read* v. *Joannon*; see also *Edmonds* v. *Blaina Furnaces Co.* and *Levy* v. *Abercorris Slate and Slab Co.* We agree with this view, and we think that this appeal should be allowed, with costs both here and below, on the ground that the mortgages or charges of any incorporated company, for the registration of which other provisions have been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not within the Bills of Sale Act, 1878.

Appeal allowed.

Solicitors for the appellants, *Linklater & Co.*, for *Boote & Edgar*, Manchester.

Solicitors for the respondents, *Chester & Co.*, for *Bullock & Worthington*, Manchester.

Solicitors for the liquidator, *Phelps, Sidgwick, & Biddle*, for *Sale, Seddon, & Co.*, Manchester.

From Q. B. Div. March 2.

BRANDON v. MCHENRY. (a.)

Practice—Setting aside execution—Bankruptcy—Debt and judgment—Proof for debt—Rejection by trustee—Annulment of bankruptcy—Execution issued on judgment—Bankruptcy Act, 1869 (32 & 33 *Vict.* c. 71), *s.* 81.

The defendant having been adjudicated a bankrupt under the Bankruptcy Act, 1869, *the plaintiff sent in a proof for* £4,084 *in respect of an alleged debt. The trustee in bankruptcy rejected the proof. The plaintiff had, prior to the adjudication in bankruptcy, signed judgment against the defendant by consent for the above sum of* £4,084, *but the plaintiff did not send in any proof in respect of the judgment. The adjudication in bankruptcy having been subsequently annulled, the plaintiff issued execution upon the judgment.*

Held, that, inasmuch as, in bankruptcy, there is power to go behind the judgment and to inquire into the consideration upon which it is founded, the proof upon the simple contract debt must be considered the same as the proof upon the judgment debt; that the rejection of the proof was an "act done by the trustee" within section 81 *of the Bankruptcy Act*, 1869, *and remained valid upon the annulment of the adjudication; and that, therefore, the plaintiff was not entitled to issue execution upon the judgment.*

Appeal from the Queen's Bench Division.

In 1879 the defendant filed a liquidation petition under the Bankruptcy Act, 1869. The plaintiff sent in a proof for £4,084 for work done as a solicitor for the defendant in certain litigation in which the defendant had been engaged. In November, 1883, resolutions accepting a composition were passed by the creditors under section 126 of the Act of 1869. On July 15, 1885, the plaintiff, by consent, signed judgment against the defendant for the above sum of £4,084. In March, 1886, the defendant was adjudi-

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

cated bankrupt under the power conferred on the court by the last clause of section 126, and the proofs in the liquidation proceedings were transferred to the bankruptcy proceedings. The plaintiff did not send in any proof upon the judgment. The trustee in the bankruptcy rejected the proof. In February, 1890, the bankruptcy was annulled, and the plaintiff subsequently issued execution upon the judgment of July 15, 1885. The defendant thereupon applied to set aside the judgment and the execution.

The Divisional Court (Wills and Wright, JJ.) refused to set aside the judgment, but set aside the execution.*

The plaintiff appealed.

By section 81 of the Bankruptcy Act, 1869, "whenever any adjudication in bankruptcy is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the trustee or any person acting under his authority, or by the court, shall be valid," &c.

[The above provision is re-enacted in section 35, sub-section 2, of the Bankruptcy Act, 1883.]

Murphy, Q.C., and *Lumley Smith, Q.C.* (*H. Reed* with them), for the plaintiff.—The trustee rejected the proof, which was upon the file, for the simple contract debt. No proof was sent in for the judgment. When the proof was rejected the plaintiff relied upon his judgment, and he might have sent in a proof at any time in respect of it. The annulment did not affect a debt for which no proof had been sent in. Therefore the plaintiff's claim upon the judgment remained notwithstanding the annulment.

They referred to *Smallcombe* v. *Olivier*, 13 M. & W. 77; *Bailey* v. *Johnson*, 20 W. R. 1013, L. R. 7 Ex. 263.

Sir Edward Clarke, S.G., and *W. B. Allen*, for the defendant, were not called upon.

Lord ESHER, M.R.—I intend to rest my decision upon one only of the grounds upon which the Divisional Court acted—namely, upon section 81 of the Bankruptcy Act, 1869. When the defendant was adjudicated a bankrupt the plaintiff might, if he had chosen, have proved upon his judgment for £4,084. But in bankruptcy the court can go behind a judgment and inquire into the consideration upon which it is founded. Therefore a proof upon the judgment would, in reality, have been a proof for a sum of £4,084 alleged to be due under a contract, and which contract had been converted into a judgment. The proof would have been for the sum of £4,084 founded upon a contract and a judgment. The plaintiff, however, did not send in a proof upon the judgment, but claimed upon his proof for the original contract debt alone. The trustee rejected that proof, on the ground that there was no consideration for the alleged debt. If the proof had been upon the judgment exactly the same result would have happened. The trustee would have inquired into the consideration for the judgment, and would have rejected the proof on the ground of want of consideration. Therefore, in reality, that which was claimed was the debt, and whether it was claimed as being a judgment debt, or a simple contract debt, is immaterial. There was no appeal against the rejection of the proof by the trustee, and so his decision was final.

What, then, is the effect of the subsequent annulment of the bankruptcy? By section 81 of the Bankruptcy Act, 1869, "all acts done by the trustee" are to be valid. Here we have a rejection of the claim by the trustee. That is an act done by him. The rejection therefore remained valid. The plaintiff cannot now allege that he can enforce the claim which had been thus rejected. All effective action upon the judgment has been put an end to by the rejection of the claim by the trustee. The execution, therefore, must be set aside. It is unnecessary to decide whether or not the judgment ought to stand.

FRY, L.J.—I am of the same opinion. In 1879, when the defendant filed his petition for liquidation, the plaintiff alleged that he was a creditor of the defendant for £4,084, and he proved in the liquidation in respect of this alleged debt. In the bankruptcy of 1886 the proofs on the file in the liquidation proceedings were transferred to the bankruptcy proceedings, and it became the duty of the trustee in the bankruptcy to consider the plaintiff's claim on his proof. The trustee rejected it. If the plaintiff had proved upon the judgment, instead of upon the simple contract debt, the trustee could have gone behind the judgment, and inquired into the consideration upon which it was based, and would have rejected the proof in exactly the same way. Then, by section 81, upon the annulment of the bankruptcy, not merely all sales and dispositions of property and payments duly made by the trustee, but also "all acts theretofore done by the trustee," are to be valid. These latter words must include the rejection of a proof by the trustee. That rejection, therefore, was valid against all parties. The effect of the rejection, therefore, is to disentitle the plaintiff to issue execution upon the judgment. It is not necessary now to consider whether it would entitle the defendant to have the judgment set aside.

Appeal dismissed.

Solicitors for the plaintiff, *G. S. & H. Brandon.*

Solicitors for the defendant, *Hores & Pattisson.*

* The above statement of facts is sufficient for the purposes of this report. There were other grounds upon which the court was asked to set aside the judgment and execution, but it is unnecessary to state the facts relating to those other grounds.

From Q. B. Div. Dec. 11.

ONSLOW v. COMMISSIONERS OF INLAND REVENUE. (a.)

Inland revenue — Stamp duty — Settlement—"Definite and certain amount of stock"—Contingent reversionary interest settled—Stock vested in trustees with power to vary investments—Stamp Act, 1870 (33 & 34 *Vict.* c. 97), *s.* 3, *schedule,* "*Settlement.*"

By a marriage settlement the settlor's reversionary and contingent interests in divers specified sums of stock vested in trustees, with powers of varying the investments, were settled.

Held, that the settlement was an "instrument . . . whereby . . . a definite and certain amount of stock . . . is settled or agreed to be settled" within the definition of the word "settlement" in the schedule to the Stamp Act, 1870, *and that it accordingly required an* ad valorem *stamp of* 5*s. for every* £100, *as provided by that schedule.*

Appeal from the Queen's Bench Division.

This was an appeal by D. H. Onslow and his wife Marion from the decision of a divisional court (Pollock, B., and Hawkins, J.) upon a case stated by the Commissioners of Inland Revenue under 33 & 34 Vict. c. 97, s. 19, as to the amount of stamp duty payable on a certain indenture of settlement, and the case is reported below (38 W. R. 445, 24 Q. B. D. 584).

(a.) Reported by R. H. DEANE, Esq., Barrister-at-Law.

The said indenture was dated the 21st of April, 1888, and the property settled by it consisted of certain moneys, stocks, funds, and securities respectively specified in three schedules to the indenture, or of the interest of the settlor, Marion Onslow (formerly Marion Oliver) therein.

It appeared that George Pickup, the grandfather of the appellant Mrs. Onslow, had died in 1834 intestate, leaving two daughters, Ann and Georgina, who subsequently (in 1849 and 1856) executed cross-settlements of their property. In 1849 Ann, the elder, settled hers on herself for life without power of anticipation, with remainder to her children as she should by deed or will appoint, with remainder upon similar trusts in favour of her sister Georgina and her children, and ultimate remainder to the next of kin. In 1856 Georgina made a settlement corresponding to that made by her sister, neither of them having then any children. In 1860 Georgina was married to George Oliver, and they had a daughter Marion, the present Mrs. Onslow, the settlor. In 1868 James Pickup, brother of George Pickup, the intestate, died, having made a will whereby he left one moiety of his property to his elder niece, Ann, for life, with remainder to her children as she should by will appoint, with remainder (if Ann had no children) upon the trusts declared as to the other moiety, which he gave to Georgina for life, with corresponding remainder and cross-remainder.

In 1888 Georgina Oliver made three appointments under her various powers, her sister Ann never having been married, and being then sixty years of age, and she herself fifty-four.

The interests to which Marion Onslow were entitled at the date of her settlement were (1) a moiety in remainder, expectant on the death of her mother, of the net proceeds of the sale and conversion of the real and personal estate of the said James Pickup, subject to reduction in the event of her mother having another child; and the other moiety thereof in remainder, expectant on the death of her Aunt Ann and her mother Georgina, the latter moiety being contingent also on her said aunt dying without issue. The above were comprised in the first schedule. The investments, which were standing in the name of George Oliver as the surviving trustee, were subject to variation, with the consent of the tenant for life. Marion was entitled (2) to an interest in remainder (comprised in the second schedule) expectant on the death of her mother, and subject to defeasance in the event of her mother having other children; and (3) to an interest in remainder (comprised in the third schedule) expectant on the deaths of her mother and aunt, contingent on her aunt dying without issue, and subject to revocation in the event of her mother having other issue. All the investments were subject to powers to vary.

The aggregate value of the property comprised in the three schedules at the date of the settlement was £209,370 11s. 5d.

The commissioners held that the indenture was chargeable with *ad valorem* duty, as a settlement, at the rate of 5s. per cent., which would amount to £523 16s., and also, under section 8 of the Act of 1870, with a deed stamp of 10s., in respect of other matter in the deed.

The Divisional Court affirmed the view of the commissioners.

Marion Onslow, the settlor, and her husband, D. H. Onslow, appealed.

Danckwertz, for the appellants.—The schedule to the Stamp Act, 1870, contains the definition of "Settlement" upon which the question in the present case turns. Settlement is there defined as follows:—"Any instrument, whether voluntary or upon any good or valuable consideration, other than a *bonâ fide* pecuniary consideration, whereby any definite and certain principal sum of money . . . or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever." There was here no such settlement of any definite and certain sum of money, or of any definite and certain amount of stock. All the three sets of property are unascertained. In *Partington* v. *Attorney-General*, L. R. 4 E. & I. App. 100, at p. 122, 17 W. R. H. L. Dig. 1, Lord Cairns laid down the principles on which the Stamp Act ought to be approached. He said, "if the Crown . . . cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be." The settlement in the present case is not a settlement within the definition given in the schedule to the Stamp Act, 1870. There is no precise sum settled. The sum mentioned is not settled at all. The stock comprised in the schedule to the settlement is not settled. The investments may be changed. What is settled is whatever may be *in esse* when the time for distribution arrives. The amounts settled must, by the Act, be both definite and certain—a definite amount, and vested certainly. The words are not tautologous. The Revenue has never asked for stamp duty on purely contingent interests. [He referred to *Sanville* v. *Commissioners of Inland Revenue*, 2 W. R. 529, 10 Exch. 159; *In re Alsager's Settlement*, 12 W. R. 477; *Hughes* v. *King*, 1 Starkie, 119]. As to a portion of the funds, no interest is given to Georgina except in the event of Ann dying without issue; and another portion is vested in her subject to being divested if her mother has another child. [FRY, L.J.—I think it is vested subject to being divested on a most improbable contingency. BOWEN, L.J.—The words of the Act are "definite and certain sum of money, or definite and certain amount of stock," not a definite and certain interest in a sum or amount.] What one must look to is the subject-matter of the settlement. If that is uncertain, there is nothing certain or definite about it. The first scheduled property is not settled at all. It is said to be settled as a convenient way of describing what may ultimately be settled. What is settled is whatever may represent the part of the estate which may fall to Mrs. Onslow's share on the death of her mother. The expenses of realizing the property may come out of the personalty or realty as the trustees choose. [*Sir E. Clarke, S.G.*, referred to *In re Jackson, Jackson's Will*, 28 W. R. 209, 13 Ch. D. 189.]

Sir E. Clarke, S.G., and *G. B. Rosher*, for the respondents, were not called on.

LINDLEY, L.J.—This case raises a question of the construction of that part of the Stamp Act, 1870, which relates to settlements. The instrument on which this question arises is the marriage settlement made between Mr. Onslow and the young lady he was then about to marry; and it contains recitals from which it appears that the lady was entitled to considerable property, some vested, some contingent, and some vested subject to being divested. The property is specified in three schedules, and with respect to the first schedule I think this recital is important: "Whereas the personal property now subject to the trusts of the said will is specified in the first schedule hereto, and stands in the name of George Oliver, the surviving trustee." When we come to deal with that, we find that what the settlement does with it is this. It says, "in pursuance of the agreement," and so on, the lady assigns to the trustees

"all that the entirety of the net proceeds of the sale, calling in, and conversion of the real estate and personal estate devised and bequeathed" by the will already mentioned. That is the first part. Then she goes on in the same way to assign to the trustees the proceeds of all the property specified in the second schedule, and, finally, that in the third schedule.

Now, when we come to look at these schedules, we find there is very considerable property specified in them, the value of the whole at the date of the settlement, ascertained in accordance with section 12 of the Act, being over £200,000. It is said that the commissioners, who have assessed the stamp upon this settlement at 5s. per cent. upon the amount I have mentioned, have gone upon the wrong principle. It is said that there is no settlement, and it is said that there is no settlement of a "definite and certain amount," within the meaning of the Stamp Act. In order to deal with that, I will read what the Stamp Act says—it is in the schedule, under the head "Settlement":—"Any instrument, whether voluntary or upon any good or valuable consideration, other than a *bonâ fide* pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments, or heritable subjects or not, or to be laid out in the purchase of lands or other hereditaments, or heritable subjects or not) or any definite and certain amount of stock, or any security, is settled, or agreed to be settled, in any manner whatsoever. For every £100, and also for any fractional part of £100, of the amount or value of the property settled or agreed to be settled, 5s." We are asked to say that there is not any settlement, and that there is not "any definite and certain" sum within the meaning of that provision. But the ingenious attempt of Mr. Danckwertz to establish that proposition seems to me to have failed. I cannot read the instrument without coming to the conclusion that it is a settlement in the ordinary acceptation of that term—just the same as any other marriage settlement is a settlement.

If Mr. Danckwertz' argument were pressed to its full extent it would come to this: that no settlement of any property could be stamped with an *ad valorem* stamp unless the interest of the settlor were a vested interest, not subject to be divested at all. Such a construction is, I think, quite impossible, and inconsistent with the terms of the Act itself. He then contended that there might be a difference between a vested interest subject to be divested and a contingent interest; but I can find nothing in the Act to warrant anything of the sort.

Just let us see how these things are done, and what the Act intended should be done. The Commissioners of Inland Revenue look at the document to see what it is that is settled, and they ascertain the value of the amount, if it is stock, in accordance with section 12; they look to see whether the sum which is settled is a certain and definite sum so ascertained. If it is, then 5s. per cent. is calculated upon it. I put to Mr. Danckwertz the case—a simple case enough—of the settlement, say, of one-fifth of £100,000. What would be the stamp duty for that? Obviously not 5s. per cent. on the whole £100,000. That would be absurd. The duty would be 5s. per cent. on the one-fifth. When we go further and see whether the 5s. per cent. is to fluctuate according to whether the interest is contingent, or subject to be divested, or vested, we find that the language of the Act warrants nothing of the kind. The amount settled, and not the nature of the settlor's interest in it, is what the statute deals with. I think the commissioners were right, and that the appeal ought to be dismissed.

BOWEN, L.J.—I am of the same opinion, and will only add that with regard to the larger portion of Mr. Dankwertz' argument, it seems to me that he omits to remember that "definite and certain" in the clause which we are considering are terms applied, not to the interest or the nature of the interest, but to the amount of the stock, and that the amount of the stock does not become uncertain because the chance of getting it may be uncertain.

FRY, L.J.—I am of the same opinion. The clause in the schedule of the Stamp Act, 1870, which we have to construe attaches itself to any instrument whereby "any definite and certain amount of stock is settled." Now it is obvious at once that the words I have read contain no definition or reference to the interest of the settlor in that "definite and certain amount." They simply refer to the stock. Two possible readings of those words seem to me to occur to the mind. One would be to say there was no settlement of that sum unless the settlor had an absolute and indefeasible interest; the other is to say that it applies to every case in which the settlor had any interest in that sum, whether that interest be vested or liable to be divested, or contingent, provided it is an interest. In my opinion the clause clearly relates to the second class of interest. It says nothing about the definiteness, the vesting, or the contingency of the interest, and it applies to every interest, whether vested, whether liable to be divested, whether contingent or not, in any sum, of which it may be said it is a definite and certain sum of stock. That is my view of the meaning of the clause. I think, therefore, the appeal fails.

Appeal dismissed.

Solicitors for the appellants, *Rowliffes, Rawle, & Co.*

Solicitor for the respondents, *The Solicitor of Inland Revenue.*

High Court of Justice.

Chan. Div. } March 5.
Chitty, J. }

In re GOVERNMENT STOCK INVESTMENT CO. (LIMITED). (*a.*)

Company — Alteration of memorandum — Business — Objects — Main purpose — Extending range of investments — Companies (Memorandum of Association) Act, 1890 (53 & 54 *Vict. c.* 62), *s.* 1 (2), (4), (5) (a) (b).

A company formed for the purpose of investing in Government stock or other securities guaranteed by Government cannot alter its memorandum of association under the Companies (Memorandum of Association) Act, 1890, *so as to extend its power of investment to non-Government securities, such alteration neither "enabling it to carry on its business more economically or more efficiently," nor "to attain its main purpose by new or improved means" within the meaning of the Act.*

Observations on the duty of the court in exercising its discretion under the Act.

Petition.

This was a petition under the Companies (Memorandum of Association) Act, 1890, asking the court to confirm a special resolution passed to alter the memoran-

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

dum of the above company by enlarging the area of investments. The alteration was opposed by some of the debenture stock holders. The purpose for which the company was established was the receipt of money on deposit and its investment on certain specified securities.

The original range of investments was as follows, the proposed alteration being inserted in italics:—

"The stocks or obligations of British, foreign, or colonial governments, states, provinces, or municipalities, or of railways or other public undertakings guaranteed by any British, foreign, or colonial government, state, province, or municipality, *or in or upon mortgages, mortgage debentures, debentures, bonds, debenture stocks, and other obligations, and preference stocks and preference shares of any corporation, company, or undertaking at home or abroad, and in or upon stocks of any trust or investment company or corporation*, provided that not more than one-tenth part of all the money invested shall be invested in the stocks of any government, state, province, municipality, railway, or undertaking."

Notice to debenture stock holders and creditors had been given under section 1 (2) in pursuance of an order in chambers.

Farwell, Q.C., and *A. D. Maclaren*, for the company.—The proposed alteration is within section 1 (5) (*a*) and (*b*), the main purpose of our company being the investment of money. The debenture stock holders are not creditors entitled to payment, and cannot object. At all events, they must show that their security is imperilled.

R. B. Yardley, for the opposing debenture stock holders.—The debenture stock holders have an absolute right to be secured under section 1 (2) (*b*), just as in cases of reduction of capital: see the Companies Act, 1867, s. 11; *In re Patent Ventilating Granary Co.*, 27 W. R. 836, 12 Ch. D. 254. Their security is imperilled, and they are entitled to object. The alteration is not within section 1 (5), and in any case the court should not exercise its discretion under section 1 (4) against the debenture stock holders.

Farwell, Q.C., replied.

CHITTY, J.—This is the first case which has arisen under this Act of Parliament, and I have, therefore, desired to have it fully argued. The Act is not a general Act enabling companies to alter their memorandums, or conferring such a power on the court, but it is confined to alterations carefully specified in section 1 (5). This does not wind up with any general clause, but is confined to the definite matters therein mentioned. Now the name of this company is the Government Stock Investment Co. (Limited), a name which by itself imports that the company's investments are to be made in Government stock. I turn to the memorandum of association, and find in the third paragraph that the objects, stating them shortly, are to receive money and invest it in the stocks or obligations of British, foreign, or colonial governments, states, provinces, or municipalities, or of railways or undertakings guaranteed by them. That clause shows that the term government in the corporate name is used in a wide sense, and is not confined to governments which are popularly described as British or foreign governments, but includes states, provinces, and municipalities. These, however, are not unfairly termed governments, because both provinces and municipalities have local government. Investment, then, is to be made in the stock of governments in this wide sense, and also in public undertakings guaranteed by governments in this wide sense. Then there is a proviso to prevent the company from investing more than one-tenth of its money in any one government.

Now, what the company desires to do is to alter the memorandum so as to extend it far beyond the Government investments authorized by the memorandum as it stands. It is proposed to add the words in italics to the list of investments, leaving the proviso to run on as before. It is plain, however, that if the court assents to this alteration it will authorize this company to invest in securities of limited liability companies, in preference stocks of such companies, or even in the stock of trust companies like itself. That is a singular departure from the objects specified in the memorandum as it stands. It is plain that this company will be authorized to invest the whole of its capital or deposits in ten limited liability companies or in ten trust companies if it so think fit, and many of these companies hold foreign stocks to a large amount. So that although this company can only invest one-tenth of its capital or deposits in Argentines, it might invest one-tenth directly in Argentines and nine-tenths in other companies holding Argentines.

Mr. Farwell says the directors are sensible men, and would not do this, but that is not the question before me. I have also to consider the future directors, and in competition with other companies they might act in this way.

Under notices and advertisements given or published according to the direction of the judge in chambers, under section 1 (2), a certain number of assents have been given to the proposed alteration, and no outside creditors object. The share capital is £750,000. The resolution for altering the memorandum was carried unanimously, but in the absence of information as to the attendance at the meeting, I cannot assume that more than half the shareholders were represented.

Now I turn to the debenture stock holders. The debenture stock issued was £438,000. The company had power to issue debentures, but in point of form no power to issue debenture stock. I say, however, nothing about the validity of the issue. The prospectus of the issue states that it is amply secured by a capital of £750,000 invested in Government or guaranteed stocks.

Therefore, those who were invited to subscribe, and did so, were told their security would be Government stocks, or the stocks of public undertakings guaranteed by Government, using government in the same wide sense as before.

Now, of the holders of debenture stock, the holders of £150,000 assented, the holders of £22,600 dissented, those of £51,000 stand neutral, and as to the balance of £210,000 no replies were received. There is one more fact to be mentioned. The directors, under the sanguine anticipation that the court would accede to the application, have invested £53,000 in investments unauthorized by the old memorandum, but allowed by the new. I use this as an illustration of what the directors would do if I sanctioned this alteration. They have invested in Army and Navy Trust Stock, Omnium Stock, and many others of a like nature, even though deferred stock, and it is plain from this that they will, if allowed, invest a considerable amount in companies of a similar character to this company.

This company seems already to have some connection with the Omnium Investment Co. There would be an interlacement of the two companies. Now in the exercise of my discretion I must have regard to the interests of the members of the company as well as to those of the creditors, and in addition to this I have to be satisfied that the alteration falls within the section 1 (5).

Under the terms of this sub-section I may confirm the alteration if it is required to enable the company—

(*a*) "To carry on its business more economically or more efficiently."

Does extending the range of the power of investment in the manner described fall within the sub-section? It is clearly not more economical. Is it more efficient? It will enable the directors to speculate more freely, but I cannot see that that is one of the objects of the sub-section, which is evidently prepared with great care, and I do not think I ought to attribute a loose meaning to the language of the Legislature as here used. Consequently I hold it is not within clause (*a*).

(*b*) "To attain its main purpose by new or improved means."

The word "purpose" is used here designedly as opposed to the word "objects" used in (*c*). The Legislature was aware that, according to the way in which the Limited Liability Acts are worked, the framers of memorandums of association insert under letters which exhaust the alphabet what they are pleased to call the objects of the company, and I think the Legislature designedly avoided the use of the word "object."

Now, what is the main purpose of this company? Mr. Farwell says "investment." He might as well say, "the acquisition of gain," using the words of the Act of 1862. In my judgment the main purpose is the investment in Government stock in the manner already described, and consequently the proposed purpose is not within (*b*).

It is not, of course, within (*c*) (*d*) or (*e*), and hence it is not within the Act at all.

Even if the alteration were within the Act, I should refuse to confirm it, because the debenture stock holders took their stock on the faith of the investments being Government stock investments, and I think they are entitled to say they will not have the company turned into an Omnium Co. In spite of the wishes of the majority, it would be my duty to refuse to confirm the alteration, not only in the interests of opposing debenture stock holders, but also in favour of those who are neutral or of those other shareholders who have possibly left this case to the care of the court, trusting that it would look after their interests.

I therefore refuse the confirmation asked for, and dismiss the petition with costs.

Petition dismissed.

Solicitors for the company, *Davidson & Morriss.*

Solicitor for the opposing debenture holders, *Loftus & Long.*

Chan. Div.
Stirling, J. } Jan. 24; Feb. 7.

In re BRIGGS AND SPICER. (*a*.)

Vendor and purchaser—Voluntary settlement—Possible claim by trustee in bankruptcy of settlor—Onus *of proof*—"*Parties claiming under the settlement*"—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

A purchaser under a trust for sale in a voluntary settlement is included in the term "parties claiming under the settlement" in section 47 *of the Bankruptcy Act*, 1883, *and, consequently, has cast upon him the burden, if the settlement should be impeached by the trustee in bankruptcy of the settlor, of proving that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement.*

Vendor and purchaser summons.

This case raised the question whether the trustees of a voluntary settlement could sell land comprised in the settlement under a trust for sale, and convey the land without casting upon the purchaser the burden of proving, if attacked by the settlor's trustee in bankruptcy at any time within ten years from the date of the settlement, that the settlor was at the time he executed the settlement "able to pay all his debts without the aid of the property comprised in the settlement."

J. J. B. Blackburn executed a voluntary settlement on the 22nd of December, 1888, by which he conveyed the land in question to the vendors as trustees upon trust for sale, and to pay the income arising from the proceeds of such sale to him for life, and after his death upon certain trusts therein declared for the benefit of his issue.

On the 21st of December, 1889, the trustees entered into a contract to sell the land to trustees for the London County Council, as part of a proposed public park at Brixton: to this contract the trustees for sale were parties of the first part, Blackburn of the second part, and the purchasers of the third part. The purchasers raised objections to the title of the vendors to the following effect: that the settlement of December, 1888, being a voluntary settlement would be void as against the trustee in bankruptcy if at any time on or before the 22nd of December, 1890, Blackburn should become bankrupt, and might further become void if he should become bankrupt on or before the 22nd of December, 1898. They further objected that the purchase could not be completed at all until after the 22nd of December, 1890, and whether it could be safely completed after the date last mentioned would depend on the evidence which could be furnished by the vendors to show that Blackburn was on the 22nd of December, 1888, able to pay all his debts without the aid of the property comprised in the settlement. These objections were answered by a contention that section 47 of the Bankruptcy Act, 1883, did not affect a purchaser from the trustees of the settlement, and, further, that Blackburn's concurrence in the conveyance would place the purchasers in the same position as if they were taking a conveyance direct from him. No difficulty existed at the present time in proving the solvency of Blackburn's position at the date of the execution of the settlement.

Section 47 of the Bankruptcy Act, 1883, is: "Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in bankruptcy, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustees of such settlement on the execution thereof."

Graham Hastings, Q.C., and *Gaselee*, for the ven-

(*a*.) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

dors.—The question is, whether the present evidence, that Blackburn at the time he executed the settlement was worth over £30,000, and that, at the outside, his debts were £1,000, is enough to make the purchasers secure. Besides, section 47 only applies to a case of the insolvency of the estate in the settlor's lifetime. The parties "claiming under the settlement" are the trustees only.

They referred to *Ex parte Russell*, 30 W. R. 584, 19 Ch. D. 588; Dart on Vendors and Purchasers, 6th ed., vol. ii., 1276, s. 6; *Spencer* v. *Topham*, 22 Beav. 573, 5 W. R. Ch. Dig. 93; *In re Snowball*, 20 W. R. 786, L. R. 7 Ch. App. 534; and *Elliott* v. *Turquand*, 30 W. R. 477, 7 App. Cas. 79.

Phipson Beale, Q.C., and *John L. Casson*, for the purchasers.—The *onus* of the proof is upon those claiming under the settlement, in every respect, including purchasers from the trustees. The present evidence does not assist the purchasers to prove what may be necessary as against the trustee in bankruptcy: see the judgment of the Master of the Rolls in *Ex parte Russell*. The whole title under the contract is too doubtful to be forced upon the purchasers.

They also referred to *Halifax Joint-Stock Banking Co.* v. *Gledhill*, *ante*, p. 104, [1891] 1 Ch. 31.

Graham Hastings, Q.C., replied.

STIRLING, J. (after stating the facts).—It is admitted by the vendors that the settlement of December, 1888, falls within the class of settlements which under this section are liable to be avoided by a trustee in bankruptcy. Two years have elapsed since the date of the settlement; but it will, "if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in bankruptcy, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement." The section appears to throw on "the parties claiming under the settlement" the burden of proving, as against the trustee in the bankruptcy of the settlor, that the settlor was at the time of making the settlement able to pay his debts without the aid of the property comprised in the settlement: *Ex parte Russell*. Who, then, are included in the terms "parties claiming under the settlement?" Plainly the beneficiaries and also the trustees of the settlement.

It is suggested, however, that purchasers and lessees who deal in good faith with the trustees are not so included. If the subject were under consideration by the Legislature, much, possibly, might be said in favour of exempting such purchasers and lessees from the heavy burden imposed by section 47, and leaving the trustee in bankruptcy his remedy only against the property for the time being, subject to the trusts of the settlement. I have, however, simply to construe the section as it stands. The words are wide and unrestricted, "parties claiming under the settlement." The proceeds of sale may be lost, or circumstances may occur to induce the trustee in bankruptcy to have recourse to the property originally in the settlement rather than to any substituted for it. A purchaser derives, and consequently claims, title under the settlement; he has notice, from the circumstances of the case, of the liability of the settlement to avoidance; and upon the fullest consideration which I have been able to give I have been unable to see good ground for holding such a purchase not to fall within the language of the Act. This being the state of the title, is it one which a purchaser can be compelled to accept? He has cast upon him the burden when attacked by the trustee in bankruptcy of the settlor of proving that the settlor was at the time of making the settlement able to pay his debts without the aid of the property comprised in the settlement. If that issue could be decided now, and upon the materials before me, I should probably hold that the vendors had made out their case, but that appears to me to be beside the point. The party from whom the attack is to be feared is not now in existence; and he cannot be bound by any proceedings at the present time. The fact on which the title depends cannot be proved merely by documentary evidence. When the attack comes the purchaser must produce witnesses, who will establish, *primâ facie* at all events, the ability of the settlor at the time of making the settlement to pay his debts. Those witnesses, however, are not under the purchaser's control; when they are wanted they may not be to be found, or they might be out of the jurisdiction, or possibly dead. Even if the purchaser should succeed in producing them, it is impossible to anticipate by what rebutting evidence the testimony may be met or what may be the effect of cross-examination; and the result may be that, even when a *primâ facie* case is made out in the first instance, the balance of evidence on the whole may be so even, that the purchaser may be held to have failed to discharge the *onus* of proof which lies on him.

The rule was thus stated by Vice-Chancellor Leach, in *Emery* v. *Grocock*, 6 Madd. 54:—"If the case be such that, sitting before a jury, it would be the duty of a judge to give a clear direction in favour of the fact; then it is to be considered as without reasonable doubt; but if it would be the duty of a judge to leave it to the jury to pronounce upon the effect of the evidence, then it is to be considered as too doubtful to conclude a purchaser." In my opinion the purchaser cannot be compelled to accept such a title. It is said next that a title can be made through the concurrence of Mr. Blackburn by his selling and conveying to the purchasers, and their paying the purchase-money by his direction to the trustees of the settlement. This would amount to an avoidance of the settlement by Mr. Blackburn, under the provisions of 27 Eliz. c. 4, and a resettlement by him of the proceeds of sale. If the purchaser consented to accept a title so made, it seems to me it would be good. It has, however, been long settled that the court will not force such a title on an unwilling purchaser: *Smith* v. *Garland*, 2 Mer. 123; *Johnson* v. *Legard*, Tur. & Russ. 281; *Clarke* v. *Willott*, 21 W. R. 73, L. R. 7 Ex. 313. The reasons given are two—first, that the court will not assist the settlor to get rid of the settlement which he has himself created; and, secondly, that there is no means of ascertaining conclusively that a settlement apparently voluntary was not in reality, in the first instance, or has not subsequently become, a settlement for value. The difficulty of ascertaining whether the settlement is to be treated as with or without consideration is none the less that, according to *Price* v. *Jenkins*, 5 Ch. D. 619, 25 W. R. Dig. 253, the consideration may be sufficient to prevent the settlor from availing himself of the provisions of 27 Eliz. c. 4, while it is insufficient to prevent the application of section 47 of the Bankruptcy Act, 1883: *Ex parte Hillman*, 27 W. R. 567, 10 Ch. D. 622. In my judgment, therefore, the title cannot be forced on an unwilling purchaser.

Solicitors, *Cooper, Walker, & Hall; Solicitor to the London County Council.*

Chan. Div.
Kekewich, J. } March 4, 5, 11.

WESTMORELAND GREEN AND BLUE SLATE CO. (LIMITED) v. FEILDEN. (a.)

Company—Winding up—Contributory—Balance order—Action to enforce—Action for debt in respect of calls—Merger of debt in order—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 101, 102, 120.

By a balance order made in the winding up of a company, a contributory was ordered to pay to the liquidator the amount of calls made previous to the winding up. The liquidator was unable to serve the balance order upon the contributory, who was out of the jurisdiction, and brought an action in the name of the company for the amount of the calls.

Held, that the original obligation of the contributory to pay the calls was not merged in the balance order, and that the action was maintainable.

Chalk, Webb, & Co. *v.* Tennent, 36 *W. R.* 263, *discussed.*

Trial of action.

The plaintiff company was incorporated on April 19, 1886.

On April 28 Colonel Feilden applied for 200 shares, which were allotted to him.

On July 14, 1888, an order was made to wind up the company, and an official liquidator was appointed.

On March 15, 1889, the chief clerk made his certificate, settling Colonel Feilden on the list of contributories in respect of 200 shares.

On May 7, 1889, the chief clerk, upon the application of the official liquidator, made a balance order against Colonel Feilden for payment of £884 8s. 1d., being the amount due on allotment of his 200 shares, and for three calls made by the directors of the company before the date of the winding up order.

At that time Colonel Feilden was residing in Guernsey, and the balance order was served upon him there; but that service was set aside as being made out of the jurisdiction.

On September 20, 1889, the company issued the writ in this action, with a specially-indorsed claim for the same sum as that stated in the balance order, and further interest upon part of that sum. The defence, amongst other grounds of defence, alleged that the action was, in fact, to enforce the balance order of May 7, 1889, and that the plaintiff company was not entitled to maintain such an action.

Renshaw, Q.C., and *Bramwell Davis*, for the plaintiff company.—The plaintiffs are suing on the original debt, and not on the balance order. The balance order is not a judgment, and there is no merger of the original debt: *Ex parte Grimwade*, 17 Q. B. D. 357, 34 W. R. Dig. 14. Moreover, in the present case the calls were made before the winding up, and *Chalk, Webb, & Co.* v. *Tennent*, 36 W. R. 263, is distinguishable.

Warmington, Q.C., and *Butcher*, for the defendant.—This is an action to enforce a balance order, and the case is covered by *Chalk, Webb, & Co.* v. *Tennent*. The plaintiffs cannot sue on the previous obligation to pay these calls, since that obligation is merged in the balance order: *Cambefort* v. *Chapman*, 35 W. R. 838, 19 Q. B. D. 229; *Kendall* v. *Hamilton*, 28 W. R. 97, 4 App. Cas. 504; *King* v. *Hoare*, 13 M. & W. 504; 1 & 2 Vict. c. 110, s. 18; R. S. C., ord. 42, r. 24.

Renshaw, Q.C., in reply, referred to *Ex parte Whinney, In re Sanders*, 13 Q. B. D. 476, 32 W. R. Dig. 11; Companies Act, 1862, s. 120. [KEKEWICH, J., referred to *In re Connell*, 4 W. R. 496.]

March 11.—KEKEWICH, J.—It is objected by the defendant that this is, in fact, an action to enforce the balance order of May 7, 1889, and that the plaintiff company is not entitled to maintain such an action.

In *Chalk, Webb, & Co.* v. *Tennent* North, J., held that such an action was not maintainable. The authorities there referred to show the grounds of his decision. One of those authorities is *Bailey* v. *Bailey*, 32 W. R. 856, 13 Q. B. D. 855. It was there held that an order to sign final judgment under order 14 will not be made where the action is for alimony *pendente lite* payable under an order of the Probate and Divorce Division. In giving judgment the Master of the Rolls said: "It is an old and well-known rule of construing statutes that when a special remedy is given for the failure to comply with the directions of a statute, that remedy must be followed, and no other can be supposed to exist," and he quotes the section of the statute giving the Divorce Court power to enforce its orders. That section is, in substance, the same as section 120 of the Companies Act, 1862, and, by parity of reasoning, an order made by the authority of the latter statute and enforceable thereunder is not a ground of action.

It is urged that in this case the calls were made by the company before the winding up, and that the balance order depends on section 101, and not on section 102, of the Companies Act, as in *Chalk, Webb, & Co.* v. *Tennent;* but section 120 applies to both, and so, therefore, does that decision.

The other authority referred to is *Carpenter* v. *Thornton*, 3 B. & Ald. 52. That case was before the court in the case of *Bailey* v. *Bailey*, and Fry, L.J., sums up the point thus:—"An action at law would lie only upon a legal claim, and an order for the payment of alimony is, pursuant to statute, enforceable only as an equitable, and not as a legal, debt." That ground also, having regard to section 120 of the Act, holds good here.

The plaintiff company then fall back on the original debt of the defendant in respect of calls. But the defendant seeks to apply the principle expounded by Parke, B., in *King* v. *Hoare;* he says:—"The cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher." In my opinion that rule has no application to a balance order, which is matter of record indeed, but does not fulfil the conditions of a judgment.

In *Ex parte Grimwade* a balance order was held not to be a final judgment within the meaning of the Bankruptcy Act, 1883, s. 4 (1), *g*. It does not prevent an executor from retaining his own debt out of his testator's assets, and it cannot be sued upon. It may be used for the purpose of obtaining a writ *ne exeat regno*, but that is because such a writ was a remedy of the Court of Chancery, and is therefore directly within the language of section 120 of the Companies Act, 1862. I do not think that *Chalk, Webb, & Co.* v. *Tennent* is an authority on this point. I think that there must have been something in the case, not disclosed by the report, upon which North, J., refused to give to the plaintiffs leave to amend so as to claim judgment for the debt.

I therefore hold that the plaintiff company is entitled to maintain this action as an action of debt.

Solicitors, *Seal*, for *Wade, Bilborough, Booth, & Co.*, Bradford; *Harper & Battcock.*

(a.) Reported by JAMES H. BAKEWELL, Esq., Barrister-at-Law.

Chan. Div. }
Kekewich, J. } March 7.

In re NATIONAL WHOLEMEAL BREAD AND BISCUIT CO. (LIMITED). (*a.*)

Practice—Company—Voluntary winding up—Petition for supervision order—Amendment of petition by adding prayer for compulsory order—Advertisement—Companies Act, 1862, *General Order, November*, 1862, *r.* 2, *Schedule* 3, *Form* 1—*Companies* (*Winding-up*) *Act*, 1890, *General Rules* 33, 34.

Resolutions were passed to wind up the company voluntarily, appointing a liquidator, and to apply to the court for a supervision order. A petition was presented by a shareholder and the liquidator asking for an order continuing the voluntary winding up subject to the supervision of the court. The petition was subsequently amended by adding a statement that difficulties had arisen, and a prayer, in the alternative, for a compulsory winding-up order.

Held, that the petition must be readvertised.

Petition.

The question in this case was whether a winding-up petition which had been amended ought to be re-advertised.

Resolutions were passed on the 19th of January, 1891, and confirmed on the 18th of February, by which it was agreed to wind up the company voluntarily, and a liquidator was appointed, and, secondly, that an application should be made to the court to continue the voluntary winding up under supervision.

On the 19th of February a petition was presented by a shareholder and the liquidator, asking for a continuance of the voluntary winding up, subject to the supervision of the court. This petition was duly advertized. The directors of the company alleged that the resolutions had not been regularly passed. They therefore refused to allow the voluntary liquidator to take possession of the books, office, or accounts of the company.

The petition was, therefore, amended on the 3rd of March by stating these difficulties, and asking by an alternative prayer that in the event of the court being of opinion that any objection existed to a supervision order, that the company might be wound up compulsorily under the Companies Acts, 1862 to 1890, and that the voluntary liquidator might be appointed provisional liquidator without prejudice to his title of liquidator under the special resolutions, or, in the alternative, that the official receiver might be appointed provisional liquidator.

When the petition came on for hearing an objection was taken that in consequence of the amendments it ought to have been readvertised.

Warmington, Q.C., and *J. E. H. Benn*, for the petitioners.—The petition, as amended, need not be readvertised: General Order, November, 1862, r. 2, Schedule 3, Form 1; *In re Electric and Magnetic Co.*, 29 W. R. 714; *In re The United Bacon Curing Co.*, W. N., 1890, p. 74; Buckley on Companies, 6th ed., pp. 673, 674, 702.

Renshaw, Q.C., and *Macnaghten*, for the company.—The rule now in force as to advertisements is rule 34 of the rules of 1890: Buckley, p. 742, 764. Where the advertisements of a winding-up petition had been headed in the matter of "the Companies Act, 1862," only, Jessel, M.R., refused, although the company consented, to make a supervision order, and directed the petition to stand over with liberty to issue fresh advertisements: *Marezzo Marble Co.*, 22 W. R. 248; Buckley, pp. 672, 673, 675. The amendment is one of substance; many people might be content with a supervision order, who would object to a compulsory order. The special resolutions themselves provided for an application to the court for a supervision order.

Warmington, Q.C., in reply.—It is doubtful whether the new rules—33 and 34—are within the powers of making rules given by the Act of 1890, s. 26, as winding up in that Act means compulsory winding up only.

KEKEWICH, J.—I take it that the intention of the rules for advertising winding-up petitions is, that the petition to be heard is to be advertised—that is to say, that what is advertised and what is heard should be substantially the same petition. There may be slips which require to be corrected, and amendments may be introduced, but if anything affects the substance of the petition it has always been the practice of the court to insist on fresh advertisements. In the case of *Marezzo Marble Co.*, the late Master of the Rolls, who was as well acquainted with the practice as any judge who ever sat on the bench, held that where a petition asking for a compulsory order was intituled merely in the Companies Acts he ought not to make a supervision order, and he directed that the petition should stand over, with liberty to issue fresh advertisements. There he thought something required that it should be made known to the public that he had not got before him the petition which had been advertised. It is the common practice where there is a voluntary winding up to make a supervision order, notwithstanding that the petition only asks for a compulsory order. North, J., seems to have thought in *United Bacon Curing Co.* that it was better to amend the petition; and there is great convenience in making the petition agree with the order, taking care that the petition is in such a form that the order may be drawn in accordance with it, and he thought that no fresh advertisement was necessary. The custom, however, has been not to insist upon amendment, notwithstanding the convenience of it. The reason of the practice is obvious. On a winding-up petition, whether presented by the company, or by contributories, or by creditors, the creditors and contributories may appear and support or oppose the petition. If the petition is for a compulsory order, and then it is asked that a supervision order should be made, the creditors are in no way injured, for they can only insist on a compulsory order if a supervision order would be an interference with their rights, and the contributories would be bound by the special resolutions which authorized the voluntary winding up. In the converse case I do not think the same remark applies. When a petition is presented for a supervision order, the contributories who have assented to that are bound by their assent, and they may oppose a compulsory order as against their interest. They may say that they have a voice in the matter, and that they will not allow it. The creditors, of course, may support a compulsory order although they are not prepared to object to a supervision order. They must have an opportunity of coming in, and I think that the object of the rule would not be attained if I allowed this petition to proceed without fresh advertisements.

The petition must stand over for a fortnight, and be readvertised in the meantime.

Solicitors, *Newson & Dunn; Frederick Bradley.*

(*a.*) Reported by H. C. ROPER, Esq., Barrister-at-Law.

Q. B. Div. (Cave and Wills, JJ.) Feb. 23, 24, 26.

In re BELLENCONTRE. (*a*.)

Extradition—Foreign and English warrants—Description of offence—Embezzlement—Fraud by a bailee or agent—Money intrusted for safe custody—Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *Schedule—Larceny Act,* 1861 (24 & 25 *Vict. c.* 96), *ss.* 75, 76.

In proceedings under the Extradition Acts it is not necessary that the description of the offence in the English warrant should correspond in terms with the description in the foreign warrant. It is sufficient for the purposes of extradition if evidence has been brought against the prisoner in the foreign country establishing a crime by the law of that country, and the same facts establish a crime by English law.

An attorney or agent who has received money from a client on the understanding that he is to invest it when a suitable investment has been found, both attorney and client in the meantime seeking for such investment, has received the money "for safe custody," and, if he misappropriates it, is guilty of an offence under section 76 *of the Larceny Act,* 1861.

Remarks on the English and French criminal law.

This was the argument of a rule *nisi* for a writ of *habeas corpus* directed to the keeper of the Holloway Prison to bring up the body of David Henri Bellencontre, with a view to his discharge from custody.

The prisoner was detained in pursuance of a warrant issued by Sir John Bridge, the chief metropolitan police magistrate, in order that he might be handed over to the French authorities to take his trial for crimes alleged to have been committed by him in France.

The grounds upon which the rule was granted were as follows:—

(1) That the French warrant is the warrant which must be regarded as the one containing the crime for which the surrender is asked. The crime of embezzlement therein is not embezzlement according to English law. The crime of misappropriating money as therein charged is not known to the English law; this warrant is void for uncertainty.

(2) The English warrants of arrest and committal are bad for differing from the French warrant, as also the requisition of the Secretary of State, and the said warrants are bad as differing one from the other.

(3) The warrant of arrest is bad for uncertainty.

(4) The warrant of committal is bad. (*a*) The prisoner has not committed crimes as a bailee or an agent within the meaning of the schedules to the Extradition Acts as construed by the English law. (*b*) The prisoner will be tried in France for embezzlement; he is not committed therefor. (*c*) If part is bad the whole is bad.

The warrant issued by the juge d'instruction of the Civil Tribunal of Bayeux ordered the apprehension of the prisoner "accused of having embezzled (*detourné*) or misappropriated (*dissipé*)" various sums of money "which had been delivered to him in his capacity of notary—crimes provided for and punished by article 408 of the Penal Code."

Requisition was then made by the diplomatic representative of the French Republic to one of her Majesty's principal Secretaries of State for the surrender of the prisoner "accused of the commission of the crime of fraud by a bailee within the jurisdiction of the French Republic." An order was thereupon made by the Secretary of State, directed to the chief magistrate of the metropolitan police courts, signifying that such requisition had been made, and requiring him to proceed in conformity with the provisions of the Extradition Acts.

The prisoner was accordingly arrested and brought before the chief magistrate, who heard the evidence, and committed the prisoner to Holloway Prison in order that he might be extradited; the crime stated in the warrant being "fraud by a bailee and frauds as an agent."

The evidence laid before the chief magistrate consisted of depositions taken in the French court relating to nineteen charges.

Charge 3 stated that on October 7, 1889, one Malassis left with the prisoner in deposit a sum of 6,000 fr., that afterwards the prisoner informed Malassis that he had an investment for 15,000 fr., whereupon Malassis at different times handed to the prisoner various sums of money amounting in the whole to that sum, the prisoner giving him receipts and promising to invest for him the whole 15,000 fr.

Charge 4, stated that the prisoner informed one Lefortier that he had an investment for 500 fr., whereupon Lefortier, on September 2, 1890, gave him that sum and he took a receipt from him.

Charges 17 and 18 stated that a sum of 10,700 fr., belonging to the sisters Guilbert as successors to their late mother, and being the proceeds of sale of her land, which had been sold for the purpose of division, was left with the prisoner to be kept by him until an investment should be found. The two ladies eventually found an investment, and thereupon wrote to ask the prisoner to invest the money, but he had absconded.

The prisoner, it was alleged in these several charges, did not in any of these cases invest the sums of money which had been intrusted to him, nor did he ever repay them to the persons from whom he had received them.

Article III. of the English treaty with France of August 14, 1876, includes amongst the crimes for which extradition is to be granted:—"18. Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any Act for the time being in force."

Feb. 23, 24.—*Sir Edward Clarke, S.G.*, and *Henry Sutton* (*Sir R. E. Webster, A.G.*, with them), showed cause.—The words in which the prisoner's offence is described in the French warrant are no doubt vague, but if an offence is disclosed that is sufficient: *R.* v. *Jacobi*, 46 L. T. N. S. 595n; *Ex parte Piot*, 48 L. T. N. S. 120, 31 W. R. Dig. 78; *Ex parte Terraz*, 27 W. R. 170, 4 Ex. D. 63. If the English warrant differs from the French warrant that is inmaterial. The terms in which an offence is described in one language do not generally admit of precise translation into another. The evidence before the magistrate was sufficient to justify the committal of the prisoner for the crimes specified in sections 75 and 76 of the Larceny Act, 1861. It showed that he had misappropriated money which was in his hands on deposit. That was so in charges 3, 17, and 18, for the prisoner had no authority to reinvest the money without further instructions. This distinguishes the case from *R.* v. *Cooper*, 22 W. R. 555, 2 C. C. R. 123; *R.* v. *Tatlock*, 2 Q. B. D. 157, 25 W. R. Dig. 91; *R.* v. *Newman*, 30 W. R. 550, 8 Q. B. D. 706, and brings it precisely within *R.* v. *Fullagar*, 41 L. T. N. S. 448. The prisoner can be tried in France only for the crime proved by the facts on which the surrender is grounded: Extradition Act, 1870, s. 3 (2). He will not be prejudiced by the particular name which the French law gives that crime. The only question is, was the

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

dence before the magistrate of the commission of an extradition crime? If so, he was justified in committing, and this court will not interfere. The fact that some of the charges do not contain evidence of a crime is immaterial: *R.* v. *Maurer*, 31 W. R. 609, 10 Q. B. D. 513.

J. P. Grain and *Eldridge*, in support of the rule.—The order of the Secretary of State and the warrant of the magistrate are grounded upon the information supplied by the authorities of the applying country, and ought to be confined to the offence alleged by that country. The charge laid against the prisoner in France is embezzlement, and it is with that crime that he should have been charged here. If extradited he will be tried in France for embezzlement under article 408 of the Code, and he cannot be committed here for any other offence. He is committed for fraud by a bailee, and there is no evidence that he was a bailee of anything; there was nothing which he had to return *in specie:* Stephen, Dig. Crim. Law, art. 285. He was given these sums of money with a view to his investing them. For the same reason he did not misappropriate money intrusted to him for safe custody. *R.* v. *Cooper* and *R.* v. *Newman* are directly in point.

They also referred to the judgment of Drummond, J., in the *Lamirande Extradition case* (*Canada*), Clarke upon Extradition, 3rd ed., pp. 113, cclii.

Cur. adv. vult.

CAVE, J.—In this case cause was shown against a rule which had been obtained for a writ of *habeas corpus* to discharge the prisoner Bellencontre, on the ground, mainly, that it did not appear that he had committed any crime for which he could be delivered over to the authorities for trial in France. Two points were made on his behalf—one of them technical, the other substantial. The first, or technical point, had reference to the forms of the warrants—the French warrant, and the order of the Secretary of State, and the warrant granted by Sir John Bridge; and it was contended that one or all of them were not in the proper form. I am of opinion that there is nothing in that ground of objection. When we come to look at the French warrant we find that it states, in effect, that the prisoner was in nineteen cases guilty of what the French law terms *abus de confiance*, or fraudulent misappropriation of money which had been deposited with him in his character of notary. That seems to me to state a perfectly good offence under article III. No. 18 of the Extradition Treaty with France. The warrant of the Secretary of State naturally translates the term into the corresponding terms in our law, and describes the charge as one of fraud by an agent or bailee. That, no doubt, is somewhat wider than the terms of the French warrant, which specifies fraudulent misappropriation by a notary. But I see no objection to it on the ground of its being wider than the French warrant. All that is necessary is to call the attention of the magistrate to what he is required to do in the case. And it is enough that the warrant of the Secretary of State draws his attention to a particular crime under the Act—that is, fraud by a bailee, which expresses in a general form what is put more specifically in the French warrant. The warrant which Sir John Bridge granted also seems to me perfectly good. "Fraud by a bailee" is the phrase used in No. 18, and it is for the magistrate to inquire whether the evidence shows such a fraud by a bailee as would be cognizable in an English court of justice. Now, in order to do that, he is to consider the law with respect to frauds by bailees and the evidence produced before him. In this case he has done so, and has arrived at the conclusion that there was evidence of fraud by a bailee who was acting as an agent. It appears to me that this is the proper mode of expressing the result of the inquiry, and that there is no ground for saying that there is any defect or informality in the warrants which would justify us in discharging the prisoner.

Then comes the substantial point in the case, which is that the evidence laid before Sir J. Bridge ought not to have satisfied him that a crime punishable by English law had been committed by the prisoner. Now when we come to deal with that point we are at once struck by the superiority of the French criminal law over our own. We have in the French Code an article which gives a clear and comprehensive description of the offence which is made punishable. It is *abus de confiance*, or fraudulent misappropriation by any person who has been intrusted with property or money—a wide and general definition which embraces many cases which are not within our criminal law on the same subject. Our law, unfortunately, instead of being in the form of a code, or even of a well-drawn consolidation Act, is a thing of shreds and patches, and we have to look to different portions of the law in order to see to what extent a person intrusted with money or property is made criminally responsible for a fraudulent misappropriation of it. In the case of a bailee he is made responsible where the article intrusted to him is one which he has to return or redeliver to someone *in specie*, but he is not made so responsible when he is at liberty, or is bound, to convert it into something else before the return or redelivery is to be made. That being so, the charges against the prisoner do not show an offence of that nature, and therefore that particular provision of our law is out of the question. Then there are two sections (sections 75 and 76) in our Law of Larceny Consolidation Act (24 & 25 Vict. c. 96) which make provision for the punishment of fraudulent bailees of a particular class. Where a man is a bailee of a particular class, a banker, merchant, broker, attorney, or other agent, and receives property with a direction in writing how to dispose of it, and misappropriates it, then, under section 75, he is punishable. But then the law requires that which the French law does not require—a direction in writing, and there being no such direction in writing in any of these cases, the first part of that section is not applicable; and, moreover, the second part is not applicable because it does not include money, which was the subject of the offences charged against the prisoner. Then section 76, which is the only other enactment which has any application to the case, provides that any banker, merchant, broker, attorney, or agent who shall be intrusted with any property (interpreted in section 1 of the Act to include money) for safe custody, and who shall fraudulently appropriate it to his own use, shall be guilty of an offence. This, again, is obviously very much narrower than the provision in the French Code, because it does not apply to all bailees, but only to bailees of the kind there specified. There is another important difference between this enactment and the French law—that the money must have been intrusted to the bailee "for safe custody" and if intrusted to him for any other other purpose it would not be within the enactment. Our criminal law, therefore, is much narrower on these points and far less clear than the law of France is. We have, however, to consider whether the facts given in evidence before the magistrate justified him in coming to the conclusion that there was a *primâ facie* case against the prisoner of an offence against the English law. Now, on that matter I have gone carefully through the nineteen charges which have been brought before us as made against the prisoner, and

I find that as regards the third, the fourth, the seventeenth, and the eighteenth charges there is a *primâ facie* case of the commission by the prisoner of what would be a crime according to section 76. It by no means follows that the prisoner must necessarily be convicted. All that is necessary is that there should be evidence to justify his committal in an English court of justice. That being so here, it follows that he may rightly be surrendered to be tried on these charges in France, that the warrant for his committal for surrender is good, and that the writ of *habeas corpus* ought not to go.

It is objected that the term used in the French warrant is "embezzlement," and that it cannot be embezzlement by English law, as the prisoner was not a clerk or servant. That, however, is not the term used in the French warrant; that is the term made use of to translate it, it might with equal propriety have been translated "fraudulent misappropriation," and then the objection would not arise. Our law gives the name "embezzlement" to fraudulent misappropriation by a clerk or servant, and so the term came to be limited in its signification in that sense; but that is not really the only meaning of the word; the thing exists in other cases than those of clerks and servants, and it is punishable in certain cases under sections 75 and 76, to which I have referred.

Another point which was taken was that, inasmuch as Sir John Bridge has committed the prisoner upon all these charges, the warrant, not being good as to all of them, is bad as to all; that is a point which I am unable to understand. There is the committal of the prisoner upon a warrant which describes him as having been guilty of "fraud by a bailee and frauds as an agent." It does not specify in which of the nineteen cases the evidence had satisfied Sir John Bridge; it seems to me that there was not evidence that should have satisfied him except in the four cases I have named. But the only object of specifying those cases as against the others is in order to give the prisoner the right, if he wishes to make use of it, to object to being tried in France for the other fifteen offences, on the ground that those are not in themselves crimes for which he could have been extradited. That objection he will have the opportunity of taking; but I do not see that there is any reason why the warrant, which is in perfectly general terms, is not to be held by us to be good in respect to those cases as to which there is sufficient *primâ facie* evidence to go upon. For that reason it seems to me that that technical objection, like the other, fails, and that consequently the rule ought to be discharged.

WILLS, J.—I am of the same opinion. As to the technical objections which have been referred to, there seems to be really nothing in them, and I do not think they are worth serious discussion. The substance of the Extradition Act, 1870, seems to me to require that the person whose extradition is sought should have been accused in a foreign country of something which is a crime by English law. If those two conditions are satisfied, that is, if facts have been brought against him in a foreign country establishing a crime by their law, and if those facts at the same time establish a crime by our law, those, as it seems to me, are circumstances under which the extradition ought to be granted. We cannot expect that the definition or description of the crime when translated into the technical language of the two countries respectively should exactly correspond. It cannot be so, because the definitions have grown up under perfectly different circumstances, and if you were to require an exact correspondence in a mere matter of definition there would be great difficulty in laying down what crimes could be made the subject of extradition. Now this has been, as it seems to me, amply provided for by the schedule to the Act of 1870 and by article III. of the treaty, which describe what are the various extradition crimes. In this case the prisoner has been accused of a number of acts which clearly fall within article 408 of the French Code, and, therefore, would be a crime in France, and which clearly fall under No. 18 in article III. of the Treaty of Extradition. It is either fraud by a bailee, or fraud by an agent (I do not care which term you use), made criminal by an Act in force in England. Now I cannot help saying that I share the feeling of humiliation which my learned brother has expressed at being obliged to confess to a neighbouring country that a great part of the atrocious things which have been done by this man, if the evidence is to be relied upon, are not punishable at all by English law. It does seem an extraordinary thing that a man, being intrusted with money by other people for investment, should be able to put it into his own pocket fraudulently and dishonestly and yet commit no crime punishable by English law. But then, fortunately, we have section 76 of the Act 24 & 25 Vict. c. 96, which says that whosoever being, amongst other things, an attorney or agent, and intrusted with the property of any other person for safe custody, commits frauds in respect of it shall be punishable. There is no doubt at all that Bellencontre answered this description of an attorney or agent as nearly as any person could do. There is no doubt also that he was intrusted with property within the meaning of that section, because he was intrusted with money, and the definition clause makes money one of the articles which are comprehended under property.

Then one question remains—Was he intrusted with the money "for safe custody"? Now I cannot doubt that this section, which deals with property of every description, including money—and money is probably the most common subject of frauds of this kind—was intended to have a real and substantial operation with regard to money that was intrusted to, amongst other people, merchants, brokers, attorneys, or agents.

Now to hold, as has been suggested, that that section applies only to money which is put in a bag and given to a man to keep in a drawer, would be to my mind simply a *reductio ad absurdum*, simply because, in the business of this and every other civilized country, no such process as that ever takes place; and the probability is that the man who did carry out the duty of keeping money intrusted to him for safe custody in that way would be said, if it were lost, not to have taken reasonable means to secure its custody. I cannot doubt that the case is fully within the meaning of that section if the money is intrusted to a man under circumstances which would make it his duty to pay it to a special account at a bank, or to keep it in any other reasonable way in which men of business ordinarily do keep their money, so as not to have those specific coins, but to have the equivalent at call when demanded. It seems to me that *Reg.* v. *Fullagar* is on all fours with some portion of the present case in that respect, because there the money which was held to be the subject of safe custody in the hands of the solicitor who received it was paid over to him on behalf of a client, to whom he wrote announcing that he had it, and asking instructions for investment. In the present instance, in Nos. 3 and 4, which my learned brother has dealt with, my opinion, and, I believe, his is, that, with regard to the sum of 6,000 fr. mentioned in the evidence, there is evidence (I do not say conclusive evidence) that that sum was originally intrusted, not for investment, but for safe custody, and that there had been, with respect to that portion of the 15,000 fr., no change of the conditions under which it was held. Therefore, that seems me to fall within the principle of *R.* v. *Fu*

With regard to the other case, that of the Guilberts, there is evidence that he held the money for investment in this qualified sense only, that he, like themselves, was to look out for an investment and communicate with them, and ascertain if it was satisfactory. The fact that one sister found an investment, and the other had been looking out for one, seems to me to be evidence that there was no definite trust to the agent to invest without further consultation with them, and that, therefore, until any further direction should be given, it was held for safe custody and for nothing else.

With regard to those offences, it seems to me that there was distinct evidence to go to the jury, and therefore evidence enough to justify the committal by the magistrate for extradition. I think also that the objection that because some of the charges are not within the extradition treaty, therefore the warrant is bad, cannot be at all maintained.

It seems to me the warrant is general, it is a committal for the crimes described generally in No. 18, and it is sufficient if there are facts which tend to establish that these crimes have been committed. The warrant is statutory in its form, and is not at all to be construed as a common law document in this country, and it is not necessary in my judgment that there should be anything like the same particularity that there would be in respect of the warrants of committal to the gaols of this country under ordinary circumstances.

I am of opinion, therefore, that the writ ought not to issue.

Rule discharged.

Solicitor for the Crown, *Solicitor to the Treasury.*

Solicitor for the prisoner, *Solomon Myers.*

IN BANKRUPTCY.

Q. B. Div. (Cave and Vaughan Williams, JJ.) } Jan. 21.

Ex parte POPPLETON (No. 2).
In re LOCK (No. 2). (*a.*)

Bankruptcy—Reputed ownership—Iron safes—Custom of trade—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

A custom exists amongst the manufacturers of iron safes to send safes to retail ironmongers upon sale or return or to sell as agents, so as to exclude the doctrine of reputed ownership.

Appeal against an order of his Honour Judge Owen in the county court at Cardiff giving effect to the findings of a jury upon an issue directed to be tried by them.

The bankrupt was a retail ironmonger at Cardiff, and amongst other articles he dealt in iron safes.

On the 15th of July, 1889, Messrs. Perry & Co., safe manufacturers, sent to the bankrupt six safes on sale or return, which remained in the possession of the bankrupt until his adjudication on the 25th of February, 1890.

A motion was subsequently made in the county court by Messrs. Perry & Co. for the delivery up of these safes, which was resisted by the trustee in the bankruptcy on the ground that the goods were in the reputed ownership of the bankrupt within the meaning of section 44 of the Bankruptcy Act, 1883.

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

The county court judge directed an issue to be tried before a jury in the following form: (1) Whether there was at the time when the safes in question came into the possession of the bankrupt a custom amongst the manufacturers of, and wholesale dealers in, iron safes to send safes to retail dealers upon sale or return; (2) Whether that custom was so well established that it was known, or ought to have been known, to persons giving credit to the bankrupt in the way of his trade.

The jury answered both the above questions in the affirmative, and from the order of the county court judge giving effect to those findings the trustee now appealed.

Sydney Woolf, Q.C., and *Kisch*, for the trustee.—The two questions properly raised the issue which had to be tried, but there was no evidence of a custom so well established that it was known, or ought to have been known, by persons giving credit to the bankrupt. The principle governing cases of this kind was laid down in *In re Horn, Ex parte Nassan* (3 Morrell's Bankruptcy Cases, 51). Was the custom so notorious that anyone making inquiry of persons cognizant with the trade might ascertain it to be the custom?

They also referred to *Ex parte Powell, In re Matthews*, 24 W. R. 378, 1 Ch. D. 501; *Ex parte Wingfield, In re Florence*, 27 W. R. 346, 10 Ch. D. 591; *Ex parte Watkins, In re Couston*, 21 W. R. 530, L. R. 8 Ch. App. 420.

Jelf, Q.C., and *Plumptre*, for Messrs. Perry & Co., were not called upon.

CAVE, J.—This appeal must be dismissed. The foundation of the order and disposition clause in bankruptcy is that where a man is in possession of goods which apparently are his own, and which a person having an elementary knowledge of the trade which he was carrying on, would have a right to suppose were his own, and may be taken to have given a man credit upon that supposition, it is only right that if the true owner allows a man to have possession of his goods under circumstances which induce others to trust him, that he should be estopped from coming forward and insisting that the goods were his, and taking from the creditors a part of that which they looked to as being the fund out of which their debts were to be paid. This is open to the qualification, however, that it is not enough for a man to say that he was not aware of the custom in the particular trade, but in order to get out of a custom in the trade it must be shown that it had not acquired such an amount of vogue as to be generally known by persons conversant with the particular trade which the debtor was carrying on. In this case the debtor was carrying on a trade of retail ironmonger, and amongst other things which he had in his possession as part of his stock-in-trade were these six safes, which did not belong to him, but belonged to the present respondents. The question was whether there was any mode of dealing carried on by retail ironmongers with respect to safes, which was so generally known in the business of an ironmonger that the persons who dealt with him would not be justified in coming to the conclusion that those safes were his. The present respondents said there is a custom of allowing retail ironmongers to have safes upon sale or return, and they produced a number of witnesses who gave evidence to that effect, and they made out an extremely strong case.

Then came a number of witnesses who were called for the trustee, but the case which they made out really was the case of the respondents, because what they said was that they did not know anything about sale or return, but they knew that it is the custom of

several manufacturers to send safes to retail ironmongers to be sold for them, and the retail ironmonger who receives such safes is an agent for sale. The distinction may be no more than a mere verbal distinction, and it is not very important to ascertain which is the more correct way of stating the proposition. I am not at all sure that the trustee's witnesses are not more correct in saying that it is a species of agency, not a species of sale or return, but, however that may be, what is clear is that, according to the evidence of the trustee's witnesses, manufacturers are in the habit of sending their safes out to retail ironmongers to be sold for them, and that they themselves, at all events, are so conversant with that practice that the mere sight of a safe in a retailer's shop would not lead them to conclude that the safe belonged to him.

Now it is not necessary to prove a custom in the sense of proving that retail dealers never have safes on any other terms than these. It is quite sufficient if it is so usual as to be generally known, because if it is known that the safes may belong to somebody else, then whether they do or do not is immaterial. The person who sees them has no right to conclude from the appearance of them in the shop that they necessarily belong to the retailer, when it is quite as likely, or, at all events, not unlikely, that they belong to the manufacturer. As long as there is a practice of a sufficiently general nature, well known to persons conversant with that trade, then those persons would not, as prudent persons, come to the conclusion that the safes belonged to the retailer when they knew perfectly well they might belong to somebody else. The evidence here, both on the one side and the other, pointed to the same result, and the jury came absolutely to the conclusion which everything in the case warranted, that it was the practice that safes were sent out to retail dealers which did not belong to those retail dealers, and that, consequently, a person who knew of that practice would never for a moment come to the conclusion, because he saw a safe in a retailer's shop, that therefore that safe belonged to him.

There is a second point which also was left to the jury, and that was whether, assuming that there was such a practice, it was known to the persons who were ordinarily conversant with the business of a retail ironmonger. With regard to that, the evidence again was all one way. There was the evidence of one or two—one I think would be quite enough—but there was the evidence of one or two wholesale ironmongers, who were persons of the class who, of course, would be acquainted with the ordinary business of a retail dealer, because they deal with them, and they say, "We know of this mode of dealing; we ourselves are not manufacturers of safes, but still we do know something of the practice of retailers, and we do know that the manufacturers are accustomed to let retail dealers have safes which do not belong to them. We do not ourselves pursue that custom because we are not manufacturers of safes, and do not retail them for cash; but we know of the existence of this." This is all the stronger, because if they are not manufacturers themselves, then the fact that they are aware what dealers do, shows that the knowledge of this practice is not confined to retail ironmongers and manufacturers of safes, but is generally known to those persons who are generally conversant with the business of retail ironmongers. That being *primâ facie* evidence to show that the practice was known to those who are conversant with the business, not one tittle of evidence was called on the other side to show that it was unknown. The jury were plainly bound as reasonable men to draw the inference that the practice was generally known, and that a person conversant with the trade of a retail ironmonger would not come to the conclusion, because he saw a safe in a retail ironmonger's shop, that it belonged to the man who was carrying on the business. The case was tried in Cardiff, a place with a very large number of establishments, and if this were not generally known to persons conversant with the business of retail ironmongers there was any number of them in the place ready to be called, but not one single person was put into the box for the purpose of contradicting it, and the inference I should draw from the way in which the questions were put to the witnesses who were called for the defence would be that all of them were thoroughly well aware that there was a practice on the part of manufacturers of safes to let retail ironmongers have safes which were not theirs, but which they had only got for the purpose of selling. I therefore come to the conclusion that the jury were abundantly justified in the conclusion they came to, and that any other conclusion would have been quite wrong, and that there was no ground at all for this appeal.

VAUGHAN WILLIAMS, J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the trustee, *Kisch & Wake*, for *D. Davis*, Birmingham.

Solicitors for the respondents, *Fowler & Langley*, Wolverhampton.

House of Lords.

From C. A. (England). Aug. 7, 1890.

VICKERS, SON, & CO. v. SIDDELL. (a.)

Patent—Specification — Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 5, *sub-sections* 3, 5; *s.* 9, *sub-section* 1; *s.* 26, *sub-section* 3.

Where the complete specification required by the Patents, Designs, and Trade-Marks Act, 1883, *does not conclude with a distinct statement of the invention claimed, as directed by section* 5, *sub-section* 5, *of the Act, it is not fatal to the validity of the patent.*

Decision of the Court of Appeal *affirmed.*

This was an appeal from an order of the Court of Appeal (Cotton, Fry, and Lopes, L.JJ.), reported 39 Ch. D. 92, 37 W. R. Dig. 133, restraining the appellants from using the respondent's invention.

The facts and arguments sufficiently appear in the judgment of Lord Herschell.

Section 5, sub-section 3, of the Patents, Designs, and Trade-Marks Act, 1883, is as follows:—"A provisional specification must describe the nature of the invention, and be accompanied by drawings if required." Sub-section 5.—"A specification, whether provisional or complete, must commence with the title, and in case of a complete specification must end with a distinct statement of the invention claimed."

Section 26, sub-section 3.—"Every ground on which a patent might at the commencement of this Act be repealed by *scire facias*, shall be available by way of defence to an action of infringement and shall also be a ground of revocation."

Moulton, Q.C., and *W. E. Bousfield* (*A. J. Ashton* with them), for the appellants.

(a.) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

Sir R. Webster, A.G., and *Aston, Q.C.* (*W. N. Lawson* with them), for the respondents.

The House took time for consideration.

August 7th, 1890.—Lord HALSBURY, L.C.—The questions of law as distinguished from those of fact which have been suggested in the argument of this case have an importance beyond the decision on the rights of the parties to this litigation, and the first is the question of the remedy if the provisional specification does not describe the same invention as the complete specification.

It is suggested that the new machinery of the comptroller and the examiner has superseded the power of raising any objection to the conformity of the provisional and the complete specification. I am unable myself to take that view. I think it is an essential condition of a good patent that the invention described in the provisional should be the same as that in the complete specification, and I think the 3rd sub-section of section 26 preserves this as a ground upon which an action for the infringement of a patent right might be defended and a ground upon which a patent might be revoked. But upon the comparison of the two in this case I am satisfied that what the patentee meant in one he meant in the other. To my mind it is impossible to doubt that the real invention contemplated by both was the same thing, and obscurely as they are both worded I think the objection fails.

The objection that no distinct claim is made is one of form only, and I think the Legislature did not intend to make the direction, which undoubtedly the Act contains, a condition upon the non-compliance with which the patent should be void. There is no trace of any such intention in the statute, and there does not seem any good reason why it should be inferred from the general policy of the statute. On the contrary, the questions of mere form, I think, were intended to be dealt with under the new machinery provided.

Upon the facts of the case, I confess I have been unable to entertain any doubt. The problem to be solved by the inventor, which it appears to me the inventor in this case has successfully solved, was how to turn large forgings. He has invented a simple, useful, and easily manageable apparatus for accomplishing this object. It may be quite true that everyone knew the use of an endless chain and of a ratchet before, but it is clear to my mind that, in the first instance, everybody acquainted with the subject thought that the patentee's was a new invention, and however old the elements of the apparatus, the combination was new. One cannot but see that the first objection raised by his former employers, though abandoned at your lordships' bar, namely, the contention that they had themselves invented it, is the strongest possible proof of what they thought about it, and they certainly were persons likely to know and appreciate whether the apparatus was new. Later on they agreed to assist the patentee in getting his patent if he would consent to their using it without paying him for the use of it. And, looking at the practical knowledge possessed by these gentlemen, I regard their conduct in this matter as being quite as important to the case of the patentee as the evidence of Dr. Hopkinson himself.

Neither the Creuzot nor the Abouchoff arrangement seems to me to touch the real point in this case, and though the obscurity which I have referred to before in the language of the specification brings it dangerously near Whitworth's patent of 1875, on the whole I am satisfied that no real anticipation of the patent has been proved, and I therefore move your lordships that this appeal be dismissed.

Lord HERSCHELL.—This is an action brought by the respondent against the appellants in respect of the infringement of a patent, dated the 20th of May, 1885, for an alleged invention of "an improved mechanical appliance for working or operating on large forgings in iron and steel." The defendants did not deny that they had infringed the patent, but impeached its validity on the usual grounds—viz., that the alleged invention was not new, and that it was not a fit subject-matter for a patent. They further alleged that it had been improperly obtained from them by the plaintiff, who was in their employ, and that he was not in truth the inventor. This latter point, although strenuously insisted upon at the trial, was abandoned on the appeal to your lordships' house, the appellants submitting to that extent to the judgment against them.

The objections of want of novelty and subject-matter cover to some extent the same ground, but it will be expedient to deal with them as far as possible separately. The invention, so far as we are concerned with it in this part of the case, consists of an apparatus for turning heavy forgings, composed of a wheel and endless chain, the wheel being internally toothed, and having a ratchet working in it, by means of which the wheel is caused to rotate, and the forging, which rests in the endless chain, is thus turned from time to time to the extent desired. It is admitted by the respondent that the elements which form this combination are all old. On the other hand, the appellants admit that the combination was never in use prior to the date of the patent. But they allege that to combine these well-known elements into the apparatus claimed needed no invention, and that it is, therefore, not proper subject-matter for a patent. Forgings, they say, had long rested in an endless chain; the idea of turning such forgings by turning the wheel over which the chain passed was not a new one, and a ratchet working in teeth was a well-known device for causing a wheel to rotate to the desired extent. All this, I think, cannot be denied. But the result is an apparatus of an extremely simple character, which possesses the advantage of being easily moved from place to place, and applied wherever wanted. And the question remains, whether this mode of dealing with forgings which require to be gradually turned was so obvious that it would at once occur to anyone acquainted with the subject, and desirous of accomplishing the end, or whether it required some invention to devise it. There is no doubt about the law applicable to such a question, though it is often difficult to apply it to the circumstances of a particular case, and its application is, perhaps, most difficult when the alleged invention consists of a new apparatus combining known elements. If the apparatus be valuable by reason of its simplicity, there is a danger of being misled by that very simplicity into the belief that no invention was needed to produce it. But experience has shown that not a few inventions, some of which have revolutionized the industries of this country, have been of so simple a character that when once they were made known it was difficult to understand how the idea had been so long in presenting itself, or not to believe that they must have been obvious to everyone.

In considering how the question your lordships have to answer ought to be determined, I think it is important to see what steps had previously been taken to accomplish the same result as is attained by the alleged invention. Down to a comparatively recent period it had been the practice to turn the forgings by handspikes, a process which not only involved much manual labour, but was a source of some danger to those employed. To get rid of these evils two devices had been adopted, which are called

in the argument the Abouchoff and the Creuzot. In the former of these the forging was turned by a hook, suspended by a bar and chain, being fixed in one of the links of the endless chain in which the forging rested, so that, the link being held fast, the forging as it descended was rolled round. The objections to this device are pointed out in the evidence of Dr. Hopkinson, and, I think, are substantial. Mr. Anderson, who made the crane for the Abouchoff works, and was experienced in such matters, was called as a witness for the defendants. It appeared on his cross-examination that he had written to the plaintiff's solicitors in these terms:—"Mr. Siddell's arrangement seems different in every way, except that the lowering of the forging supplies the power necessary to rotate it. I will give evidence if needed, though I would rather not." The opinion thus expressed, and the fact that the plaintiff's apparatus, which I am satisfied is more advantageous than that employed at the Abouchoff Works, was not adopted there, appear to me to afford some evidence that it was not so obvious as is suggested by the appellants. The Creuzot apparatus, which was free, no doubt, from the objections urged against the Abouchoff, was of a more elaborate character than the plaintiff's, and could not be so readily moved and applied at the different parts of the works. Beyond these two no other plan appears to have been successfully adopted, and it strikes me as very important that the defendants, who were erecting new machinery, and, of course, knew that some means must be applied for turning the forgings, used for a time, in spite of its disadvantages, the old method of handspikes, and were not at once prepared with any mechanical device to substitute for it, and ultimately, but not until after the plaintiff's invention, made use of the apparatus now in question. I will not dwell upon the various experiments made by the defendants before they took this course. It is suggested that these had their origin in the peculiar position of the defendants' works at the time, though the explanation does not appear to me to be altogether sufficient. It is material, however, to note the manner in which the defendants, who, it must be remembered, were thoroughly conversant with the subject, dealt with the plaintiff's patent in the first instance. They offered to take a licence for a nominal consideration, and to help him to enforce his patent right as between himself and the general public, provided it was done without prejudice to their interests; and they alleged that the apparatus designed by the plaintiff had been improperly obtained from their drawings; but they did not suggest at the outset that it was no invention at all, as the idea was one which would occur at once to any mechanic whose attention was directed to the subject.

After a careful consideration of all the arguments presented by the learned counsel for the appellants, I find myself unable to differ from the conclusion arrived at by the courts below, that the apparatus of the plaintiff was a new invention and a fit subject-matter for a patent, though I admit that the case is near the border line, and that no great exercise of the inventive faculty was required for its production.

I need not elaborate my reasons for thinking that the invention was a new one; they will be obvious from what I have already said in relation to the objection dealt with. It does not appear to me to have been anticipated either by the Abouchoff or Creuzot apparatus. But the patent is said to be open to the charge of want of novelty on another ground. One modification of the plaintiff's invention, though not that infringed by the defendants, with which alone we have hitherto dealt, is said to have been anticipated by Whitworth's patent of 1875. In order to establish this the appellants maintained that the arrangement of the adjustable clip or ratchet is claimed by itself, and not as part of the combination described in the letterpress in connection with it. They rely, in order to make good this contention, on the statement in the specification, that "the appliance as shown in figures 1 and 2 on sheet 1 can also be used in combination; in fact, each arrangement of appliance can be used, either separately or combined, for the purpose of lifting, slinging, or turning over the ingot or forging when in the furnace, under the press or hammer, or when being otherwise operated on." The specification is certainly not a model of clearness or precision. But I do not think the language has the effect contended for. And I have come to the conclusion that the patent is not bad by reason of any of the modifications of the invention claimed by it having been anticipated by Whitworth's patent.

Two points made on behalf of the appellants remain to be considered. It is said that the complete specification goes beyond the provisional in the invention which it discloses, and that the invention described in the complete is not substantially the same as that which is described in the provisional specification. It is to be observed that under section 9 (1) of the Act of 1883 the comptroller is bound to refer both specifications to an examiner, for the purpose of ascertaining whether this is the case, and, if the examiner reports that it is not, the comptroller may refuse to accept the complete specification until it has been amended to his satisfaction. The comptroller must, therefore, have been satisfied in the present case that the two specifications did substantially describe the same invention. But I will assume (and I am not to be understood as at all indicating a contrary view) that, notwithstanding this, the old objection of want of conformity between the provisional and the complete specification is still open. The provisional specification "must describe the nature of the invention," the complete "must particularly describe and ascertain the nature of the invention, and in what manner it is to be performed." It is obvious, therefore, that the former may be much more general and less detailed in its terms than the latter. It is enough if the nature of the invention is conveyed by it to the reader. It is alleged by the appellants that the particular apparatus which is in controversy in this action is to be found described in the complete specification only, and that there is no reference to it in the provisional. This latter is most clumsily framed, but I think the scheme of turning the crane wheel, over which the endless chain passes by means of a ratchet, and so causing the forging to rotate, does sufficiently appear upon the face of it.

The last objection taken to the patent is that the complete specification does not "end with a distinct statement of the invention claimed," as required by section 5, sub-section (5), of the Act. The Act does not provide that if this requirement is not complied with the patent shall be void, and I think it impossible to imply any such condition. There is no more warrant for doing so in this case than in the case of non-compliance with any other of the provisions of the section. The provision which immediately precedes that in question requires that a specification should "commence with the title." It could hardly be gravely contended that if the comptroller accepted a specification where the title did not occupy the first place the patent granted ought on that account to be held void. I need not detain your lordships further upon this point, as it was fully dealt with, and, to my mind, satisfactorily dis[illegible] of, by the learned judges in the Court of App[illegible], as I do, with their view of the law, [illegible]ry to express any

opinion whether the specification did end with a distinct statement of the invention claimed, within the meaning of the statute. I should certainly not recommend it as an example to be followed.

Lord MACNAGHTEN.—I concur.

Lord MORRIS.—I have had the advantage of reading the judgment which has just been delivered by Lord Herschell, and I entirely concur in it.

Order appealed from affirmed. Appeal dismissed, with costs.

Solicitors for the appellants, *Cattarns, Jehu, & Co.*, for *Younge, Wilson, & Co.*, Sheffield.

Solicitors for the respondent, *J. H. Johnson, Son, & Ellis.*

Privy Council.

Dec. 19.

JENOURE *v.* DELMEGE. (*a.*)

(*On appeal from the Supreme Court of Jamaica.*)

Libel—Misdirection—Privilege—Onus probandi.

Wherever a communication is privileged, it is not necessary for the defendant in an action for libel to prove bona fides: *the* onus *is on the other side to show malice.*

There is no distinction in this respect between different classes of privileged communications.

Where a jury was told that the existence of privilege depended on their finding that the defendant honestly believed his statement to be true,

Held, a misdirection.

This was an appeal by special leave from an order (July 26, 1888) of the Supreme Court of Jamaica, by which an order *nisi* for a new trial was refused, except upon one of the grounds of the application; and also from an order (September 5, 1888) discharging the order *nisi*.

The action was brought by the respondent to recover £500 damages for a libel contained in a letter by the appellant reflecting on the conduct of the respondent, a medical man.

The appellant pleaded that he was a justice of the peace for the parish of Portland, denied the publication of the libel, and pleaded, in the alternative, that the occasion was privileged, that the letter was written *bonâ fide* and without malice and in his capacity of a justice of the peace, and he also pleaded justification.

Verdict for the respondent for £50. Judgment entered for that amount and costs.

The order *nisi* for a new trial was granted on the ground of misdirection, the learned judge having left the question of privilege to the jury.

Henn Collins, Q.C., and *Montague Lush*, for the appellant, argued that a new trial should have been granted.—The judge should have directed the jury that the occasion was privileged, either because the inspector of constabulary was the person to whom the appellant ought to have published the letter written in his capacity of justice of the peace, or because he honestly believed he was the proper person. The judge ought to have decided the point of privilege for himself, and not left it to the jury, with the preliminary question whether the appellant honestly believed that the statements in his letter were true. The jury should have been directed that in order to succeed the respondent must have proved malice. There was no evidence on that point.

They cited *Somervill* v. *Hawkins*, 20 L. J. C. P. 131; *Taylor* v. *Hawkins*, 16 Q. B. 321; *Harris* v. *Thompson*, 13 C. B. 333; *Cooke* v. *Wildes*, 3 W. R. 458, 5 E. & B. 328; Starkie on Libel, 250; *Pattison* v. *Jones*, 8 B. & C. 578; *Stace* v. *Griffith*, L. R. 2 P. C. 420, 17 W. R. H. L. Dig. 3, 10; *Fairman* v. *Ives*, 5 B. & Ald. 645; *Waring* v. *McCaldin*, 7 Ir. Rep. C. L. 282, 21 W. R. Dig. 242; *Maitland* v. *Bramwell*, 2 F. & F. 623; *Dawkins* v. *Lord Paulet*, 18 W. R. 336, L. R. 5 Q. B. 102; *Clark* v. *Molyneux*, 26 W. R. 104, 3 Q. B. D. 237, 240; *Spill* v. *Maule*, 17 W. R. 805, L. R. 4 Ex. 232.

Jelf, Q.C., and *F. Salford* (*Meryon White* with them), for the respondent, argued that there was evidence to go to the jury, and there was no misdirection.—The first six cases referred to by the appellant were in the respondent's favour.

They referred to *Davies* v. *Snead*, L. R. 5 Q. B. 608, 19 W. R. C. L. Dig. 64, followed in *Waller* v. *Lock*, 30 W. R. 18, 7 Q. B. D. 621; *Padmore* v. *Lawrence*, 11 Ad. & El. 380; *Scarll* v. *Dixon*, 4 F. & F. 250; *Howe* v. *Jones*, 1 Times L. R. 461; *Macdougall* v. *Knight*, 38 W. R. 44, 14 App. Cas. 194.

Henn Collins, Q.C., replied.

The judgment of their lordships (Lord MACNAGHTEN, Sir BARNES PEACOCK, Sir RICHARD COUCH, and Mr. SHAND (Lord SHAND)) was delivered by

Lord MACNAGHTEN.—This was an action of libel brought by the respondent, Louis Edward Delmege, against the appellant, Frederick Alfred Jenoure.

The respondent is a Government medical officer in the parish of Portland. The appellant is a pen-keeper residing in the same parish, and a justice of the peace.

The libel complained of was contained in the following letter addressed by the appellant to the inspector of constabulary for the district:—

"Boston, Priestman River,
"14th January, 1888.

"Sir,—I have been informed on good authority that Dr. Delmege, of Manchioneal, was called by one Lindsay (who, I believe, is his servant) to attend a woman in labour named Zipporah Henry, of Manchioneal, on Sunday, 8th January; that, though implored by Lindsay to attend the woman, the doctor refused to do so without the fee, and that consequently the woman died on Monday morning from want of medical attendance. I shall be obliged, in the interest of humanity, especially as I am informed it is by no means an uncommon occurrence for Dr. Delmege to refuse to attend such cases, if you will inquire into this matter, and, if the facts prove to be as stated, that you will report the case to the proper authority, as such wilful neglect cannot be allowed.

"I am, Sir,
"Your obedient servant,
"F. A. JENOURE, J.P.

"R. L. Rivett, Esq.,
"Inspector of Constabulary,
"Port Antonio."

The appellant pleaded that the statements contained in the letter were true in substance and in fact, and that the occasion of the publication was privileged.

The action was tried before Sir Adam Gib Ellis, C.J., and a special jury. A great number of witnesses were examined on both sides. Evidence was adduced by the respondent raising the question of express malice. In the result the jury returned a

(*a.*) Reported by J. M. COLLYER, Esq., Barrister-at-Law.

general verdict for the respondent, with £50 damages, and judgment was entered accordingly.

The appellant moved for a new trial. The motion was made on several grounds. But on the 26th of July, 1888, a rule was granted, only on the ground of misdirection with regard to the question of privilege.

The rule came on for argument before Ellis, C.J., and Curran and Northcote, JJ. On the 5th of September, 1888, the court unanimously discharged the rule, and confirmed the judgment.

The appellant subsequently applied for, and obtained special leave from, her Majesty in Council to prefer an appeal. And he has appealed, not only from the order of the 5th of September, 1888, but also from that of the 26th of July, 1888, as well as from the verdict and the judgment entered thereon.

The case was very fully and ably argued. The arguments were not limited to the question of misdirection. The learned counsel for the appellant contended that the verdict was against evidence, and ought to be set aside on that ground. The learned counsel for the respondent laboured to prove that the misdirection (if misdirection there was) might be regarded as immaterial, and that on the facts, which were all before the jury, no other verdict could properly have been returned. Their lordships intimated in the course of the argument that they could not accede to either view. If actual malice had been found it would have been difficult to have contended that there was no evidence before the jury to support the finding. At the same time, taking all the circumstances into consideration, and bearing in mind that the language of a privileged communication is not to be scrutinized too strictly (as was observed in *Laughton* v. *The Bishop of Sodor and Man*, 21 W. R. 204, L. R. 4 P. C. 495, 508), their lordships think that the jury might properly have held that the evidence was consistent with the non-existence of malice. The question was pre-eminently one for a jury to determine under proper direction.

Their lordships have not had the advantage of seeing a note of the summing up. But the substance of it, so far as material on the question of misdirection, is stated very clearly in the judgment of the Chief Justice upon the application to make the rule absolute.

The Chief Justice told the jury that it was the duty of the appellant, as a justice of the peace, to bring circumstances such as those mentioned in his letter to the notice of the proper authorities. Their lordships may observe in passing that, in their opinion, nothing turns on the position of the appellant as justice of the peace. To protect those who are not able to protect themselves is a duty which everyone owes to society. The Chief Justice went on to tell the jury that the proper authority to whom such a complaint should have been submitted was the superintending medical officer; but he also told them that, if they thought that the appellant had addressed the letter to the inspector of constabulary by an honest unintentional mistake as to the proper authority to deal with the complaint, then the communication would not be deprived of any privilege to which it would have been entitled had it been addressed to the superintending medical officer. So far the summing up seems to be open to no objection. The Chief Justice then proceeded to explain to the jury that the existence of privilege was contingent on whether, in their opinion, the appellant honestly believed the statements contained in the letter to be true. The meaning of the Chief Justice is made perfectly clear by what follows. After referring to cases where the alleged defamatory matter was spoken or written by masters with reference to the characters of servants, he points out that, in such cases, "no question as to the *bona fides* of the defendant arises as preliminary to the existence of privilege." Where, however, "it is alleged that the defamatory communication was made in discharge of a duty," his view was that the defendant must "satisfy the jury that he made the communication with a belief in its truth." "No doubt," he adds, "the *dicta* of some of the judges in the masters and servants cases cited, seem to extend to all classes of privileged communications; but no case was cited, and I have been able to find none, where, when privilege was claimed on the ground that the communication was made in the discharge of a duty, it has been held that the plaintiff, to support his action, must prove express malice. . . . In the one case, there can be no room for doubt that, if the defendant establish the relation which existed between him and the plaintiff, a privilege arises which can only be overcome by proof of express malice. In the other, the authorities already cited show that, where a defendant claims privilege in respect of a charge of misconduct volunteered by him, he must satisfy the jury that he acted *bonâ fide* before the question of privilege arises for the determination of the judge."

There can be no doubt, therefore, that the learned Chief Justice gave the jury to understand that it lay upon the appellant to prove affirmatively that he honestly believed the statements contained in the alleged libel to be true, and that, unless and until that was made out by him to their satisfaction, it was not incumbent on the respondent to prove express malice.

Curran, J., took the same view of the authorities, and Northcote, J., concurred.

Notwithstanding some *dicta* which, taken by themselves and apart from the special circumstances of the cases in which they are to be found, may seem to support the view of the Chief Justice, their lordships are of opinion that no distinction can be drawn between one class of privileged communications and another, and that precisely the same considerations apply to all cases of qualified privilege. "The proper meaning of a privileged communication," as Parke, B., observes (*Wright* v. *Woodgate*, 2 C. M. & R. 577) "is only this: that the occasion on which the communication was made rebuts the inference *primâ facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made." There is no reason why any greater protection should be given to a communication made in answer to an inquiry with reference to a servant's character than to any other communication made from a sense of duty, legal, moral, or social. The privilege would be worth very little if a person making a communication on a privileged occasion were to be required, in the first place, and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true. In such a case *bona fides* is always to be presumed.

Their lordships consider the law so well settled that it is not, in their opinion, necessary to review the authorities cited by the Chief Justice. The last case on the subject is *Clarke* v. *Molyneux*, to which, unfortunately, the attention of the Supreme Court was not called. That was a case, not of master and servant, but of a communication volunteered from a sense of duty. A verdict was found for the plaintiff. But it was set aside by the Court of Appeal on the ground of misdirection. In giving his judgment, Cotton, L.J., used the following language, every word of which is applicable to the present case.

"The burden of proof," he said, "lay upon the plaintiff to show that the defendant was actuated by malice; but the learned judge told the jury that the defendant might defend himself by the fact that these communications were privileged, but that the defendant must satisfy the jury that what he did he did *bonâ fide*, and in the honest belief that he was making statements which were true. It is clear that it was not for the defendant to prove that he was acting from a sense of duty, but for the plaintiff to satisfy the jury that the defendant was acting from some other motive than a sense of duty."

Their lordships are therefore of opinion that there was a misdirection on a material point, which may have led to a miscarriage. Indeed it is difficult to see how the jury could have done anything but find for the plaintiff, having regard to the way in which the question was presented to them. The jury were told that it was for the defendant to prove that he honestly believed the statements in his letter to be true, whereas the letter itself put those statements forward, not as matters of the truth of which the writer had satisfied himself, but as matters calling for inquiry and consideration by the proper authorities.

Their lordships think that the verdict cannot stand, that the judgment entered thereon and the orders of the 26th of July, 1888, and the 5th of September, 1888, ought to be discharged, and that there ought to be a new trial, but only on the terms that the plea of justification is not to be raised again. It seems to their lordships that that issue has been finally disposed of.

As regards the costs in the court below, their lordships think that the respondent is entitled to the costs of the issue as to justification, and that the other costs of the trial and the costs of the motion for a new trial, and the argument upon the rule before the Supreme Court ought to abide the result of the new trial. Their lordships will humbly advise her Majesty accordingly. The appellant must have the costs of this appeal.

Solicitors for the appellant, *Tucker & Lake.*

Solicitors for the respondent, *Tippetts & Son.*

July 11, 15, 1890.

LYONS *v.* HOFFNUNG. (*a.*)

(*On appeal from the Supreme Court of New South Wales.*)

Stoppage in transitu—*Duration of right of unpaid vendor.*

Where goods are delivered to a carrier to be carried to a destination indicated at the time of sale, it is immaterial whether the carrier is or is not thereby constituted an agent of the purchaser for the purpose of passing the property to him.

The transitus *lasts until the destination is reached.*

This was an appeal from an order of the Supreme Court of New South Wales, dated the 14th of September, 1888, setting aside a verdict in favour of the appellant and granting a new trial. The case is reported in 9 L. R. N. S. W. 313.

The majority of the judges of the court below held that the verdict was against evidence, and that there had been a misdirection by the Chief Justice.

The appellant, who brought the action, was the assignee in bankruptcy of one William Clare, the respondent, who, as well as the bankrupt, carried on business in Sydney, with the defendants.

The action was brought against them for the conversion of goods which they had sold to Clare upon credit. Upon hearing of Clare's insolvency they obtained the goods, then on board the s.s. *Gambier*, and destined for Kimberley, upon giving an indemnity to the owners or charterers of the ship, Messrs. Wm. Howard Smith & Sons (Limited).

The defendants contended that this was a stoppage *in transitu*, legitimately effected by them as unpaid vendors.

The learned Chief Justice directed the jury at the trial that the exchange of bills of lading between Clare and Howard Smith & Co. and the payment of freight constituted a fresh contract between Clare and the charterers as his agents, and was equivalent to a delivery to Clare.

The facts are reported in their lordships' judgment.

Barnes, Q.C., and Howard Smith, for the appellant, supported the verdict.—The contract between Clare and the respondents was that they should deliver the goods to Clare at Howard Smith & Co.'s wharf. The delivery having been made, the *transitus* was ended.

They referred to *Dixon* v. *Baldwen*, 5 East, 175; *Kendall* v. *Marshall, Stevens, & Co.*, 31 W. R. 597, 11 Q. B. D. 356; *Bethell* v. *Clark*, 36 W. R. 185, 611, 19 Q. B. D. 553, 20 Q. B. D. 615; *Valpy* v. *Gibson*, 4 C. B. 837; *Ex parte Watson*, 25 W. R. 489, 5 Ch. D. 35; *Whitehead* v. *Anderson*, 9 M. & W. 518.

Finlay, Q.C., and *Pollard*, were not called upon.

The judgment of their lordships (Lord WATSON, Lord HERSCHELL, Sir BARNES PEACOCK, and Sir RICHARD COUCH) was delivered by

Lord HERSCHELL.—The question raised in this action is whether the respondents, who are merchants carrying on business in Sydney, were entitled to stop *in transitu* certain goods which were purchased of them by William Clare, the trustee under whose insolvency is the appellant on the present appeal, and was the plaintiff in the action below.

At the trial evidence was given by William Clare that when he purchased the goods he gave instructions to Davis, who was acting on behalf of the vendors, to mark the packages $\frac{WC}{K}$, that is: William Clare, Kimberley, and that he told him to send the goods, when packed and marked, down to Howard Smith & Co.'s wharf in Sydney. He stated that he gave no other instructions, but on cross-examination he admitted that he had told Marks that the goods were going to Kimberley; that he was going to take the goods there; that they were going with him. The evidence given by Marks was, that a day or two before the purchase he saw Clare, who told him that he was going to Kimberley; that he wanted the goods he was purchasing to be shipped by the first boat, which was *The Gambier*; and evidence was also given by Davis that at the date of the purchase Clare had stated that he was undecided whether the goods were to go by *The Gambier* or some other vessel, but that he would let them know; and that he came two days later and told them the goods were to be shipped by *The Gambier* to Kimberley.

Messrs. Howard Smith & Co., to whose wharf the goods were to be sent, are shipowners, and were known to both parties to be then loading vessels for the port of Kimberley, the earliest of their vessels to sail being *The Gambier*. The goods were sent by the respondents to Howard Smith & Co.'s wharf, and a document was sent with them which was initialed on

(*a.*) Reported by J. M. COLLYER, Esq., Barrister-at-Law.

behalf of Howard Smith & Co. by one of their employés, which was in these terms:—"Wm. Howard Smith & Sons (Limited), Sydney, 20/5/86. Steamer *Gambier*. For King's Sound. Shipper, S. Hoffnung & Co. Consignee, W. Clare. Goods, Kimberley." It appears that in respect of some of the goods, those apparently that were in bond, a more elaborate form of receipt was given by the shipowners, but in those receipts also Hoffnung & Co. were described as the shippers of the goods, Clare as the consignee, and the place of destination as Kimberley.

At the trial before the Chief Justice several questions were put to the jury. The first three were in these terms:—(1) "Did Clare instruct the defendants to deliver the goods to Clare at Howard Smith & Co.'s wharf, and did the defendants accept such instructions?—Yes. (2) If so, did the defendants in fact deliver the goods at Howard Smith & Co.'s wharf in accordance with such instructions?—Yes. (3) Did Clare instruct the defendants to ship the goods by the s.s. *Gambier*, and consign them to him at Kimberley?—No." The fourth is immaterial, and it was not answered by the jury. The fifth was in these terms:—"After the goods were in fact delivered at Howard Smith & Co.'s wharf, was any contract entered into between Clare and Howard Smith & Co. to ship the goods to Kimberley on his account?—Yes."

Upon those findings the Chief Justice entered the verdict for the plaintiff. A rule was afterwards obtained to set aside that verdict and for a new trial, on the ground that the findings of the jury were against the weight of evidence, and also on the ground that the learned Chief Justice had misdirected the jury on a point to which their lordships will call attention hereafter. That rule came on for argument before three learned judges in the Supreme Court, and was made absolute for a new trial by a majority of those judges.

The first question their lordships have to consider is whether the verdict can, as the appellant alleges, be supported as being right upon a true view of the facts proved at the trial, or at least as being one which might reasonably be found by the jury. The first two questions put to the jury appear to their lordships to be possibly open to the charge of ambiguity. If the meaning of the language used: "Did Clare instruct the defendants to deliver the goods to Clare at Howard Smith & Co.'s wharf?" and "Did the defendants in fact deliver the goods at Howard Smith & Co.'s wharf in accordance with such instructions?" be:—were the instructions to deliver them to Clare personally at Howard Smith & Co.'s wharf, and were those instructions obeyed?—it is obviously impossible to support the finding. But even if the meaning be:—were the defendants to deliver the goods to Clare at Howard Smith & Co.'s wharf in this sense, that they were to be held by Howard Smith & Co. for Clare, not as carriers, but as his agent in some other capacity?—the verdict appears to their lordships to be entirely against the weight of evidence, or indeed to have no evidence at all to support it. If all that was meant be:—were the goods to be delivered to Clare at Howard Smith & Co.'s wharf in this sense, that the transaction of sale and delivery was to be then completed, so that the property should pass to Clare and he should become the owner of the goods?—the finding would be perfectly correct, but wholly immaterial upon the question whether the respondents had a right to stop the goods *in transitu*.

Reliance was placed by the appellant on the fact that the receipts which have been mentioned were handed over by the respondents to Clare, and that, being in possession of these receipts, he obtained from Howard Smith & Co. a bill of lading. He stated that in that bill of lading he was named as consignee, but that the name of Hoffnung & Co. did not appear as shippers. Their lordships think that some doubt may well be entertained whether he is accurate in that statement, having regard to the evidence as to the course of business, and indeed applying common knowledge as to the course which such a transaction would ordinarily take. But, however that may be, and assuming it to be the fact that he did obtain such a bill a lading, in their lordships' opinion the circumstance is wholly immaterial. The goods were undoubtedly carried by the vessel *Gambier* on a voyage to Kimberley, and were in transit upon that voyage at the time when, owing to the insolvency of Clare, the respondents stopped them. The arrangement for the freight at which the goods were carried appears to have been made in contemplation of this and other purchases by Clare before the date when those purchases were effected. The shipowners undertook, in consideration of the fact that he was about to have a considerable quantity of goods shipped, to carry them somewhat below the ordinary freight. As far as the evidence goes no transaction with regard to the carriage of these goods took place between Clare and the shipowners after the date of the purchase, except the exchange of the receipts which have been mentioned for the bill of lading. Even assuming that the jury were entitled to disregard all the oral evidence in the case except that given by Clare, and to act upon that evidence alone, in the opinion of their lordships the decision ought to have been in favour of the defendants in the action.

It appears to their lordships that, upon the undisputed facts of the case, the right to stop *in transitu* under the circumstances proved at the trial was clear. The goods at the time of the purchase were undoubtedly intended by the purchaser to pass direct from the possession of the vendors into the possession of a carrier to be carried to a destination intimated by the purchaser to the vendors at the time of the sale; because, although the language used by Clare, according to his evidence, was that he was going to Kimberley, and going to take these goods with him, that language must be interpreted according to the ordinary course of business as it would be understood by business men; and it is obvious that Clare was not going to take these goods with him in any other sense than that he intended himself to be a passenger by the vessel on which they were to be shipped, and by which they were to be carried, his intention being that the goods should be shipped on board that vessel as cargo in the ordinary way, carried by carriers to their destination, and there delivered to him.

These circumstances appear to their lordships sufficient to indicate that the right to stop *in transitu* existed. The test laid down by Lord Ellenborough in the case of *Dixon and Others* v. *Baldwen and Another*, 5 East, p. 175, appears clearly to cover such a case as this. Alluding to the case of *Hunter* v. *Beale* (cited in *Ellis* v. *Hunt*, 3 T. R. 467), in which it was said that "the goods must come to the corporeal touch of the vendees, in order to oust the right of stopping *in transitu*," Lord Ellenborough says that this was "a figurative expression, rarely, if ever, strictly true. If it be predicated of the vendee's own actual touch, or of the touch of any other person, it comes in each instance to a question whether the party to whose touch it actually comes be an agent so far representing the principal as to make a delivery to him a full, effectual, and final delivery to the principal, as contradistinguished from a delivery to a person virtually acting as a carrier or mean of conveyance to or on the account of the principal in a mere course of transit towards him." Their lordships think it cannot

be doubted that in the present case, putting the case most favourably for the appellant, the goods came into the hands of Howard Smith & Co. as carriers on Clare's account.

The law appears to their lordships to be very clearly and accurately laid down by the Master of the Rolls in the case of *Bethell* v. *Clarke*, 20 Q. B. D., p. 617. He says: "When the goods have not been delivered to the purchaser, or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless, the goods are *in transitu* and may be stopped." The present case appears to fall distinctly within the terms there employed. The goods had not been delivered either to Clare or to any agent of his to hold for him otherwise than as a carrier, but were still in the hands of the carrier as such and for the purposes of the transit. There does not seem to be any pretence for the allegation that Howard Smith & Co. were ever intended to receive or hold, or ever did receive or hold, these goods except as carriers, to convey them to their destination, Kimberley. No arrangement other than an arrangement with reference to the terms of freight had been made by Clare before the goods were put into the possession of Howard Smith & Co. They were received by Howard Smith & Co. upon the terms—for they signed receipt notes to that effect—that they should be carried by them to Kimberley, by means of a particular vessel. Those receipts, showing the terms upon which the goods had been received, passed into the hands of Clare, and were acted upon by him without the slightest objection to their form. After he had obtained possession of the receipt notes all that he did was to exchange them for a bill of lading, in order that they might, under that bill of lading, be carried to Kimberley, their destination. There does not, therefore, seem to be throughout the whole transaction the slightest evidence that Howard Smith & Co. ever held or were intended to hold these goods otherwise than as carriers to be taken by them to their destination.

Under these circumstances it seems difficult to understand the contention that the right of stoppage *in transitu* did not exist. The learned Chief Justice, in summing up to the jury, appears to have told them that if Clare made a new contract with Howard Smith & Co. in respect of the carriage of these goods after they came into their possession, that would be sufficient to constitute a delivery to Clare, which would put an end to any right to stop *in transitu*. Their lordships gather this from the particular direction complained of, and which formed one of the grounds on which the rule was granted. The ground was:—"That his Honour, it is submitted, erroneously told the jury that if Clare handed up to Howard Smith & Sons (Limited) the bills of lading, or shipping receipts, received by him from the defendants, and received from Howard Smith & Sons (Limited) another bill of lading, it was of no moment whether the latter bill of lading contained the names of the defendants as shippers, because if at that time they entered into a contract with Clare to carry these goods, and were paid freight, then there would be a fresh contract with Clare, under which Howard Smith & Sons (Limited) became Clare's agents and it would be equivalent to a delivery to Clare." No doubt it might be equivalent to a delivery to Clare for the purpose of passing the property to Clare, but if his Honour intended to instruct the jury that such a contract entered into between Clare and the shipowners would be equivalent to the shipowners holding the goods for Clare otherwise than as carriers, and becoming his agents so as to create a new transaction, having its initiation only at that time, their lordships are unable to agree with the law which appears to have been laid down. If the goods were received by Howard Smith & Co. to be carried to Kimberley, and this was indicated as the destination of the goods at the time when the vendors were instructed to deliver the goods to the carriers, then, in the view which their lordships take, it is immaterial whether a fresh bill of lading was obtained by Clare or whether that bill of lading contained the name of Clare or of the defendants as shippers.

The appellant relied upon several cases which were pressed by the learned counsel on their lordships, in which it had been held that although the vendor knew that some foreign destination was intended for the goods, yet if he delivered them to a shipping agent to be by him sent abroad, the transit, so far as the vendor was concerned, then came to an end, and that there was no right in the vendor to stop on the subsequent voyage. Their lordships do not think that those cases are in any way applicable to the circumstances existing here. There the delivery was not a delivery by the vendor to the carrier to be carried to a destination indicated at the time of sale. A new transit commenced which had its origin in the action of the shipping or forwarding agent, as the case might be, which appears to be an altogether different case from that with which their lordships have to deal, where the goods passed direct from the hands of the vendors into the hands of the carriers to be carried to the destination then contemplated by both parties.

Their lordships will, therefore, humbly advise her Majesty that the judgment appealed from be affirmed. The appellant must pay the costs of the appeal.

Solicitors for the appellant, *Walker, Mewburne, & Walker*.

Solicitors for the respondents, *Helmsley & Helmsley*.

Court of Appeal.

From Q. B. Div. March 21.

STEINMAN & CO. v. ANGIER LINE (LIMITED). (a.)

Ship—Bill of lading—Exceptions—"Thieves of whatever kind, whether on board or not, or by land or sea"—Thefts by stevedores employed by shipowner.

Goods were shipped under a bill of lading which provided that the shipowner should not be liable for any loss or damage caused by (inter alia) "*thieves of whatever kind, whether on board or not, or by land or sea.*" *The goods were stolen during the stowage by some of the stevedore's men, who were paid by and in the service of the shipowner.*

Held, that the words "thieves of whatever kind" did not relieve the shipowner from liability for thefts committed by persons in his service.

Appeal from the judgment of A. L. Smith, J., at the trial of the action without a jury.

The plaintiffs shipped certain goods on board the defendants' steamship for carriage from Liverpool to Buenos Ayres under a bill of lading which provided in the exception clause that the defendants were not to be liable for any loss or damage caused by "the act of God, the Queen's enemies, pirates, robbers, or thieves of whatever kind, whether on board or not, or

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

by land or sea, barratry of the master or mariners," and at the foot was the following clause:—"It is expressly agreed that and declared that the shipowner shall not be liable for or in respect of any neglect or error in judgment on the part of the master, pilot, crew, or other persons whomsoever in his service or employment."

Upon the ship's arrival at Buenos Ayres some of the goods were found to be missing, and the plaintiffs brought an action to recover damages for their non-delivery. The learned judge found as a fact that the goods had been stolen during the stowage by some of the stevedore's men, who, it was admitted, were paid by and in the service of the shipowners; and held that the exception of "thieves of whatever kind, whether on board or not, or by land or sea" did not relieve the shipowners from liability. He accordingly gave judgment for the plaintiffs.

The defendants appealed.

Barnes, Q.C., and *Hurst*, for the defendants.

Bigham, Q.C., and *Carver*, for the plaintiffs.

The arguments and the authorities are fully referred to in the judgment.

Cur. adv. vult.

March 21.—BOWEN, L.J., read the following judgment:—This is an action brought by the owner of goods against the shipowner in respect of the loss of cargo, found by A. L. Smith, J., to have been stolen by the stevedore's men during stowage. The bill of lading includes among the exceptions "thieves of whatever kind, whether on board or not, or by land or sea." The stevedore under the charter-party was appointed by the charterer, but paid by the ship and in the service of the ship. Is the shipowner liable to make good the loss? This depends upon the true construction of the exception and its effect on the *primâ facie* liability of the shipowner, from which the exceptions are intended within defined limits to release him. The history of the introduction into English policies and English bills of lading of special provisions as to "thieves" requires to be borne in mind. The broad principle of commercial law always was, and is, that the ship, in the absence of express provision to the contrary, was liable to the cargo-owner for losses occasioned by theft committed on board. This idea was of cardinal moment both in the law of insurance and in the law of carriers. In the earliest forms of insurance, before the middle of the 17th century, there were no express words which covered losses by theft, and theft on board a vessel, since it presumably proceeded from negligent custody and not from accident, was not a peril of the sea. *Furtum non est casus fortuitus.* "Insurers," says Emerigon (cap. 12, sec. 29), "are not liable for simple theft committed on board the vessel, because it is presumed, with reason, that the accident has happened through some default of the captain or crew." About the middle of the century in question the word "thieves" found its way into the list of the marine casualties against which insurances were effected, and from this time forth there has been a recurring discussion both in England and America as to the extent to which in policies of insurance effect ought to be given to this special stipulation. Robbery imports violence, but "theft," which, properly speaking, does not, may be of several kinds. There may be the assailing thief from outside, the thief who "breaks through and steals"; there may be a thief on board among those who are lawfully on board; there may, lastly, be a thief among the crew. The controversy has principally turned upon the question whether the term "thieves" ought not to be confined to the first of these categories—viz., the depredators outside the ship. That the expression was wide enough to cover, not merely thefts on board by passengers, but also thieves among the crew or servants of the shipowner, has scarcely been suggested, except in an American authority which will hereafter be mentioned.

At the first it appears to have been uncertain to what extent the introduction into English policies of the word "thieves" really affected the insurer. In Malyne's Lex Mercatoria, c. 25, the term is interpreted to mean "assailing thieves," "for otherwise," says Malyne, "if there be thieves on shipboard . . . the master of the ship is to answer for that and make it good, so that the assurers are not to be charged with any such loss," which, Malyne adds, "sometimes is not observed": see also Roccus de Navibus, caps. 42 and 43: Beawes, 6th ed., 196; Weskett on Insurance, ed. of 1781; 1 Marshall (Insurance) 187. The language of Malyne has not been, however, universally accepted as applicable to those policies where express mention is made of thieves: see Park (Insurance), ed. of 1809, p. 30. And in the case of the *Atlantic Insurance Co.* v. *Storrow*, 5 Paige, Chancery New York, 293 (A.D. 1835), Walworth (Chancellor) distinguishes the expression used in Malyne, Weskett, Roccus, and Emerigon, on the ground that they are speaking only of the general contract against loss by sea risks and without reference to the express clause in modern policies against loss by thieves. The Chancellor accordingly held the insurer liable for a loss occasioned by the act of thieves who had no connection with the ship, although the master and ship might also be liable as carriers on their bills of lading. In the *American Insurance Co. of New York* v. *Bryan*, 1 Hill, N. Y. 25 (A.D. 1841), a similar question arose before the Supreme Court of New York in an action upon a policy which contained the word "thieves." The Chief Justice at the trial had directed the jury that a loss by theft, whether by assailing thieves or by embezzlement of the crew, or by whatever person, was within the policy, and this direction was upheld by the court.

No English case, however, has gone to this extent. And the law so laid down has been doubted by writers of authority (see 3 Kent's Com., 12th ed., 303; 1 Phillips on Insurance, 2nd ed., 149.) The introduction of the term "thieves" into the exceptions in English bills of lading is of a later date, in older bills of lading dangers of the sea being the only accidents excepted: Beawes, p. 196; Abbott, 5th ed., p. 214. For goods stolen or embezzled the master was liable, unless there was *vis major*: 1 Molloy, 329. By degrees the list of exceptions was expanded, and the word "thieves" in a bill of lading has received a judicial interpretation in the case of *Taylor* v. *Liverpool and Great Western Steamship Co.*, 22 W. R. 752, L. R. 9 Q. B. 547. It was there held in effect that the term was only intended to deal with thefts by persons "not belonging" to the ship, an expression which, however, is ambiguous, but which in *Taylor's case* seems to be used as equivalent to persons outside the ship. The present form of bill of lading is subsequent in date to the decision in *Taylor's case*, and is designed apparently to widen still further the meaning there attributed to the word "thieves." But thieves may "belong" to a ship in two ways. They may be persons who, though they are lawfully on board, have nothing to do with the service of the ship; or they may be the master and crew or persons in the service of the ship. Is the language "thieves of whatever kind, whether on board or not, or by land or sea," intended in this bill of lading to add both of these classes of depredators or only the former class to the "outside thieves" who were previously covered [illegible] the word in ordinary bills of lading? This q[illegible] [illegible]nstruction must b[illegible]

decided on the broad principle which has been so long and so constantly invoked in the interpretation of contracts with carriers by sea as well as land—viz., that words of general exemption from liability are only intended (unless the words are clear) to relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants. The exceptions in a bill of lading are not intended to excuse the carrier from the obligation of bringing due skill and care on the part of himself and his servants to bear both upon the stowing and upon the carrying of the cargo. Even in cases within the exceptions the shipowner is not protected if default or negligence on his part or that of his servants has contributed to the loss. Accordingly, in *Grill* v. *General Iron Screw Colliery Co.*, 14 W. R. 893, L. R. 1 C. P. 600, on appeal, 16 W. R. 796, L. R. 3 C. P. 476, an exception in a bill of lading of "accidents of whatever nature or kind soever" was held not to cover a collision caused by the negligence of master and crew. (See also *Phillips* v. *Clark*, 5 W. R. 582, 2 C. B. N. S. 156, and *Czech* v. *General Steam Navigation Co.*, 16 W. R. 130, L. R. 3 C. P. 14.) It is the duty of the shipowner by himself and his servants to do all he can to avoid the excepted perils—the exception, in other words, limits the liability, not the duty. Upon this ground, I am of opinion on this bill of lading that the mere introduction into the list of exceptions of the words "thieves of whatever kind," &c., does not relieve the shipowner from liability for the thefts committed by those in the service of the ship. A subsequent clause in the bill of lading exempts the shipowner from liability for neglect or error in judgment, but leaves wilful misconduct of those in the ship's service still untouched. If it was intended to relieve the shipowner from liability for thefts committed by persons in the ship's service, clear and explicit language to that effect should have been used. I agree accordingly with A. L. Smith, J., and think that this appeal must be dismissed, with costs.

Lord ESHER, M.R., and FRY, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Pritchard, Englefield, & Co.*

Solicitors for the defendants, *Downing, Holman, & Co.*

High Court of Justice.

Chan. Div. North, J. — Dec. 16.

CORPORATION OF WOLVERHAMPTON *v.* BILSTON COMMISSIONERS. (*a.*)

Water company—Water supply—Profits from supplying water—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 51, 52.

The commissioners of a township entered into an agreement with a water company to take the water supply for the township from the company. The undertaking of the company was afterwards transferred to the corporation of a borough by a private Act of Parliament, which confirmed and made perpetual the agreement respecting the water supply of the township; and, by subsequent private Acts of Parliament, provision was made for the application of the profits or revenue obtained by the corporation from supplying the water for the benefit of the borough and of the water consumers therein.

Held, that the agreement continued to bind the commissioners to take the water supply for the township from the corporation, and that the commissioners might be restrained by injunction from obtaining the supply elsewhere, and also that the corporation supplied water for their own profit, and were a "water company" within section 52 of the Public Health Act, 1875.

Action.

This was an action by the Corporation of Wolverhampton, to whom the undertaking of the Wolverhampton New Waterworks Co. had been transferred by the Wolverhampton Waterworks Transfer Act, 1867 (30 & 31 Vict. c. cxxxiii.), to restrain the defendant commissioners, who were the local board of health for the township of Bilston, in Wolverhampton, from supplying, or taking steps to supply, the township of Bilston within the limits of the water supply of the plaintiffs with water other than that supplied by the plaintiffs.

By an agreement dated the 16th of May, 1866, and made between the Wolverhampton New Waterworks Co. and the defendant commissioners, it was mutually agreed between the parties thereto that the Waterworks Co. should supply the township of Bilston with water, and that the commissioners should purchase such supply for the term of fourteen years, the amount of water to be supplied to the township daily to be 220,000 gallons at the least, and such further or greater quantity as the commissioners might require, and the water to be of the usual good quality and fit for all ordinary domestic purposes, and that the commissioners were to pay for the daily supply of 220,000 gallons at the rate of one-fifth of a penny per gallon, whether they consumed that quantity or not, and the company were to supply at the same price any quantity which the commissioners might require beyond that amount.

The Wolverhampton Waterworks Transfer Act, 1867, transferred to the plaintiff corporation the undertaking of the Waterworks Co., confirmed the agreement of the 16th of May, 1866, and made it perpetual, subject to a right for either the plaintiff corporation or the defendant commissioners to have the price to be paid for the water readjusted at the expiration of successive periods of twenty-one years, but made no express provision with respect to the application of any profits which might be gained by the plaintiff corporation from the business of the Waterworks Co. which was transferred to them.

The Wolverhampton Improvement Act, 1869 (32 & 33 Vict. c. cxxxi.), s. 187 (which is cited in the judgment), provided that the plaintiff corporation should apply a portion of the profits derived from the waterworks undertaking towards a reserve fund.

A provisional order of the Local Government Board, which was confirmed by the Local Government Board's Provisional Order Confirmation Act, 1888, and which, so far as is material to the present case, is cited in the judgment, repealed section 187 of the Wolverhampton Improvement Act, 1869, and provided that the plaintiff corporation should keep the accounts relating to the waterworks undertaking separate from their other accounts, distinguishing capital from income, and should apply the revenue to certain purposes therein mentioned.

The plaintiff corporation claimed an injunction to restrain the defendant commissioners from supplying, or taking steps to supply, the township of Bilston with water other than water supplied by the plaintiff corporation under the agreement of the 16th of May, 1866, as confirmed by the Wolverhampton Waterworks Transfer Act, 1867, or, in the alternative, a declaration

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

that the plaintiff corporation were a "water company" within the meaning of the Public Health Act, 1875, and that the defendant commissioners might be restrained from commencing to construct waterworks within the limits of the supply of the plaintiff corporation so long as they were willing to supply water proper and sufficient for all reasonable purposes for which it was required by the defendant commissioners in accordance with the provisions of section 52 of the Public Health Act, 1875. Questions of law and of fact were raised by the parties, the defendant commissioners alleging that the water supplied by the plaintiff corporation was deficient in quantity and quality. But it was agreed that the following questions of law should first be heard and determined—viz., whether upon the construction of the agreement of the 16th of May, 1866, the defendant commissioners were bound to take their water from the plaintiff corporation as successors to the Waterworks Co., and whether, if the defendant commissioners were so bound, they were nevertheless empowered by section 51 of the Public Health Act, 1875, to obtain an independent supply of water, or were prevented from so obtaining such independent supply by section 52 of that Act, on the ground that the plaintiff corporation were a "water company" supplying water of sufficient quantity and quality, the defendant commissioners contending that the plaintiff corporation were not a "water company" within section 52 of that Act.

The Public Health Act, 1875, enacts by section 4 that "water company" means "any person or body of persons corporate or unincorporate supplying, or who may hereafter supply, water for his or their own profit"; and by section 51 that "any urban authority may provide their district or any part thereof, and any rural authority may provide their district or any contributory place therein, or any part of any such contributory place, with a supply of water proper and sufficient for public and private purposes, and for those purposes, or any of them, may: (1) construct and maintain waterworks, dig wells, and do any other necessary acts; and (2) take on lease or hire any waterworks and (with the sanction of the Local Government Board) purchase any waterworks, or any water, or right to take or convey water, either within or without their district, and any rights, powers, and privileges of any water company; and (3) contract with any person for a supply of water"; and by section 52 "Before commencing to construct waterworks within the limits of supply of any water company empowered by Act of Parliament or any order confirmed by Parliament to supply water, the local authority shall give written notice to every water company within whose limits of supply the local authority are desirous of supplying water stating the purposes for which, and (as far as may be practicable) the extent to which, water is required by the local authority. It shall not be lawful for the local authority to construct any waterworks within such limits if and so long as any such company are able and willing to supply water proper and sufficient for all reasonable purposes for which it is required by the local authority; and any difference as to whether the water which any such company are able and willing to lay on is proper and sufficient for the purposes for which it is required, or whether the purposes for which it is required are reasonable, or (if and so far as the charges of the company are not regulated by Parliament) as to the terms of supply, shall be settled by arbitration in manner provided by this Act."

Cozens-Hardy, Q.C., *Underhill*, and *Ernest Moore*, for the plaintiff corporation.—Under the agreement of the 16th of May, 1866, as confirmed by the Wolverhampton Waterworks Transfer Act, 1867, the defendant commissioners are bound to take their supply of water from the plaintiff corporation, and the latter are entitled to an injunction to restrain the defendant commissioners from breaking that agreement by getting their supply of water elsewhere: *Luker* v. *Dennis*, 26 W. R. 167, 7 Ch. D. 227. The defendant commissioners also are prevented by section 52 of the Public Health Act, 1875, from obtaining an independent supply of water under section 51 of that Act, because the plaintiff corporation are a "water company" within that Act.

Moulton, Q.C., and *Upjohn*, for the defendant commissioners.—The defendant commissioners are not bound, under their agreement of the 16th of May, 1866, with the Waterworks Co., to take their supply from the plaintiff corporation. If the defendant commissioners were so bound they would nevertheless be entitled to obtain an independent supply under section 51 of the Public Health Act, 1875, and section 52 does not prevent them from so doing, because the plaintiff corporation are not a "water company" as defined by section 4 of that Act, because they do not supply water for their own profit.

NORTH, J., after deciding that the defendant commissioners were bound by virtue of the agreement of the 16th of May, 1866, as confirmed by the Wolverhampton Waterworks Transfer Act, 1867, to take their water supply from the plaintiff corporation so long as they supplied sufficient water of good quality and fit for all ordinary puposes, and that an injunction would lie to restrain the defendant commissioners from breaking the agreement by taking their supply elsewhere, according to *Luker* v. *Dennis*, proceeded:—Then it was said that if the defendants were wrong on that point, as I hold they are, and that they are bound by the agreement to take their full supply from the plaintiffs, they have a right to take advantage of the provisions of the 51st section of the Public Health Act, 1875, and that the 52nd section does not stand in their way. Now the 51st section enacts: [His lordship read section 51 of the Public Health Act, 1875, and after stating that the word "person" therein would include a corporation, continued:—] It is said that under that section the defendants are authorized to construct and maintain waterworks and dig wells and so on.

I do not think it necessary to consider that further, because, taking it to be so, there is a limitation contained in the 52nd section which enacts: [His lordship then read section 52 of the Public Health Act, 1875, and continued:—] It is said that that section does not apply, because the plaintiffs are not a water company to whom the defendants are bound to give notice under the 52nd section.

Their argument rests on this. The term water company is defined by section 4 of the Act as "any person or body of persons corporate or unincorporate supplying, or who may hereafter supply, water for his or their own profit." The company supplying the water originally was the Wolverhampton Waterworks Co., and there is no question but that they were a corporate body of persons supplying water for their own profit. Afterwards their undertaking was transferred to the Wolverhampton Corporation, and under the Act of 1869, s. 187, "The corporation shall from time to time set apart out of the profits of their waterworks undertaking, but not out of any other receipts, such sum as they think proper to form a reserve fund to meet contingencies, or for repairing or improving from time to time works connected with that undertaking, and may invest and accumulate the sum so set apart, in the way of compound interest or otherwise, until the reserve fund amounts to a sum

of £5,000, and from time to time, if and as occasion requires, shall apply the reserve fund to the purposes for which it is created, and shall so proceed from time to time, if and as the amount thereof is reduced by such applications; and as long as the reserve fund unapplied amounts to £5,000 they shall carry the interest, dividends, or annual income thereof to the improvement fund under this Act, and the same shall form part of that fund."

The result is that the receipt of profits by the plaintiffs is recognized by the Legislature. The profits were given them by the Transfer Act of 1867, and the Improvement Act of 1869 compels them to apply a portion of the profits towards the reserve fund without making any provision for the rest of the profits. Then the Act of 1888, which confirms the provisional order, makes some alteration in that. The provisional order, by article 13, repeals section 187 of the Act of 1869, and in lieu thereof the following provisions are to take effect, namely:—"The corporation shall keep accounts in respect of their water undertaking separate from all their other accounts, distinguishing therein capital from income, and shall apply all money from time to time received by them on account of revenue in the manner and in the order following." Then various things are laid down as expenses to be incurred from that source, and by the 8th sub-clause of article 13 they are to apply such yearly sum as they think proper to form a reserve fund, and there are considerable details given as to the reserve fund, and it is provided: "That the corporation shall carry any balance of such revenue remaining in any year, and exceeding the sum of £500, to the improvement fund, or (if so determined by resolution of the corporation) shall apply such balance, or any part thereof, in reducing the price of water to consumers, as and for so long as the corporation may by resolution determine."

Now that differs from the 187th section in two points only. The word "profits" is not used, nor the words "surplus of profits," but it provides that this surplus or balance, give it whatever name you please, which would remain from the profits of the undertaking (meaning the excess of the receipts over disbursements) is to be carried, first of all, to a reserve fund, to a limited amount, and then the balance is to be applied either by carrying it to the improvement fund, or they may, if they please, apply the balance, instead of keeping it, for reducing the water rates. But, in my opinion, that is not a substantial alteration of the application of this surplus fund. If that was profits down to this time, the fact that the word "profits" is not used with respect to it in this provisional order does not make any difference. Then we come to the interpretation clause. Is this a water company? The corporation is a body of persons incorporated who supply water. Is it for their own profit? In my opinion it is for their own profit, because they make a profit out of it, which profit is to be applied in the way indicated. I do not think it turns on the question whether the year happens to be a profitable year or not; but it is a case in which the rates are so regulated that there is a surplus left of profits over expenditure. In my opinion the corporation is a water company entitled to receive notice under the 52nd section of the Act.

His lordship then made a declaration in favour of the plaintiff corporation on the questions which had been raised before him, and ordered the remainder of the issues to stand over until the next sittings.

March 13.—The Bilston Commissioners having appealed from this judgment, the Court of Appeal (LINDLEY, BOWEN, and KAY, L.JJ.) held (Kay, L.J., dissenting) that, on the true construction of the agreement of the 16th of May, 1866, made perpetual by the Wolverhampton Waterworks Transfer Act, the appellants were bound to take from the plaintiffs all the water required for their district. The question as to the Public Health Act, 1875, was not argued, and the declaration relating to it was, by arrangement, struck out of the decree, without prejudice to the appellants raising it again.

Solicitors, *Sharpe, Parkers, Pritchard, & Sharpe*, for *H. Brevill*, Wolverhampton; *Woodcock, Rylands, & Parker*, for *J. D. Wassell*, Bilston.

Chan. Div. } Nov. 11, 12.
Kekewich, J. }

JAMES v. SMITH. (a.)

Principal and agent—Purchase—Conveyance—Declaration of trust—Statute of Frauds (29 *Car.* 2, *c.* 3), *ss.* 4, 7—*Practice—Pleadings—Amendment—Ord.* 19, *r.* 15.

The plaintiff, being desirous of purchasing a house, asked the defendant to attend the sale and "be his friend." The defendant attended the sale, bid for the house, which was knocked down to him, paid for it out of his own money, and took a conveyance in his own name. The plaintiff brought this action for a declaration that the defendant was his agent and a trustee of the house for him. The defendant, by his statement of defence, denied the agency, and pleaded section 4 of the Statute of Frauds; but, at the trial, the defendant's counsel, in argument, relied on section 7, and, after the plaintiff's counsel had replied, the defendant's counsel applied for leave to amend the statement of defence by pleading section 7.

Held, that the amendment could not be allowed at so late a stage of the action, and, therefore, that it was not open to the defendant to rely on section 7; but

Held, on the evidence, that the plaintiff had failed to establish that the defendant had been constituted his agent, and, therefore, that the action should be dismissed.

Bartlett *v.* Pickersgill, 4 *East*, 577, *note* (b), 1 *Eden*, 515, 1 *Cox*, 15, *is not overruled by* Heard *v.* Pilley, 17 *W. R.* 750, *L. R.* 4 *Ch. App.* 548, *and is still sound law.*

Trial of action.

This was an action brought by Alfred James against Thomas Lawdon Smith, claiming a declaration that the latter had acted as the plaintiff's agent in the purchase of a house called "Galway House," in South Acton, and that the defendant was a trustee of the house for the plaintiff, and claiming that the defendant might be ordered to convey the house to the plaintiff.

The facts, shortly, were as follows:—The mortgagees of the house in question had advertised it for sale, and the plaintiff, being the tenant of it, and desirous of purchasing it, asked the defendant to attend the sale and to "be his friend." On July 30, 1888, the defendant went to the sale and bid £230 for the house, which was knocked down to him. He paid the deposit, signed the contract, and subsequently took a conveyance of it to himself. He refused to convey to the plaintiff, and denied that he had acted as his agent, and alleged that he had purchased the house on his own behalf and for his own benefit. He pleaded also the 4th section of the Statute of Frauds, which enacts that "no action shall be brought upon any agreement made upon . . . any contract or sale of lands, tenements, or hereditaments, or any

(a.) Reported by J. W. GREIG, Esq., Barrister-at-Law.

interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

O. L. Clare, for the plaintiff.—Under the 4th section of the Statute of Frauds an agent can be appointed by parol. It is true that under the 1st and 3rd sections the appointment must be in writing, but the language of section 4 is different, the words being "some other person thereunto by him lawfully authorized." *Heard* v. *Pilley*, 17 W. R. 750, L. R. 4 Ch. App. 548, is in my favour, and *Bartlett* v. *Pickersgill*, 1 Cox, 15, is disapproved. If the fact that the agent has got a conveyance is to make a difference it will be allowing a fraudulent agent to better his position by increasing his fraud. A case can be established against an agent by parol evidence.

Warmington, Q.C., and *Upjohn*, for the defendant.—If an agent has a conveyance and takes the legal estate, a declaration of trust must be proved. Under section 7 of the Statute of Frauds such a declaration must be in writing. Here there is nothing of the sort. *Bartlett* v. *Pickersgill* has never been overruled, and Lord St. Leonards treats it as good law: Sug. V. & P., 14th ed., p. 703: that case is on all fours with the present one.

Clare, in reply, referred to *Rastell* v. *Hutchinson*, 1 Dick. 44; *King* v. *Boston*, 4 East, 572; and *Fell* v. *Chamberlain*, 2 Dick. 484.

Upjohn, being called on as to pleading the statute, argued that it was sufficient to plead the statute generally, but, if not, asked leave to amend by also pleading section 7.

KEKEWICH, J.—It is not part of my duty to say whether, on the whole, the Statute of Frauds has been a beneficial or a mischievous statute. As to that there have been many opinions. It is quite easy for advocates on one side or the other to assume that this case is an illustration and a strong support of the view which they hold. Certainly, in this case, if the plea of the Statute of Frauds succeeds, you have an instance of the evasion by the defendant of the arrangement into which I have no doubt, upon the evidence, he entered. I put aside for a moment one point, to which I attach considerable importance—namely, the terms upon which Mr. Smith agreed to bid for this property. Taking him simply as an agent for the plaintiff, he would evade his liability by pleading the statute, if that plea is successful. Now a very interesting and difficult question has been raised before me, whether that plea ought to succeed in a case of this kind, and the argument has gone entirely upon the distinction between the 4th section and the 7th section of the statute, a distinction which, of course, is well known to all lawyers, and which is pointed out in more than one of the cases cited.

The plaintiff relies upon *Heard* v. *Pilley* as overruling *Bartlett* v. *Pickersgill*, 4 East, 577, note (*b*), 1 Cox, 15. And certainly there are strong expressions falling from both of the Lords Justices before whom that case came, adverse to the decision in *Bartlett* v. *Pickersgill*. One can quite understand any counsel or editor going so far as to say that *Bartlett* v. *Pickersgill* is overruled; but I think that the distinction pointed out by Mr. Warmington is worth attention. There is no doubt that *Bartlett* v. *Pickersgill* was a case of a different character to *Heard* v. *Pilley*. It is distinctly stated in the last-mentioned case in the argument on behalf of the plaintiff that it was distinguishable because it was not a suit for specific performance of an unexecuted contract, but to oblige the agent, who had obtained a conveyance of the estate, to convey it to the plaintiff. And, notwithstanding the extremely plain expressions of the Lords Justices, including the remarks of Giffard, L.J., at the conclusion of his judgment, I think I must read them with reference to the case then before the court, and not consider them as overruling *Bartlett* v. *Pickersgill*. I do not think, therefore, that I can take *Heard* v. *Pilley* as overruling *Bartlett* v. *Pickersgill* for all purposes. On the other hand, I have a valuable judgment of the late Master of the Rolls in *Cave* v. *Mackenzie*, 46 L. J. Ch. 564, where he pointed out the distinction relied upon on argument in *Heard* v. *Pilley*, and he refers to the different language of the two different sections of the Statute of Frauds, and the result of it. It is true, certainly, that the difference is highly technical, but then the court is dealing with a thoroughly technical matter, and one must expect to find technical differences. I think that there is much force in Mr. Clare's argument that a man, against whom a contract can be enforced as agent, ought not to escape liability by taking a conveyance, and doing that which, as Mr. Clare says, is exaggerating his fraud, and thus put himself in possession of the legal estate, so that he is no longer agent but trustee. There is considerable force in that, and I can well understand, in that view, the statement at the conclusion of the judgment in *Heard* v. *Pilley* to the effect that the court "will not allow the Statute of Frauds to be made an instrument of fraud." That was also much insisted upon in the case of *Lincoln* v. *Wright*, 7 W. R. 350, 4 De G. & J. 16. But if the Statute of Frauds has said plainly that you cannot enforce a trust or confidence unless it is expressed in writing, and the particular trust or confidence which the plaintiff seeks to enforce is not expressed in writing, and the Statute of Frauds has further distinguished between agency and trust or confidence, and the way in which agency, and trust or confidence are respectively to be proved, then it seems to me that all remarks of that kind fall to the ground. My opinion of the cases is that *Bartlett* v. *Pickersgill* is still sound law, and that the language which Lord St. Leonards uses in his book on Vendors and Purchasers, 14th ed., p. 703, is also sound—viz., "Where a man merely employs another person by parol as an agent to buy an estate, who buys it for himself and denies the trust, and no part of the purchase-money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the Statute of Frauds." He is referring there, I have no doubt, to section 7 of the statute.

Then I have a point of pleading to which my attention was only called at the very last stage, and so late, to my mind, as to make very considerable difficulty in allowing any amendment to be made. By ord. 19, r. 15, the defendant is bound to plead the Statute of Frauds. The rule does not say that he is bound to plead a particular section. Here, however, the defendant has pleaded the 4th section, and it is admitted that on the 4th section he fails, and that he must rely upon the 7th section; and then I am asked, at the last moment, to allow that amendment to be made. I have said over and over again that there is no judge upon the bench more willing to allow amendments, even at the last moment, than I, provided that there is no surprise to the other side. But I think that I should be going too far to allow an amendment of this kind, and introducing laxity into the practice. A party relies upon one particular section, and when he finds that the authorities are against him, he says, I wish to rely upon something else. I think I ought

not to allow that amendment. Therefore, although I hold the 7th section of the Statute of Frauds to be applicable, I think that it has not been properly pleade[illegible]d is not, therefore, available to the defendant.

That being so, I have heard all the evidence, and have to consider the facts. [His lordship then stated his conclusion upon the facts to be that, although there was some arrangement between the plaintiff and the defendant that the defendant should purchase the property in order that the plaintiff might ultimately become the purchaser, yet that there was insufficient evidence to determine what the terms of the arrangement between the parties were, and that no agency was proved so as to be capable of being enforced as against the defendant, and, accordingly, that the plaintiff's case must be held to have failed.]

Solicitors for the plaintiff, *Ross & Douglas Norman.*

Solicitor for the defendant, *Ernest Lloyd.*

Chan. Div. }
Kekewich, J. } March 14, 17.

In re THE OPERA (LIMITED). (*a.*)

Company—Winding up—Execution—Mistake of law—Assets increased by mistake of sheriff—Right to recover from officer of the court.

If the assets in the hands of an officer of the court on behalf of creditors or others have been increased by a transaction occasioned by an honest mistake of law, the court will not allow its officer to take advantage of the mistake, but will order him to make repayment out of assets.

No difference between the different classes of secured and unsecured creditors represented by the officer of the court will be considered.

Adjourned summons.

On the 16th of January, 1890, the sheriff of the county of London, under a writ of *fi. fa.* issued by a judgment creditor, seized goods of the Opera Co. at the theatre carried on by them.

On the 17th and 18th of January two more writs were lodged with the sheriff.

On the 18th of January a creditors' petition for the compulsory winding up of the company was presented.

From the 18th to the 27th of January the sheriff received the moneys paid by the public for entrance to the theatre, amounting to £1,495.

On the 24th of January a provisional official liquidator was appointed by the court, and on the same day the sheriff, out of the takings of the theatre then received by him, paid to the first two execution creditors £631 and £45, the amounts due to them respectively, and to the third execution creditor £150 on account. He also paid £20 to the liquidator, and retained his costs.

On the 1st of February an order was made to wind up the company.

On the 8th of February an order was made by the court that the sheriff should withdraw from possession, which he did accordingly.

On the 13th of May an order was made by the court that the sheriff should pay to the official liquidator all the moneys which he had received, except the £20 already paid, without prejudice to any rights which the sheriff might have against the goods siezed by him before the presentation of the petition.

This was a summons on behalf of the sheriff that the official liquidator might be ordered to pay to him, out of the moneys received upon the sale of the goods seized by the sheriff under the writs of the 16th and 17th of January, the sums of £681 and £49, being the two sums paid to the first two execution creditors, together with the sheriff's amount of the charges on the writs.

The company had issued debentures, constituting a charge upon its undertaking and all its property present and future, which were declared to be a floating security.

Warmington, Q.C., and *Vernon Smith*, for the sheriff.—The liquidator is an officer of the court, and must act equitably: *Ex parte James, In re Condon*, 22 W. R. 937, L. R. 9 Ch. 609; *Ex parte Simmonds, In re Carnac*, 34 W. R. 421, 16 Q. B. D. 308; *In re Brown, Dixon* v. *Brown*, 32 Ch. D. 597, 34 W. R. Dig. 18. The rule that money paid under a mistake of law cannot be recovered will not be acted upon by the court itself or its officers. The sheriff mistook his proper remedy: *In re Withernsea Brickworks*, 29 W. R. 178, 16 Ch. D. 337.

Marten, Q.C., and *Manby*, for the company.—The sheriff gave up possession of the goods, intending to insist on his right to the takings of the theatre; his right was a legal right to the goods, and he gave that up; he had no equity. In the cases cited there was a distinct equity in favour of the person seeking to recover: *In re Evans, Evans* v. *Evans*, 35 W. R. 586, 34 Ch. D. 597; *Rogers* v. *Ingham*, 25 W. R. 338, 3 Ch. D. 351; and *Union Bank of London* v. *Lenanton*, 26 W. R. Dig. 34.

E. Beaumont, for debenture-holders.—The execution by the sheriff is not an act done by directors in the ordinary course of business, and cannot postpone the debenture-holders. *In re Florence Land and Public Works Co.*, 27 W. R. 236, 10 Ch. D. 530; *Hubbuck* v. *Helms*, 35 W. R. 574; *Taylor* v. *M'Keand*, 28 W. R. 628, 5 C. P. D. 358; *Panama, New Zealand, and Australian Royal Mail Co.*, L. R. 5 Ch. App. 318, 18 W. R. Ch. Dig. 53; *In re Colonial Trusts Corporation*, 15 Ch. D. 465, 29 W. R. Dig. 40; *Wheatley, Silkstone, and Haigh Moor Coal Co.*, 33 W. R. 797, 29 Ch. D. 715. Secondly, the debenture-holders are in no way responsible for the acts of the sheriff, he has no equity as against them.

KEKEWICH, J.—For the purpose of determining the principle upon which this case must be decided, I need only refer to two cases—*Ex parte James* and *Ex parte Simmonds*. In the former case a trustee in bankruptcy was ordered to repay to an execution creditor money which, under a mistake of law, the former had insisted upon being paid to him, and the latter had paid accordingly. In his judgment James, L.J., says:—"I am of opinion that a trustee in bankruptcy is an officer of the court. . . . The court, then, finding that he has in his hands money which in equity belongs to someone else, ought to set an example to the world by paying it to the person really entitled to it."

I think that James, L.J., is there speaking of a broader equity than the technical equity; because he goes on to say:—"In my opinion the Court of Bankruptcy ought to be as honest as other people." In *Ex parte Simmonds*, Esher, M.R., adopts the judgment of James, L.J., and says:—"A trustee in bankruptcy has always been treated as an officer of the Court of Bankruptcy, and the court will order him to act in an honourable and high-minded way." I think that the principle to be deduced from these cases

(*a.*) Reported by JAMES H. BAKEWELL, Esq., Barrister-at-Law.

s, that if the assets in the hands of an officer of the court, on behalf of creditors or others, have been increased by a transaction occasioned by an honest mistake of law, then, notwithstanding that such mistake is not capable of rectification as between ordinary adverse litigants, the court will compel its officer to recognize the rules of honesty as between man and man, and to act accordingly.

In this case, the sheriff, on taking possession, had the right of seizing the goods of the company; but instead of insisting upon that right he seized the money in the tills, which was not liable to seizure because of the presentation of the petition for winding up. By this act the sheriff gave up possession of the goods.

The mistake, therefore, consisted in the receipt by the sheriff of these moneys and payment of the execution creditors thereout. The result of the mistake has been that the creditors, represented by the official liquidator, have obtained the money in the tills and the goods also; and the liquidator, on behalf of the creditors, now claims to have the benefit of that mistake, by which the assets in his hands have been so increased. That is exactly the question of honesty which is dealt with in the authorities to which I have referred.

I think that the debenture-holders, notwithstanding their floating security, are in no better position than the ordinary creditors; the official liquidator really represents both classes of creditors.

I am of opinion, therefore, that no difference between the different classes of creditors comes into question, and that because the official liquidator is an officer of the court and represents both classes of creditors I have power to make the order asked.

Summons allowed.

Solicitors, *Lewis & Lewis; Boxall & Boxall; Fladgates.*

IN BANKRUPTCY.

Q. B. Div. (Cave and Vaughan Williams, JJ.) Jan. 16; Feb. 16.

Ex parte TOBIAS.
In re TOBIAS & CO. (*a.*)

Bankruptcy—Discharge—Absolute refusal—Second application for discharge—Right of bankrupt to apply de novo*—Practice—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *ss.* 28, 104.

Where the discharge of a bankrupt has been refused absolutely, the bankrupt is not entitled to apply to the court de novo *for an order of discharge. But the court has power, under section* 104 *of the Bankruptcy Act,* 1883, *to entertain an application by the bankrupt for a review, and may thereupon rescind or vary its former order if it thinks fit.*

Appeal against an order of his Honour Judge Shand in the county court at Liverpool absolutely refusing the bankrupt's discharge.

The bankrupt and his brother traded as chemical brokers at Liverpool down to the year 1884, when they were adjudicated bankrupt.

In October, 1884, the present appellant applied for his discharge, which was refused on the 31st of October, 1884.

On the 17th of October, 1890, the appellant applied *de novo* to the court at Liverpool for an order of discharge, or in the alternative for an order reviewing the order of the 31st of October, 1884.

In the course of the hearing the bankrupt's counsel abandoned the application for a review, and the application *de novo* for a discharge was refused.

The bankrupt now appealed from that refusal.

W. F. Taylor, for the bankrupt.—The discharge was refused on the 31st of October, 1884, on the ground that the bankrupt had been guilty of rash and hazardous speculations, and had continued to trade after knowledge of insolvency. The application on the 17th of October, 1890, was made on fresh evidence as to the conduct of the bankrupt from 1884 to 1890. He had been in responsible situations and had worked hard and contracted no debts. He had also given every assistance to the official receiver in getting for the creditors a sum of £2,680 which came to him under his mother's marriage settlement. The county court judge was of opinion that the bankrupt had no right to make the application, and he said that in any event the case did not come within the words of the judgment in *In re Lloyd, Ex parte Lloyd*, 6 Morrell's Bankruptcy Cases, 297, 38 W. R. Dig. 16. The application for a review of the first order was abandoned, because it was thought that it could not be supported.

Muir Mackenzie, for the official receiver.—I do not propose to argue the question whether there is power to a bankrupt to apply *de novo* in the way this bankrupt has applied. The only other question is whether the facts brought forward will justify the court in interfering with the order of the county court judge. The discharge was refused for trading with knowledge of insolvency and for rash and hazardous speculations. The subsequent good conduct of the bankrupt cannot alter that.

Cur. adv. vult.

Feb. 16.—CAVE, J., read the written judgment of the COURT, which, after dealing with the facts, proceeded:—This case raises for our determination the questions which were discussed, but upon which no decision was given, in the case of *In re Lloyd, Ex parte Lloyd*, and I may say at once that I think the learned judge was right in regarding that case as no authority upon the point which alone came before him. Where upon the hearing of the application of the bankrupt the judge is of opinion that the applicant is not entitled to an absolute discharge, and also feels himself unable to fix a period of suspension, he may, in refusing to grant a discharge, reserve liberty to the bankrupt to apply again, and if he does so the bankrupt may apply again in pursuance of the leave reserved as a matter of right; but, having regard to the power of rehearing hereinafter referred to, I think it would be more convenient that in such a case the judge should refuse the discharge absolutely. Where the discharge is absolutely refused the bankrupt cannot apply *de novo* as a matter of right, as was sought to be done here, and in my opinion the learned judge was justified, after the abandonment of the application for a review, in making the order which he did make; and, indeed, I agree with him that he had no power to entertain the application, the refusal of the 31st of October, 1884, having been, as he says, an absolute refusal.

Is, then, the position of a bankrupt whose order of discharge has been refused, and rightly refused, on his first application, an utterly hopeless one, and must he, no matter how exemplary his subsequent behaviour, be compelled to go through the remainder of his life as an undischarged bankrupt? I should be very sorry to think that this was so, and agree with the learned judge of the county court that the refusal of a discharge is the very order above all others which

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

may with advantage be considered after the lapse of time. It appears to me that the power of reconsidering an absolute refusal is conferred on the court by section 104 of the Bankruptcy Act, 1883, which provides that every court having jurisdiction in bankruptcy under the Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction. This section gives the court a discretion of the widest and most far-reaching character, and when properly exercised it is so beneficial in its operation, and so calculated to advance the ends of justice, that I think it ought not to be restrained by construing it in any niggardly spirit.

One general, although not invariable, rule has been laid down for guiding the court in the exercise of its discretion under this section—viz., that the court should not grant a rehearing where the only object of the applicant is to obtain another opportunity for appealing from the decision of the judge when he has let the time for appealing from the original decision go by. The universal practice of fixing a limit of time on the powers to appeal is derived from the general maxim, *Interest reipublicæ ut sit finis litium*, and the maxim should not be extended beyond the limit of its utility. Where litigants have gone to trial and the court has decided between them, it is inexpedient that the defeated party should be allowed to reopen the litigation at any distance of time when the position of the parties may have been materially affected by the lapse of time or the loss of material evidence. In such a case as this, however, where the refusal of the discharge operates as a punishment on the bankrupt, there can be no reason why the punishment should not be remitted at any distance of time if it can be shown that the object of the punishment has been effected. No one is affected by the modification or rescission of such an order except the bankrupt himself and, to some extent, society at large, which is benefited by the infliction of a punishment just in proportion to its justice and necessity, and is therefore injured, and not benefited, by the continuance of a punishment after the necessity for it has ceased.

I entertain no doubt that the judge was at liberty to hear an application to review the order of October 31, 1884, if he thought a *primâ facie* case was made out for such an indulgence. We are told that in this case the application for a review was abandoned because it was supposed—as it seems to me wrongly—that an application for review could only be founded on evidence which might have been before the court on the original application. I see nothing at all in the section to warrant this limitation. The learned judge seems to have discussed the merits of the case in order that we might consider it upon the merits if we were of opinion that he had power to hear the application; and as I think he had the power to rehear his former decision of October 31, 1884, I do not see why we should not proceed to deal with the case at once instead of sending the bankrupt to renew his application for a rehearing, which would occasion considerable expense to all parties without any corresponding advantage. The learned judge says he should have refused the application, even if he had thought he had the power to rehear it, on the ground that the new facts did not bring the case, to use the judge's words, within the conditions sketched by me in the case of *In re Lloyd, Ex parte Lloyd*. If the judge will look at that case again I think he will see that I sketched no conditions whatever, but was simply giving an instance by way of illustration, and I should be very sorry to lay down beforehand any conditions for limiting the judge's discretion as to the circumstances which might seem to him sufficient to induce him to vary his refusal of the discharge.

The conduct of this bankrupt since the bankruptcy appears to have been creditable. He has worked hard, held some responsible positions, lived on a narrow income, and has not incurred any debts. He has also rendered to the official receiver every assistance in getting for the creditors a sum of £2,680 which came to him under his mother's marriage settlement. Upon the whole of the facts, and having regard to the scale of punishment which has been adopted under the Act of 1883, I am of opinion that a suspension of the applicant's discharge for nearly seven years is a sufficient punishment, and that he should now have his discharge. As, however, the appellant has adopted the wrong mode of procedure, and only succeeded in getting his discharge by our indulgence, he must pay his own costs, and the official receiver will take his costs out of the deposit.

Appeal allowed.

Solicitors for the appellant, *Whitley & Co.*, Liverpool.

Solicitor for the official receiver, *The Solicitor to the Board of Trade.*

Q. B. Div. (Cave and Vaughan Williams, JJ.) Jan. 22.

Ex parte WHITTAKER.
In re PARRETT. (*a.*)

Bankruptcy—Proof—Surety for bankrupt—Proof for purpose of voting at first meeting—Proof before payment of debt—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *schedule* 1, *r.* 9.

A surety for a bankrupt is not entitled to prove for the purpose of voting at the first meeting of creditors unless he has paid the debt for which he is surety.

Appeal against an order of his Honour Judge Hughes in the county court at Macclesfield, by which he affirmed a decision of the official receiver admitting, for the purpose of voting at the first meeting of creditors, a proof of debt for £500.

The first meeting of creditors of the debtor was held on November 14, 1890, at which a proof was tendered for the purpose of voting by one John May for £500 as guarantor of the debtor to a bank.

At this time Mr. May had not paid any part of the debt, and an objection to the proof was taken under rule 9 of the First Schedule to the Bankruptcy Act, 1883, which provides that "a creditor shall not vote at any such meeting in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained."

The objection was overruled by the official receiver as chairman of the meeting, and this decision was subsequently affirmed by the county court judge.

Herbert Reed, for the appellant.—The ground of the objection is, that the proof was an unliquidated or contingent debt, the value of which could not be ascertained. Formerly a surety could not prove at all until payment, even for a dividend. Now, it would seem, by the decision in the case of *Ex parte Delmar, In re Herepath & Delmar*, 38 W. R. 752, that, under the provisions of section 37 of the Bankruptcy Act, 1883, a surety for a bankrupt is entitled to prove against the bankrupt's estate although he has not paid the debt for which he is surety. But that decision does not affect the present case, which comes under rule 9 of the First Schedule, and not under

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

section 37. I do not object to May proving for a dividend, but to his vote at the first meeting.

No person appeared as respondent to the appeal.

CAVE, J.—I think the appellant is entitled to succeed. It is clear that the liability of a surety, if it can be the subject of proof before the debt is paid, as to which I express no opinion at present, nor do I think the question was finally settled by the very peculiar case of *Ex parte Delmar, In re Herepath & Delmar*, but if he can prove, it can only be a contingent liability in respect of which he can tender a proof. It is clear that until he has actually paid the debt his proof is not a liquidated one, but, at the outside, a contingent liability.

The appeal must be allowed.

VAUGHAN WILLIAMS, J., concurred.

Appeal allowed.

Solicitors for the appellant, *Muir & Blunt*, Macclesfield.

Court of Appeal.

From Chan. Div. Feb. 25, 26.

COX v. BENNETT (No. 2). (a.)

Administration action — Married woman — Separate estate—Restraint on anticipation—Order for payment of costs by married woman—Order that arrears of income of married woman be not immediately paid to her—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1 (2), 19.

A married woman was entitled, under the will of a testator whose estate was being administered in an action commenced before the passing of the Married Women's Property Act, 1882, *to part of the income of his estate for life for her separate use, without power of anticipation. In* 1889 *she, in her own name, without a next friend, first commenced an action in the Queen's Bench Division, and subsequently took out a summons in the administration action, for certain relief against the trustees of the will. Both her action and summons were dismissed, and she was ordered to pay the trustees their costs thereof respectively, both orders (being in the usual form as settled in* Scott *v.* Morley, 36 *W. R.* 67, 20 *Q. B. D.* 120) *limiting execution to her separate property not subject to restraint against anticipation, unless, by virtue of section* 19 *of the Married Women's Property Act*, 1882, *such property should be liable to execution notwithstanding such restraint.*

At the date of these orders the trustees had in their hands a sum representing arrears of the married woman's income, which had accrued due since the date of the summons, and which was more than sufficient to pay the costs.

The trustees having applied for leave to retain their costs of the Queen's Bench Division action and of the summons, out of the money in their hands,

Held (affirming the decision of Kekewich, J.), *that such leave ought to be granted.*

In re Glanvill, 34 *W. R.* 118, 309, 31 *Ch. D.* 532, *considered and distinguished.*

The principle of law on which Pike *v.* Fitzgibbon, 29 *W. R.* 551, 17 *Ch. D.* 454, *was decided—viz., that the general engagements of a married woman can only be enforced against separate estate to which she was entitled free from any restraint on anticipation at the time such engagements were entered into—has been altered by the Married Women's Property Act*, 1882.

An order of the court made merely for convenience of administration, and in effect directing that money representing arrears of income which have actually accrued due to a married woman, should not be immediately paid to her, does not render such arrears "property subject to restraint against anticipation," and consequently such arrears can be taken in execution under an order made in the form settled in Scott *v.* Morley.

Appeal from Kekewich, J.

The action was commenced in 1867 to administer the estate of a testator under whose will the present appellant, Mrs. Laura Midwinter, who was a married woman and one of the defendants in the action, was entitled to the income of part of his estate for her life for her separate use without power of anticipation.

By an order of Bacon, V.C., dated the 22nd of April, 1882, and made upon the second further consideration of the action, Robert Brown and Walter James Midwinter were appointed new trustees of the will, and the trust estate became vested in the said new trustees jointly with John Bennett, the continuing trustee, upon the trusts of the will. After divers other directions the order proceeded: "And it is ordered that the said defendants, John Bennett, Robert Brown, and Walter James Midwinter, be at liberty, out of any moneys in their hands forming part of the testator's estate, to pay to each of the defendants, Emma Brown, Esther Elizabeth Bennett, and Laura Midwinter, upon their respective separate receipts, until further order the sum of one hundred and twenty-five pounds on the following days of each year (that is to say), the 24th of June, the 29th of September, the 25th of December, and the 25th of March, the first of such payments to be made on the 24th of June, 1882." After directing the accounts to be continued, the order proceeded: "And it is ordered that the defendants, John Bennett, Robert Brown, and Walter James Midwinter . . . be at liberty to pay to the defendants, Esther Elizabeth Bennett; Emma Brown, and Laura Midwinter respectively, upon their respective receipts, the residue, (after deducting the proportionate parts of the said costs as aforesaid, and after retaining sufficient to enable them to pay the proportionate parts of the outgoings in connection with the estate for the following quarter), of the balances from time to time of the accounts respectively in respect of the shares of the testator's estate devised and bequeathed in trust, for the benefit of them respectively and their respective issue; and any persons interested are to be at liberty to apply in chambers as to the residues of such balances respectively if the same are not so paid"; and the subsequent further consideration of the action was adjourned, with liberty to apply.

It appeared that Mrs. Midwinter, who was married before the passing of the Married Women's Property Act, 1882, was separated from her husband, and that, in connection with the pecuniary arrangements between them, she had claimed that certain moneys in the hands of the trustees of the will should be paid over to her. Pursuant to that claim, in January, 1889, she instituted, in her own name, without a next friend, an action in the Queen's Bench Division for repayment to her of certain money already paid to her husband, and for payment to her of the moneys already mentioned as being then in the hands of the trustees. That action stood over pending an application to Kay, J., who was the judge before whom the administration action was being carried on.

In February, 1890, Mrs. Midwinter took out, also in her own name, without a next friend, a summons (in the administration action) against the

(a.) Reported by R. H. DEANE, Esq., Barrister-at-Law.

trustees, and Kay, J., ordered certain sums to be paid to her at once, and that the summons should stand over. On the 16th of July, 1890, Kay, J., dismissed the summons, and ordered Mrs. Midwinter to pay the trustees their costs thereof.

The order (being in the usual form, as settled in the case of *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120) expressly limited execution to the separate property of the married woman not subject to any restraint against anticipation, unless, by virtue of section 19 of the Married Women's Property Act, 1882, such property should be liable to execution notwithstanding such restraint.

On the 12th of August, 1890, a formal order in the same form was also made dismissing the action in the Queen's Bench Division, with costs.

At the time these orders were made the trustees had in their hands a sum of £304 2s. 8d., being arrears of Mrs. Midwinter's income actually accrued due since she took out her summons.

Section 1, sub-section (2), of the Married Women's Property Act, 1882, provides that "a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

Section 19 provides that "nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached, or to be hereafter attached, to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors."

The trustees having made an application for leave to retain the taxed costs of Mrs. Midwinter's summons (which she had been ordered to pay) out of the sum of £304 2s. 8d. arrears of her income in their hands, Kekewich, J., gave them permission to do so.

Mrs. Midwinter now appealed from the order giving that permission.

Mulligan and *Watt*, for the appellant.—A married woman cannot be made to pay costs out of money as to which she is restrained from anticipation. [KAY, L.J.—Some of this money was in the trustees' hands at the date of the dismissal of the summons.] Yes, but under the order of the 22nd of April, 1882, she was not entitled to payment of it till later. [LINDLEY, L.J.—Then the disability to receive it was not in consequence of the restraint on anticipation in the will, but in consequence of an order of the court.] There was a restraint on anticipation in the will. No part of this lady's income which has accrued due since she took out her summons can be taken to pay these costs: *In re Glanvill, Ellis* v. *Johnson*, 34 W. R. 118, 309, 31 Ch. D. 532. The other side rely on *D'Oechsner* v. *Scott*, 24 Beav. 239, 6 W. R. Ch. Dig. 91; but there the settlement contained a clause expressly providing that the trustees might reimburse themselves out of money coming into their hands any expenses incurred by them in the execution of the trusts. [KAY, L.J.—In *In re Glanvill* Cotton, L.J., in noticing *D'Oechsner* v. *Scott*, said that Lord Romilly decided it on the peculiar wording of the settlement there, which went beyond the usual terms in favour of the trustees.] They cannot rely on *D'Oechsner* v. *Scott*, or on *In re Bown, O'Halloran* v. *King*, 33 W. R. 58, 27 Ch. D. 411, because here the order limited execution to the separate property not restrained from anticipation. This case cannot turn on the Married Women's Property Act, 1882, as section 19 expressly provides that nothing in the Act shall affect any settlement made respecting the property of any married woman. *Hyde* v. *Hyde*, 36 W. R. 708, 13 P. D. 166, is not inconsistent with *In re Glanvill*. [KAY, L.J.—The real question is whether the appellant could, at the date of the issuing of her summons, have charged any of these moneys by instrument under her hand.]

They also referred to *Pike* v. *Fitzgibbon*, 29 W. R. 551, 17 Ch. D. 454; *Stanley* v. *Stanley*, 26 W. R. 310, 7 Ch. D. 589; and *In re Andrews, Edwards* v. *Dewar*, 34 W. R. 62, 30 Ch. D. 159.

Renshaw, Q.C., and *Reginald Winslow* (*Bramwell Davis* with them), for the respondents.—The only restraint on anticipation that cannot be disregarded is that created by the will, not that arising from the order of the court, and made merely for the purposes of the administration of the estate. At the date of the order dismissing the summons the trustees had £304 2s. 8d. arrears of income in their hands, and in the following month a further sum of about £55 came in, so that there was far more than enough to pay these costs, which only amounted to about £216 altogether. [KAY, L.J.—You say she could have made a valid mortgage of these moneys at that time?] Certainly. She could have charged the whole. It is merely for convenience of administration that she is only to be paid £125 quarterly, and the balance at the end of the year. As to *D'Oechsner* v. *Scott*, it shows that the trustees had a right to be indemnified out of moneys coming to their hands. Section 1, sub-section (2), of the Married Women's Property Act, 1882, is the section that applies to this case. [LINDLEY, L.J.—You do not want that if you are right on the facts.]

Freeman, for another party.

Mulligan, in reply.—The court, in interpreting the will, fixed by its order the times of payment, and the income cannot be anticipated with reference to those times. [LINDLEY, L.J.—That order cannot affect the will so as to create a restraint on anticipation not directed by the will itself.] The income attached must be free from restraint at the date of the wrongful act in respect of which the married woman is ordered to pay costs. [KAY, L.J.—There was no positive order for payment by the lady out of her separate estate in *In re Glanvill*.] In *Pike* v. *Fitzgibbon* James, L.J., said at the end of his judgment that the only separate property which could be reached was that which a married woman had at the time of contracting the engagements which it was sought to enforce.

He also referred to *Whittaker* v. *Kershaw*, 38 W. R. 497, *ante*, p. 22, 45 Ch. D. 320, at p. 327.

Cur. adv. vult.

Feb. 26.—LINDLEY, L.J.—This is an appeal from an

order made by Kekewich, J., authorizing the trustees of a will, under which a Mrs. Midwinter is entitled to income to her separate use without power of anticipation, to retain and pay certain costs which they had incurred in the execution of their trusts, and which costs she had been ordered personally to pay.

Now there were two orders, or one order and one judgment, affecting her. One was an order dated the 16th of July, 1890, by which a summons taken out by her without any next friend, that is to say, under the provisions of the Married Women's Property Act, 1882, which alone entitles her to sue in that way, was dismissed, with costs. She was ordered to pay the costs, and then there was the usual limitation as to separate estate which she could not anticipate. It ran in this way:—"And it is ordered that execution be limited to the separate property of the defendant, Mrs. Midwinter, not subject to any restraint against anticipation unless by virtue of section 19 of the Married Women's Property Act such property shall be liable to execution notwithstanding such restraint." The other was a judgment against her, dated the 12th of August, 1890, when a certain action, instituted by her also in her own name and without any next friend, was dismissed with costs in the same way. So that we have here, on the 16th of July, 1890, and the 12th of August, 1890, two orders, or one order and one judgment (there is no necessity to distinguish between them) against her, made in proceedings instituted by her under the Married Women's Property Act, and ordering her to pay the costs.

Now, at the times those orders were made the trustees had in their hands certain arrears of the income which was settled upon her for her separate use, and which arrears are more than sufficient to pay the costs which she has been ordered to pay.

Under those circumstances Kekewich, J., made the order which is appealed from, giving the trustees liberty to retain out of the sum of £304 2s. 8d. (being the amount received by the trustees in respect of the rents and profits accrued due to the 16th of July, 1890, of certain property held on trust for her), certain sums of costs which I need not specify.

Now Mrs. Midwinter has appealed from that order, and she says it is wrong, inasmuch as it affects property as to which she is restrained from anticipation. Mr. Mulligan, on her behalf, puts it in this way—that the time to which we ought to direct our attention is a time anterior to those orders —I suppose the time when the legal proceedings were instituted—and that at that time it does not appear there were arrears that could be attached. He relies in support of that argument on a case of *In re Glanvill*, and upon the 19th section of the Married Women's Property Act.

Since this case was argued yesterday I have looked at *In re Glanvill* a little more closely. It appears to me that that case, and the reasoning on which it is based, does not apply to the present case at all. In the first place, in the case of *In re Glanvill* the action was not under the Act at all. There were no proceedings taken by the lady under the Act. In the second place, there was no order for payment by the married woman herself in that case, and that distinguishes the order appealed from in that case from the order which is now under appeal. In that case, in the third place, the order which was made by Bacon, V.C., which was appealed against, was evidently wrong, because it entitled the trustees to retain out of future accruing separate estate. To that extent it was obviously wrong. But there was this point raised. There was a small sum of £36 which was said to be arrears, and which it was said might be impounded or retained by the trustees. When you come to look at the judgments, you find that that £36, small sum as it was, accrued after the order on further consideration which did not order her to pay the costs, but ordered her next friend to pay the costs, and the court there came to the conclusion that even that sum could not be attached; and there is language in that judgment that goes the length of showing, or containing an intimation of opinion, that the only arrears that could be attached would be arrears that had accrued at the time of the institution of the suit. The main controversy was obviously not as to that £36. That was merely a small item in the matter; but the main controversy was as to the propriety of the Vice-Chancellor's order entitling the trustees to retain the costs that had been incurred (and which the married woman ought to pay) out of her separate property which was acquired afterwards. There the Vice-Chancellor was wrong. When you look at the case of *Hyde* v. *Hyde*, the Court of Appeal there, in dealing with a sequestration, did allow the sequestrator to attach and take in execution the arrears of a married woman's separate estate which were due at the time the sequestration issued, and they made no reference there as to any earlier time.

Now, quite apart from that, it appears to me that what we have to deal with is, not the case of *In re Glanvill*, but the Act of Parliament—the Married Women's Property Act. I confess I am not at all disposed to extend the decision in *In re Glanvill* to a case which arises under the Married Women's Property Act, for the reason which I will now give. In the first place, the court itself in *In re Glanvill* declined to say what would be right in a case arising under the Married Women's Property Act. Fry, L.J., dealt pointedly with that. He says, "The action was begun in 1882, before the passing of the Married Women's Property Act, 1882. How the case would have stood if the plaintiff had been suing without a next friend under the provisions of that Act I give no opinion. The question is one of some difficulty, and is not now before us." That is precisely the question which we have to deal with. The Married Women's Property Act enables a married women to sue without a next friend—that is, section 1; and what is far more important to my mind is this, that that Act departs from the principle upon which *Pike* v. *Fitzgibbon* was decided, and which was taken as the foundation of the decision in *In re Glanvill*. It alters the whole law, as I understand it, as laid down in *Pike* v. *Fitzgibbon*. Therefore, if we look at the Act, we find ourselves face to face with this difficulty:—Supposing a married woman avails herself of the provisions of the Act of Parliament by instituting proceedings at law or in equity without a next friend, and is ordered to pay costs, and supposing at the time of the institution of those proceedings she has no separate estate, but afterwards acquires separate estate, are those costs to remain unpaid if that separate estate is free from anticipation? It appears to me that they ought not, that is to say, if you can find at any time arrears that can be attached, you may attach those arrears of the separate estate, although of course you cannot attach the future income which she is restrained from anticipating. In giving that effect to the Act, it appears to me we are giving full effect to section 19, to which Mr. Mulligan referred. We are not in the least infringing the clause against anticipation. We are doing nothing more than taking arrears which she can anticipate and can deal with. That appears to me to be the true result of the Act of Parliament, and of the case of *In re Glanvill* so far as it has any bearing on cases arising under the Act. I say nothing about the decision in *In re Glanvill*; I daresay it was right, but it is clearly distinguishable

from the case we have to deal with. It was not a case depending upon the Act, and I certainly am not prepared to introduce what would be a startling state of things if we applied *In re Glanvill* to proceedings taken under the present Act.

I think, therefore, the appeal must be dismissed.

KAY, L.J.—The difficulty in this case arises, undoubtedly, from the language used by the judges of the Court of Appeal in the case of *In re Glanvill*. Lindley, L.J., has stated the facts of this case, and I will not repeat any of them. In *In re Glanvill* an action had been dismissed, with costs. It was an action by a married woman by her next friend, and the question was, which part of her separate estate could be attached for the payment of those costs, and most certainly all the Lords Justices concurred in saying that no part of her separate estate, except that which was free from anticipation at the date when the action was begun—not when the order for costs was made—could be attached to satisfy those costs. The case was peculiar in this respect. The action, as I have said, was by a married woman by her next friend, and, therefore, commenced before the Married Women's Property Act, which has made the use of a next friend unnecessary. The order for costs was made, of course, against the next friend, but it in terms gave liberty to apply against the married woman if the next friend did not satisfy the costs; and it was under that liberty to apply that an application was made to have those costs paid. Now between the time of the institution of the action and the time of making the order dismissing it, with costs, or, at any rate, before the application was made under the liberty to apply, there had accrued some £36 of the income of the married woman as to which she was restrained from anticipation; but it had become due to her, and therefore that sum at the time of the application to the court constituted arrears of her income, and, of course, the fetter against anticipation was gone as soon as the income was payable to her. Therefore, if the date of the application to make her liable was the date to be looked at, those arrears, at any rate, would have been arrears that could have been attached. But the Lords Justices distinctly said No, we must not look at that date, but we must look at the date when the action which was dismissed with costs was begun, and as this sum had not then accrued, and did not constitute arrears so as to be free from the fetter against anticipation, the court has no power to make an order that the costs shall be paid out of the £36.

That raises the difficulty in this case, and we took a little time to consider it further. Lindley, L.J., has pointed out that this case differs in that particular—that the action and summons, both of which had been dismissed with costs (or at least the action was dismissed with costs, and the lady was ordered to pay the costs of the summons), were proceedings taken by her after the Married Women's Property Act had come into operation, and therefore without a next friend. [His lordship then read section 1, sub-section (2), of the Married Women's Property Act, 1882, and proceeded:—] The question here is whether income which had accrued after the date of the action, but before the order for payment of costs, could be made liable? Of course, at the time when the order for payment of costs was made, these were arrears of income. There has been some question whether they could be properly called arrears of income, because it seems that under the will which gave her this income for her separate use, without power of anticipation, no days of payment were fixed, but the court, by an order of the 22nd of April, 1882, for convenience in the administration of the estate, directed that a certain sum should be paid out quarterly, and then that the residue of the income, if it exceeded that amount, was to be paid to her when the trustees passed their accounts at the end of the year, the object obviously being, for the convenience of administration, to let the trustees have a certain sum in their hands to pay for repairs and other outgoings which they had to pay. I have no doubt, notwithstanding this order of the court, that these were arrears of income due to the wife, though under the order they would not be payable; and that you cannot read that order into the will, so as to treat the days of payment in the order as though they had been days of payment fixed by the will, because it was merely for the purpose of convenience of administration that that order was made.

Therefore, upon that point I am clear that, at the time when this order for payment of costs was made, these moneys were arrears of income due to the married woman, as to which, of course, the restraint on anticipation had gone; that is to say, to put the proper test, at the moment when these orders were made she could have charged the money then coming to her which had accrued due, and was in the hands of the trustees—she could have charged that for valuable consideration, and made an effectual assignment of it, notwithstanding the restraint on anticipation. If she could have done that, surely the essential justice of this case is, that the order for the payment of costs should be an order which could be executed against that fund. The costs are not incurred at the moment of bringing the action: the costs are not incurred until after the action is brought, that is to say, in the progress of the action. These were costs of her own trustees; they were incurred during the action, which the court ultimately decided was improperly brought, and ought to be dismissed with costs. It seems to me it is only just and right, if you can arrive at it in any way, to say that those costs shall be paid, not merely out of separate estate to which she was entitled at the time of bringing the action, but out of any separate property she was entitled to when the order was made. To try the question it is only necessary to suppose she had, at the time of bringing the action, no separate property except that which she was restrained from anticipating, and that when the order for payment of these costs was made, there were no arrears of that particular property at all, but that in the meantime she had become entitled to a large sum under some other will or settlement for her separate use, as to which she was not restrained from anticipation. Would it be just and equitable to let her go free, and to let her take away that property, as to which there was no restraint on anticipation, and to say to the trustees, "You shall not have those costs"? Clearly not. It seems to me that the order which was in fact, and in terms, that she should pay out of her separate property, excepting only that as to which she was restrained from anticipation, would apply to any separate property which was hers at the date when that order was made. I arrive at that conclusion from a consideration of what seems to me the natural justice of the case, and also on principle. The only question is whether the case of *In re Glanvill* prevents our holding that. For the reasons which have been given by Lindley, L.J., in which I concur, I do not think that it does. That was a case, as he has pointed out, which did not come under the Married Women's Property Act at all, because the action had been commenced before the coming into operation of the Married Women's Property Act. All the judges carefully reserved any opinion as to what the decision in that case would have been if the action had been brought under that Act.

I think, therefore, with Lindley, L.J., that that case ought not to be extended to a case in which the facts are such as they are here, that is to say, where an order has been actually made for payment by the married woman, only limited to prevent that payment being recovered against the estate as to which she was restrained from anticipation—and it seems to me that that order ought to be treated as applying to all separate estate which belonged to her at the date of the order, and as to which she was not restrained from anticipation. I take the date of the order, rather than the date of the commencement of the proceedings, as the proper date to be looked at in this case. For these reasons I agree with the Lord Justice that this appeal must be dismissed.

Appeal dismissed.

Solicitors, *R. T. Webster; Daniel Stock; Mackinson, Carpenter, & Son.*

From Chan. Div. Jan. 20, 21.

In re HESELTINE.
WOODWARD *v.* HESELTINE. (*a.*)

Bill of sale—Statutory form—Address of attesting witness—Name and description of grantee—Bills of Sale Act, 1882 (45 *&* 46 *Vict. c.* 43), *ss.* 8, 9—*Form in schedule.*

The execution of a bill of sale was attested by "C.. clerk to the D. Bank, D.-street, Charing-cross." The affidavit made by the attesting witness, and filed with the bill of sale, gave the private residence of the witness as his address.

Held, by the Court of Appeal (*differing on this point from* North, J.), *that the address of the attesting witness as given in the bill of sale was sufficiently in accordance with the statutory form.*

A bill of sale was expressed to be granted to "the D. Bank, of 6, *D.-street, Charing-cross (of which said bank S., of the same place, is the sole proprietor)." The chattels comprised in the bill of sale were thereby assigned to "the said bank and its assigns," and the bill of sale contained no further mention of S.*

Held, that no irresistible inference could be drawn from the bill of sale itself that the "D. Bank" was in fact S., and accordingly that the bill of sale was void, on the ground that the name and description therein contained of the grantee was not in accordance with the statutory form.

Bird *v.* Davey, ante, *p.* 40, [1891] 1 *Q. B.* 29, *distinguished.*

Appeal from North, J.

The plaintiff was an unsecured creditor of the estate of W. Heseltine, deceased, and the action was for administration of the estate, for a declaration that a bill of sale executed by the deceased in favour of the defendant Simmons was void, and for an injunction to restrain Simmons from removing or selling the goods comprised in the bill of sale.

The widow of the deceased was also made a defendant.

The bill of sale, which was dated the 12th of June, 1890, was expressed to be made between Heseltine of the one part, "and the Discount Bank of London, of 6, Duncannon-street, Charing Cross, in the County of Middlesex (of which said bank Lewis Simmons, of the same place, is the sole proprietor) of the other part"; and "in consideration of the sum of £500 now paid to the said W. Heseltine by the said bank," Heseltine thereby assigned "unto the said bank and its assigns" the chattels specifically described in the schedule thereto annexed "by way of security for the payment of the sum of £500 and interest thereon at the rate of ninepence in the pound per month. And the said W. Heseltine doth further agree and declare that he will duly pay to the said bank the principal sum aforesaid, together with the interest then due, by monthly payments of £30 on the 18th day of every month, the first payment to be made on the 18th day of July next, provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said bank for any cause other than those specified in section 7 of the Bills of Sale Act (1878) Amendment Act, 1882."

The attestation, on the face of the bill of sale itself, of the execution thereof by the grantor was as follows: "Signed and sealed by the said W. Heseltine in the presence of me, William George Cleverly, clerk to the Discount Bank of London, 6, Duncannon-street, Charing Cross."

In the affidavit made by the attesting witness filed with the bill of sale he described himself as "William George Cleverly, residing at 12X, Peabody-avenue, Pimlico, clerk to the Discount Bank of London, 6, Duncannon-street, Charing Cross."

The grantor, W. Heseltine, died on the 2nd of December, 1890, and on the 3rd of December the defendant Simmons took possession of the chattels which were the subject-matter of the bill of sale.

North, J., granted an interlocutory injunction to restrain the defendant Simmons from selling, disposing of, or removing the chattels until the trial of the action, on the ground that the bill of sale was not in accordance with the statutory form, because the attestation of the execution of the bill of sale did not give the address of the attesting witness.

Simmons appealed.

Bosanquet, Q.C., and *J. H. Poulter,* for the appellant.—The statutory form has been complied with by giving the business address of the attesting witness, and it is not necessary to give also the place where he sleeps as his address; it is sufficient if either be given: *Blackwell* v. *England,* 6 W. R. 59, 8 E. & B. 541; *Attenborough* v. *Thompson,* 6 W. R. 135, 2 H. & N. 559; *Hewer* v. *Cox,* 9 W. R. 143, 3 E. & E. 448; *Ex parte Breull,* 29 W. R. 299, 16 Ch. D. 484. [LOPES, L.J., referred to *Haslope* v. *Thorne,* 1 Mau. & Sel. 103, and *Alexander* v. *Milton,* 2 Cr. & J. 424.] *Stoy* v. *Rees,* 38 W. R. 683, 24 Q. B. D. 748, which was relied on by North, J., was a case as to indorsement of a plaintiff's address on a writ of summons, and turned on the words "who resides at" used in Appendix A., Part 1, Form 4, of the Rules of the Supreme Court, and is, therefore, not applicable.

Napier Higgins, Q.C., and *Ingpen,* for the plaintiff.—The bill of sale is void for non-compliance with the statutory form in several particulars; first, the address of the attesting witness is not properly stated in the attestation clause, and the defect is not cured by its being stated in the affidavit filed with the bill of sale: *Parsons* v. *Brand, Coulson* v. *Dickson,* 38 W. R. 388, 25 Q. B. D. 110; *Stoy* v. *Rees.* The cases of *Blackwell* v. *England* and *Attenborough* v. *Thompson* were decided on the Bills of Sale Act, 1854, which did not contain the same stringent provisions as to registration as the Acts of 1878 and 1882. [LOPES, L.J., referred to *Hickley* v. *Greenwood,* 38 W. R. 686.] The Acts of 1878 and 1882 do not contemplate that the attesting witness could have two addresses, either of which it was sufficient to state; the place of residence and not the place of business should, therefore, have been given. Secondly, the bill of sale is void because

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

the name of the grantee is not properly given in the bill of sale. It was Simmons who advanced the money, but the grantee named in the bill of sale is the "Discount Bank of London," and the bill of sale is so registered: Bills of Sale Act, 1878, s. 11 (2) and s. 12. The statutory form does not contemplate an incorporated company being the grantee of a bill of sale. It is doubtful whether in Acts prior to the Interpretation Act, 1889 (52 & 53 Vict. c. 63), the word "person" includes a body of persons corporate or unincorporate: see section 19 of the Interpretation Act, 1889. [They were stopped.]

Bosanquet, Q.C., in reply.—Simmons carries on a banking business under the name or style of the "Discount Bank of London." There is nothing in the Bills of Sale Acts to prevent either a corporate body or a trading firm lending money on the security of a bill of sale, and doing so in their trade name. This bill of sale states on the face of it that Simmons is the sole proprietor of the "Discount Bank of London," so that nothing is concealed, and there is no variance from the statutory form calculated reasonably to deceive: *Ex parte Stanford*, 34 W. R. 507, 17 Q. B. D. 259; *Thomas* v. *Kelly*, 37 W. R. 353, 13 App. Cas. 506. [LOPES, L.J., referred to *Bird* v. *Davey*, *ante*, p. 40, [1891] 1 Q. B. 29.] A firm or corporation can now sue or be sued in the firm or corporate name: R. S. C., ord. 16, rr. 14, 15.

Napier Higgins, Q.C. [having been previously stopped, was now again called on].—The Discount Bank being composed of one person only—viz., Simmons—no proceedings could be instituted in the name of the Discount Bank. The Rules of the Supreme Court do not apply to such a case. The Discount Bank might be a company in which Simmons had all the shares, and evidence extraneous to the bill of sale itself is required to show whether or not the Discount Bank is a corporate body, and therefore *Bird* v. *Davey* is distinguishable. The words "sole proprietor" are not equivalent to "trading in the name of." The grantor should be clearly informed by the bill of sale as to his legal position; if Simmons died, the grantor would not know to whom to apply for the purpose of redeeming the bill of sale, because by the operative part the chattels are assigned to the bank "and its assigns."

He referred to *Ex parte Blain*, 28 W. R. 334, 12 Ch. D. 522, at p. 533; *Ex parte Corbett*, 28 W. R. 569, 14 Ch. D. 122; and *Pharmaceutical Society* v. *London and Provincial Supply Association*, 28 W. R. 957, 5 App. Cas. 857.

Bosanquet, Q.C., in further reply, referred to *Downs* v. *Salmon*, 36 W. R. 810, 20 Q. B. D. 775.

D. L. Alexander, for the administratrix.

LINDLEY, L.J.—This is an appeal by Simmons, the holder of a bill of sale, from an order of North, J., granting an *interim* injunction to restrain him from selling or removing the goods therein comprised. The case was decided against him on the ground that the bill of sale was void because the proper address of the attesting witness did not appear upon it.

Other objections were also taken which were not discussed in the court below.

In the attestation clause the attesting witness is described as "W. G. Cleverly, clerk to the Discount Bank of London, 6, Duncannon-street, Charing Cross." In the affidavit filed with the bill of sale he describes himself as "of 12X, Peabody-avenue, Pimlico." The plaintiff contends that in the attestation clause the witness ought to have given his place of residence, but that argument does not seem to me to be sound. The address given in the attestation clause was the place where he was employed all day, a letter addressed there would have reached him, and a person wishing to see him might have found him more readily by going there than by going to the place where he slept. I think that the bill of sale cannot be held void on this ground.

Another objection was taken—that the bill of sale was void as not being in accordance with the form given by the statute. We all know the difficulty of construing section 9 of the Act. In construing it we must have recourse to the authority of the recent case of *Thomas* v. *Kelly*. Lord Macnaghten there says, 13 App. Cas. 506, p. 519:—"This section seems to me to deal with form and form only. So purely is it I think a question of form that I should be inclined to doubt whether a bill of sale would not be void which omitted the proviso referring to section 7, though I cannot see that the omission would alter the legal effect of the document or mislead anybody. It has been held, and I think rightly, that section 9 does not require a bill of sale to be a verbal and literal transcript of the statutory form. The words of the Act are, 'in accordance with the form,' not, 'in the form.' But then comes the question, When is an instrument which purports to be a bill of sale not in accordance with the statutory form? Possibly when it departs from the statutory form in anything which is not merely a matter of verbal difference. Certainly I should say when it departs from the statutory form in anything which is a characteristic of that form." Now one of the characteristics of the form is that the name of the grantee should be given, and it is important that there should be no ambiguity about the name. Here a bill of sale is given to a gentleman who lends money upon it. The grantee is described as "The Discount Bank of England, of 6, Duncannon-street, Charing Cross, of which said bank Lewis Simmons, of the same place, is the sole proprietor." A marked distinction is here drawn between the Discount Bank and Simmons himself, he is stated to be the proprietor of the thing called the Discount Bank of London.

We are asked to construe this bill of sale as made between Heseltine of the one part, and "Lewis Simmons, trading under the style or firm of the Discount Bank of London," of the other part. That is not what the bill of sale says, and the distinction between himself and the bank runs through the document. The chattels are expressed to be assigned "to the said bank," and Heseltine agrees that he will pay the money "to the said bank." Can we from what appears on the face of the bill of sale, without any extrinsic evidence, draw the irresistible inference that Simmons is the bank? I think we cannot, and I am therefore of opinion that the bill of sale departs from the statutory form in an essential point, and is void under the Act.

LOPES, L.J.—I entirely agree. As to the attesting witness I think that the court below came to an erroneous conclusion, and that the address was sufficient. The object of requiring the address to be given is to give such information as would enable a person to find the witness. A letter addressed to 6, Duncannon-street would find him, and a person wishing to see him would more readily find him there than at the place where he slept.

The other point, that the bill of sale is not in accordance with the statutory form, is of more importance. It is urged that it is not in accordance with the scheduled form because the description of the grantee is not clear. If the grantee is described in a way likely to mislead, I think that the bill of sale is not in accordance with the form and is void. In *Ex parte Stanford*, 17 Q. B. D., p. 270, it is said: "A bill of sale is surely in accordance with the prescribed form if it is substantially in accordance with it, if

it does not depart from the prescribed form in any material respect. But a divergence only becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect either greater or smaller than that which would attach to it if drawn in the form which has been sanctioned, or if it departs from the form in a manner calculated to mislead those whom it is the object of the statute to protect."

I think that the present bill of sale does depart from the form in a manner calculated to mislead those whom it is the object of the statute to protect. The description of the grantee is such as to raise an ambiguity, and I think an intentional ambiguity. It appears to me that on the face of the instrument there is nothing from which an irresistible inference is to be drawn that Simmons is the bank or that the bank is not a corporation. I think, therefore, that the order appealed from is right. The case is distinguishable from *Bird* v. *Davey* on the ground that in that case there was, in the opinion of the court, an irresistible inference from what appeared on the bill of sale itself that the same person attested the execution by both grantors, and, if so, the statute was satisfied by his address being once given.

KAY, L.J.—There are two points settled by decision. First, that the words "in accordance with the form" have not the same effect as "in the form." This was laid down by the House of Lords in *Thomas* v. *Kelly*. It is difficult to define the degree of latitude which the Act allows, but all the lords agreed that some departure from the words of the form was allowable. Secondly, it was decided in *Bird* v. *Davey* that an imperfection on the face of a bill of sale which was corrected by other information supplied by the document itself, did not invalidate the bill of sale. Here the description of the grantee is, "The Discount Bank of London, of which bank L. Simmons is the sole proprietor." "The Discount Bank of London" might be the name of a corporation, and is there any irresistible inference from what appears on the bill of sale, that it was not? Unless there is such inference, *Bird* v. *Davey* does not apply, and the bill of sale is bad. If the description had been "The Discount Bank of London, which is not a corporation, but a firm in which L. Simmons is the sole proprietor," I do not say how the case would have stood. That is not the language used, but a description is given which might denote a joint-stock company in which Simmons held all the shares, and to say that there is any irresistible inference that "The Discount Bank of London" was the trade name of Simmons is going too far. I think, therefore, that there is a substantial departure from the statutory form, and that the bill of sale is invalid.

Appeal dismissed.

Solicitors for the appellant, *Harold L. Simmons.*

Solicitors for the respondents, *Leggatt, Rubinstein, & Co.*

From Q. B. Div. March 19.

REG. v. JACKSON. (a.)

Habeas corpus—*Husband and wife—Right of husband to capture and confine a wife refusing him conjugal rights—Matrimonial Causes Act*, 1884 (47 & 48 *Vict.* c. 68).

A husband has no right to the custody of his wife's person.

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

Where a wife had refused to obey a decree for the restitution of conjugal rights obtained by her husband,

Held, that he had no right to seize her by force and confine her in order to compel her to render him conjugal rights.

Return to a writ of *habeas corpus.*

On March 16 application for a writ of *habeas corpus* was made to a divisional court (Cave and Jeune, JJ.) on behalf of Emily Emma Maude Jackson, who, as was alleged, was detained in the custody of her husband, Edmund Haughton Jackson.

The application was refused, and on March 17 it was renewed before the Court of Appeal, who directed the writ to issue subject to their jurisdiction to entertain the appeal.

The return to the writ was now made, and the question came on for argument.

The return was in the following terms:—

"I, Edmund Haughton Jackson, in obedience to the writ, herewith do certify and return as follows:—

"1. The said Emily Emma Maude Jackson is my wife.

"2. During my absence in New Zealand in the year 1888, my said wife went to reside with her sisters and brother-in-law. It was arranged that she should shortly join me in New Zealand, but she wrote to me pressing me to return to England, and I did so, but on my return to England in July, 1888, she refused to live with me, and I was denied access to her.

"3. I commenced proceedings in the Divorce Division of the High Court of Justice against my said wife for restitution of conjugal rights, and on the 30th day of July, 1889, a decree was made for such restitution.

"4. Since the making of such decree, I have endeavoured to persuade my said wife by letters (personal access being still denied to me) to come and live with me, but, acting under the advice and counsel of her said sisters and brother-in-law, she has in no way responded to my overtures.

"5. I therefore, on the 8th day of March instant, took my said wife, and have since detained her in my house, using no more force or constraint than was necessary to take her or to prevent her returning to her said relations. She has had perfect liberty in and the full run of the house short of leaving it.

"6. Such restraint, I submit that I could lawfully use in order to have an opportunity of regaining the affection of my wife, which had become alienated from me, and which it was impossible I could do when she was under the influence of her said relations."

It appeared from Mr. Jackson's affidavit that he and his wife were married on November 5, 1887, after an engagement which had been broken, but had been renewed at Mrs. Jackson's instance.

The marriage was opposed by Mrs. Jackson's relatives, and it was agreed that Mr. Jackson should go out to New Zealand, and that Mrs. Jackson should join him there in six months' time.

Accordingly, on November 7, he started for New Zealand with his wife's consent. Mrs. Jackson continued to reside with her relatives, but on Mr. Jackson's arrival in New Zealand he received letters from her urging him to return, which he accordingly did. On his arrival in England he was refused access to her and she declined to live with him.

On July 30, 1889, he obtained a decree for the restitution of conjugal rights, with which, however, she declined to comply, and accordingly, on Sunday, March 8, with the assistance of two friends, Mr. Dixon Robinson and Dr. W. H. Robinson, he seized Mrs. Jackson as she was coming out of church w[illegible]

her sister, and forced her into a carriage which he had in attendance, and drove her to his house at Blackburn, where she had since been confined.

The affidavit continued :—

"After the carriage started my wife offered no further resistance, though she continuously protested against having been taken, and desired to be released, saying that I could not force her to live with me. On arriving at the house she walked quietly in without any use of force whatever. My friend Dixon Robinson drove with us to Blackburn inside the carriage, and later in the day we were joined by Dr. Robinson, who was my other coadjutor in the seizure of my wife. Immediately on my arrival home I placed my wife in the charge of my sister, who now resides with me, with instructions to give her every attention, and I also engaged the services of a qualified nurse." "Until about 7 o'clock on Sunday evening my wife refused all refreshment of any description, but ultimately consented to take some light refreshment, insisting, however, in regard to everything she took that my friend Dr. Robinson should share it with her, as she feared it might be drugged. After the nurse came, however, she appeared to regain confidence, and since the Monday after her capture she has freely partaken of any food set before her." "During the whole period since the seizure of my wife she has been treated by myself and everyone in the house with every kindness and consideration, and I cannot remember to have said or done a cruel, unkind, or ungentlemanly word or act to her during the whole time." "Since Wednesday last my wife has had the free run of the house, doing just as she pleased (save leaving the house, had she so desired), but declining to come downstairs until evening. I have, moreover, several times offered to take her a drive with me, but she has declined. On one occasion only were the blinds of her room upstairs pulled down to prevent her exchanging signals with her relatives outside, and they were drawn up a few moments afterwards, and no restraint or interference was subsequently placed upon her so seeing or communicating with her relatives."

Mrs. Baldwin, the sister of Mrs. Jackson, filed an affidavit describing the capture. She said, "Mr. Jackson had his face almost covered with a black wrap, which went over his nose. He rushed at my sister and seized her by the arm, and said, 'You are my wife; come with me into this carriage.' She said, 'I will not,' and then said to me, 'Hold me fast and prevent him taking me.' I caught hold of her waist. He was accompanied by two young men named Robinson, one a surgeon, the other a solicitor's articled clerk. A struggle ensued, they endeavouring to force her into the carriage, and she resisting with all her might, and I assisting her to the utmost of my power. Eventually she was dragged backwards into the bottom of the carriage by her husband, I clinging to her all the time. He then bent back with great violence two of the fingers of my right hand, and so loosened my grip round her waist. When my hands were being thus loosened, Dixon Robinson (the articled clerk) pushed me violently on the right shoulder, and I fell back from the carriage. My sister's legs were sticking out of the carriage door when she was on the bottom of the carriage, and Dixon Robinson, after pushing me away, got hold of her legs and shoved them into the carriage and jumped in, and they immediately drove away with her. The struggle took place in the full view of the congregation coming out of the church. She resisted going with him to the utmost of her power and struggled violently against him, and was only taken away by main force."

Dixon Robinson, in his affidavit, said :—"I helped Mr. Jackson to separate them (Mrs. Baldwin and her sister), and he helped his wife into the carriage. I stood between Mrs. Baldwin and Mr. Jackson while he did so. After he had so lifted his wife into the carriage her feet were still outside, and I put them inside. No more force was used than was absolutely necessary." He further said that he did not see Mrs. Jackson again (after the day of capture) until the Tuesday, but he remained in the house until the 14th inst., and during the whole time he had never seen the slightest approach to cruelty, but Mr. Jackson always treated her with the greatest kindness and consideration. Dr. Robinson, who was also in the house until the 14th, made a similar affidavit, and said that during the time he was in the house he repeatedly saw Mrs. Jackson, and she was always treated kindly, and except on the Sunday, when he removed her from the room, he never saw anything on Mr. Jackson's part which had even the appearance of force. Dr. Martin also made an affidavit as to the lady having been attended by him. When he first saw her, he said, on the Sunday evening he found her suffering from excitement and exhaustion, having had no food since her breakfast. "The only complaint she made," he said, "was that her husband when he got in had rudely taken her bonnet off and thrown it into the fire." He found also, he said, an extensive bruise on her arm, which she said was done while they were struggling to get her into the carriage. He had attended the lady since, he said, and though she had suffered from fits of depression, she had kept up very well, and so far, he thought, her health had not suffered. He had observed, he said, no symptoms of harsh treatment, and she seemed to have been treated with every consideration. The nurse also made a similar affidavit.

No affidavits were filed by Mrs. Jackson, and it was admitted that she had had no opportunity of doing so, her solicitor having been denied access to her.

Henn Collins, Q.C., Malcolm Douglas, and *T. Terrell*, for Mr. Jackson.—This court has no jurisdiction to issue the writ. [Lord HALSBURY, L.C.—You are perfectly at liberty to argue that question, but it seems to me that it is a purely academic one, as I have myself undoubtedly original jurisdiction to grant it, and the result would be that if you should succeed in convincing the court that they had no jurisdiction to entertain the appeal, I should on my own account issue the writ; and as the parties are in court I should direct the return to be made *instanter*.] The decision in *Bell Cox* v. *Hakes* in the Court of Appeal (36 W. R. 209, 20 Q. B. D. 1), which has not been expressly overruled on this point in the House of Lords (*ante*, p. 145, 15 App. Cas. 506), was undoubtedly to the effect that this court had jurisdiction in such a case. It would, therefore, be hopeless to argue the question here further. As to the return to the writ, it is valid and sufficient. A husband has a right to the society and *consortium* of his wife. He may at common law take possession of his wife's person, using no more violence than is necessary, and may confine her to prevent her from absenting herself permanently from his society. He must not imprison her punitively, but he may confine her by way of restraint. He has a right to the custody of his wife's person. The law on the subject has been laid down in *Ex parte Cochrane*, 8 Dowl. Prac. Cases, 630, which was not overruled by *R.* v. *Leggatt*, 18 Q. B. 781. In *Manby* v. *Scott*, 1 Siderfin. 109, 2 Smith's L. C., 9th ed., 466, it is said that a wife is subject to her husband, but he cannot put her to death, or starve, or beat her. [Lord ESHER, M.R. —The right to beat and the right to confine a wife appear from the judgment in *Ex parte Cochrane* to

stand or fall together.] That is not so. The right to beat seems to be taken from Bacon's Abridgement, Baron and Feme, 693. "The husband hath, by law, power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner." For this Fitzherbert Natura Brevium 80 is cited. The passage goes on, "He has, by law, a right to the custody of her, and may, if he think fit, confine her, but he must not imprison her." This right was recognized in *R.* v. *Lister*, 1 Str. 477. Where a wife is in the custody of a third person a husband may have a *habeas corpus* in order to regain possession of her: *R.* v. *Mary Meade*, 1 Burr. 542. The right to beat a wife is entirely separate, and it is not contended that it now exists. It depends on the passage in Fitzherbert which speaks of *castigatio*, a phrase which was explained in *Lord Leigh's case*, 3 Keeble, 433, by Lord Hale to mean admonition, not personal chastisement: *Atwood* v. *Atwood*, Prec. in Ch. 492. In *Sir T. Seymore's case*, Godb. 215, a wife was said to be *sub virgâ viri*. *R.* v. *Leggatt*, according to the report in the *Law Times*, 19 L. T. 201, does not dispute the husband's right to the custody of his wife, and no mention of *Ex parte Cochrane* was made in the judgment.

Finlay, Q.C., and *Forbes Lankester*, for Mrs. Jackson.—There is not any such right as is asserted on the part of the husband. *Ex parte Cochrane* is entirely inconsistent with *R.* v. *Leggatt*, and is, therefore, overruled by it. The logical outcome of *Ex parte Cochrane* is that the husband's right to the custody of his wife should be enforceable by process of law, and this proposition is expressly negatived by *R.* v. *Leggatt*. *R.* v. *Lister* is a decision that only under certain circumstances, which do not exist here, is a husband justified in restraining his wife. [They cited *R.* v. *Middleton*, 1 Chit. 654; *Lord Leigh's case*; *Vane's case*, 13 East, 171n.] The result of the husband's contention would be that he might place his wife in perpetual confinement. The right to beat and the right to confine are inseparable, and if either ever existed they are both now gone. The Matrimonial Causes Act, 1884, deprives the court of the power to enforce a decree for the restitution of conjugal rights by imprisonment, and it is impossible to suppose that the husband, who is the interested party, should still have a right to do so. No authority has been cited in support of the alleged right to seize a wife by force, and it is submitted that serious breaches of the peace, and even riots, might occur if such a right were to be established. There can be no distinction between confinement and imprisonment. Every person who is restrained of his liberty is imprisoned.

Henn Collins, Q.C., in reply cited 1 Hale 628.

Lord HALSBURY, L.C.—We will see the lady herself in order to satisfy ourselves that she is a free agent in the course she has taken.

Their lordships accordingly had an interview with Mrs. Jackson in their private room.

Lord HALSBURY, L.C.—The court has satisfied itself, by hearing what Mrs. Jackson had to say, that in refusing to go to her husband's house, and in resistance to her continuance therein, she was acting entirely of her own will, and has not been forced—nor indeed, as far as present circumstances are concerned—induced by anyone else to refuse to continue in her husband's house, and that she was not compelled to remain where she was before he removed her. I confess that some of the propositions which have been laid down in the course of the arguments in the case are such as one is reluctant to suppose could ever have been the law of England. Whatever absurd and obsolete *dicta* may be found in old law books as to the right of the husband over his wife in respect of personal chastisement or confinement, I should have thought they would hardly be cited in a court of justice, in this or any civilized country, as authorities. It is important to bear this in mind, because a good many statements, far more moderate in character and involving less outrage to the common feelings of humanity, are bound up with these supposed *dicta* as to the right of the husband over his wife. The only justification which can be found for such *dicta* is in the free translation given to them by Lord Hale, who suggests that the term "*castigatio*" may be taken to mean not corporal violence, but admonition, and I am glad that somebody, even in that age, endeavoured to get rid of the law apparently involved in some of these *dicta*. I mention this because it appears to me that the authorities for the right now claimed are every one of them grounded on the same notion of the absolute dominion of the husband over his wife which lies at the foundation of the arguments here for the right to detain this lady. The question of law has never been raised in an abstract form unaccompanied by circumstances by which a qualification might be introduced into the abstract proposition laid down. I believe the first and only case in which it has ever been decided for the husband as to his right to the custody of his wife was that of *Ex parte Cochrane*. But no authority has been cited which establishes the proposition that the mere relation of husband and wife gives to the husband a complete dominion over the wife's person, when unaccompanied by any circumstances of misconduct, or any proximate approach to misconduct, on her part, which would entitle her husband to restrain her. I do not mean to lay it down as a proposition of law that there may not be some acts of misconduct by the wife, or a proximate approach to acts of misconduct, which might not give the husband a right to use some physical restraint. For instance, if she was about to elope with anyone; in such a case the exercise of the husband's authority to restrain her might be justified, on the same principle as he—or, indeed, any person—might restrain her if out of her mind and likely to do herself a mischief. Such exercise of authority, so understood and limited, may be justified as reasonable and in accordance with law.

But what we have on the return to this writ is very different, and it is on that we have to determine. After stating the circumstances of the marriage, the decree, and the refusal of the wife to cohabit, it states: "I therefore took my wife, and have since detained her in my house, using no more force or restraint than necessary to take her and keep her." That is the return which seeks to justify an admitted imprisonment of this lady. I do not know that I am able to express in sufficiently precise language the difference between "confinement" and "imprisonment," but if there is any distinction I can only say that upon these facts I should find an imprisonment here. It is put as a broad proposition that where there has been a wilful absenting of herself by the wife from her husband's house, it is his right to seize possession of his wife by force and detain her in his house until she renders him conjugal rights. That is the proposition of law involved in the return, and I am not prepared to assent to it. The Legislature has expressly deprived the Matrimonial Court of the power of imprisoning the wife for refusal to comply with a decree for restitution of conjugal rights, and the result, if the husband had the power to do so, would be that, whereas the court had no power to hand the wife over into her husband's hands, or to punish her for contempt by imprisonment, the hus-

band might himself of his own motion seize and imprison her until she consented to the restitution of conjugal rights. That is the proposition I am called upon to establish by holding this return to be good. I am of opinion that no such right or power exists in law. I am of opinion that no such right ever did exist in our law.

Whatever authorities may be quoted for any such proposition, it has always been subject to this condition—that where the wife is reasonably apprehensive of ill-usage the court will never interfere to compel her to return to her husband's custody. Now this brings me to the particular circumstances of this transaction. I am prepared to say that no English subject has a right to imprison another English subject (who is *sui juris* and entitled to a judgment of his or her own) without any lawful authority, but if there were any qualification of that proposition I should be of opinion that the facts of this case would afford an ample justification to any court for refusing to allow this husband to retain the custody of his wife. It seems to have been thought that a lady, who is admitted to be of good position in society, may be dealt with roughly in this kind of way, subject only to a question as to the exact degree of force or violence used or of physical pain inflicted upon her by seizure under the circumstances stated. But is it nothing that a lady, coming out of church on a Sunday, is to be seized by three or four men, in the face of the congregation, and forcibly put into a carriage and carried off? Is not one to consider the element of insult involved in such a seizure. And what happens afterwards? If the lady's statement to the medical man be true (and it is not contradicted), the moment she entered the house her husband tore her bonnet off her head and threw it into the fire.

That is a statement made by the medical man in his affidavit made on behalf of the husband, and there is no denial or explanation of the statement. I confess I receive with indignation the statement of the facts in this case, and the utter absence of any apparent sense of the delicacy or the respect due to the wife, whom the husband had sworn to love and cherish and protect. The statements in the affidavits on the part of the husband I am unwilling to look at, for this reason—that though, if they are to be taken as undisputed, they may make out so far a case in his favour that the lady voluntarily entered into the marriage under circumstances which reflect no discredit upon him, yet I do not know how far I can trust them, as the lady has not been allowed to have any communication with her legal adviser as to any matters on which she might have contradicted these statements, and, therefore, I cannot rely upon them.

The result is that there is no power by law such as the husband professed to exercise, and the facts, to my mind, afford sufficient reason to the lady to apprehend violence in future, considering the circumstances of her seizure. On either of these grounds it would be enough to say that the return of the writ is, in my judgment, bad, and that the lady must be restored to her liberty, and allowed to choose her own place of residence wherever she pleases.

As there has now been an authoritative declaration of the law against the supposed power of the husband, any attempt on his part to exercise it again will be a serious contempt of court.

Lord ESHER, M.R.—In this case it is admitted that this lady is physically confined so that she is deprived of her liberty. The proposition is that a husband has a right to take possession of his wife by force, and to keep her in confinement, not imprisonment, in order to prevent her from leaving him and depriving him of her society. A series of propositions have been cited on behalf of the husband which, if true, make an English wife the abject slave of her husband. According to them she is a chattel with which he may deal as he pleases. The foundation for the whole doctrine appears to be contained in a Latin phrase in a writ in Fitzherbert's Natura Brevium. Whatever may be the right translation of *castigatio*, I do not believe that any such right ever existed or was recognized by English courts.

I confess that, to my mind, the distinction that has been drawn between confinement and imprisonment is too refined. To my mind it makes no difference whether the wife is confined to one room or has the run of the house, so long as she is deprived of her liberty. It is said that a husband has the custody of his wife, and may restrain her from extravagance, and confine her to the house to prevent her from spending his money at certain shops. I know of no such right, nor do I believe any such right has ever existed. A husband has not the custody of his wife in the sense that a gaoler has the custody of a prisoner, and the wife is not a chattel the property of her husband. But it is said that if she is doing wrong, or is about to do some wrong, he may seize and confine her. What is his authority for doing so? He could not exercise that right in the case of any other woman. The whole proposition is based on the erroneous loose idea which seems to have got abroad that a husband has a right of property in his wife. He has no more rights over her as to her personal liberty and freedom from assault or insult than he has over any other woman in England. I admit that *Cochrane's case* supports the contention of Mr. Henn Collins, but after reading through that long and complicated case I have come to the conclusion that if it is still law it is absolutely wrong, and must be overruled. Of course, restraint is not imprisonment or confinement, and if a husband perceives that his wife is about to injure his honour, he may stop her in the very act and restrain her, and so too if she should be taking his money or other property out of his house he may take it away from her. That is entirely different from the right insisted on here, which is a right to seize and confine her. It was admitted that the logical outcome of the argument was that the wife might be placed by her husband in perpetual confinement if she refused to yield him conjugal rights. I absolutely abjure any such right on the part of the husband.

But even if there were the right contended for in the present case, we are bound to take notice of the insulting manner in which the husband acted. The seizure of the lady was on a Sunday, as she was coming out of church, in the face of the congregation. She was seized by three men, dragged to a carriage, thrust violently in, her legs hanging out of the carriage, while she was lying at the bottom of it, and thrust in by the young man, the attorney's clerk. That was the way in which the husband had seized his wife, and then these young men were kept in the house with a "nurse." What for? Obviously, to keep a watch over her. The lady was seized and confined under circumstances of the grossest insult; and, in my opinion, her seizure was brutal, as between husband and wife—I say it was brutal. That being so, the law does not entitle this husband to retain his wife in confinement, and he has shown himself a man to whom the court will not give her back.

It is true that he has obtained a decree for the restitution of conjugal rights, but the Act of Parliament has expressly forbidden the enforcement of that decree by means of attachment, and can it be contended that the husband is entitled to enforce it by private violence? To my mind the Act is the strongest evidence to show that the Legislature had

no idea that the husband had any such power. In my opinion, therefore, by English law a husband has not, and never had, the right to imprison his wife either by way of prevention or punishment. The return to the writ is consequently bad, and the lady must be discharged.

FRY, L.J.—The return to this writ raises a question of law. Has or has not a husband the right to capture and confine his wife until she consent to render him conjugal rights? On the assertion of that right the husband in this case relies. The proposition divides itself into two heads—the right to capture, and the right to confine. For the former of these no vestige of authority has been cited. In the case of *Ex parte Cochrane*, on which the husband's counsel placed reliance, the possession of the wife was obtained by strategy, and not by force. That question may therefore be dismissed and consideration confined to the question whether a husband has a right to confine or imprison his wife until she yield him his conjugal rights. The only authority for that contention is the case of *Ex parte Cochrane*, decided in 1840. No earlier authority for it can be found with the exception of the passage in Bacon's Abridgement, which is so vague that it cannot be considered a satisfactory statement of the law. The case of *R.* v. *Lister* is at direct variance with it, as it was there stated that the husband's right to restrain his wife depended on certain grounds, which, it is admitted, do not exist here, and on those grounds only. I cannot, therefore, regard *Cochrane's case* as a satisfactory authority. It is impossible to overlook the fact that similar cases must frequently have occurred. The recourse to the ecclesiastical courts for an order for the restitution of conjugal rights was habitual, and there is on the books no case of the assertion of such a right of private imprisonment as is here set up. That is, I think, cogent evidence to show that no such right existed. But after *Cochrane's case* came the case of *R.* v. *Leggatt*, which, to say the least, shakes the authority of the former case. In the latter case Lord Campbell laid down, and the other judges appeared to agree, that a husband has no right to the custody of his wife in the sense in which a parent has a right to the custody of his child. Even if that case stood alone, I think it would be sufficient to show that there is no such right as is here contended for; but if the law were ambiguous or doubtful before, it is plainly altered by reason of the Act of 1884, which deprived the court of the power of enforcing by attachment a decree for the restitution of conjugal rights. I cannot believe that after that, any right to enforce such a decree remains to the husband where he is at once an interested party, judge, and executioner. I do not think that there ever was such a right by law, and certainly, if there were, it has now ceased to exist. I wish to confine my judgment to that view of the law, and I prefer neither to animadvert on the old *dicta* of the judges, nor to comment on the conduct of the husband in this case. It would not, in my opinion, be right to do so without considering the circumstances of the marriage. There may have been causes which excuse the action he took, but, as the Lord Chancellor has said, our only information is derived from affidavits, on which I do not think we ought to rely. I base my judgment entirely on the ground that the right set up does not exist by the law of England. The lady must, therefore, be discharged.

Order accordingly.

Solicitor for Mr. Jackson, *Thairlwall.*

Solicitors for Mrs. Jackson, *Shaw, Tremellen, & Kirkman*, for *Hall, Baldwin, & Weeks*, Clitheroe.

High Court of Justice.

Chan. Div. } Chitty, J. } Dec. 5; March 23.

LAWRENCE v. EDWARDS. (*a.*)

Parish clerk—Sequestration—Bankruptcy of incumbent—Appointment by stipendiary curate—Injunction—34 & 35 Vict. c. 45, ss. 1, 5, 6.

The rights belonging to an incumbent by virtue of his benefice are not taken away or interfered with by the issue of a sequestration, except in so far as they are taken away or interfered with by the express terms of the Sequestration Act, 1871.

The office of parish clerk is a temporal office.

Motion.

This was a motion by the plaintiff, the rector of Eversley, Hants, who had been adjudicated a bankrupt, to restrain the defendant from receiving any fees or emoluments belonging to the office of parish clerk.

In consequence of the bankruptcy of the plaintiff (the Rev. Arthur Lawrence), the bishop had issued a writ of sequestration in May, 1889, and in March, 1890, appointed a stipendiary curate. In October, 1890, the parish clerk died, and on the 1st of November the rector appointed his son to be parish clerk, and thereupon the stipendiary curate, on Sunday, November 19, announced to the congregation that he had appointed the defendant to be parish clerk in the place of the deceased clerk.

The 91st canon provides that "no parish clerk, upon any vacation, shall be chosen in the City of London, or elsewhere, but by the parson or vicar, or, where there is no parson or vicar, by the minister of that place for the time being, which choice shall be signified by the said minister, vicar, or parson to the parishioners the next Sunday following, in the time of Divine service."

No inhibition had been issued against the rector, who continued to reside in the parish and occupy the rectory-house.

Willis Bund, for the motion.—The rector not having been inhibited, he has the right to make the appointment. In *Pinder* v. *Barr*, 2 W. R. 589, 4 E. & B. 105, the incumbent had been suspended.

He also referred to *Pack* v. *Tarpley*, 9 Ad. & E. 468 482, and *Tarrant* v. *Haxby*, 1 Burr. 367.

The defendant did not appear upon the motion.

CHITTY, J. (after stating the facts, continued:—).—The injunction I am asked for at the bar is merely to restrain the defendant, until judgment or further order, from receiving the profits and fees of the office. I am not asked to interfere in any way with the defendant performing his duties as parish clerk in the church itself. It is unfortunate that the defendant has not appeared on this motion, and that I have not had the benefit of any argument on his behalf, but Mr. Willis Bund has put the whole case very fairly before the court, and I am bound to come to some conclusion for the purpose of this motion upon such argument as has been presented to me.

Now it has been decided in the case of *Pinder* v. *Barr* that, where the vicar was suspended for misconduct by the bishop from performing the duties and receiving the profits of the vicarage, he was not the proper person, and had no authority, to appoint a parish clerk so long as the suspension remained in force. The question there turned upon the construc-

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

tion of the 91st canon, which was considered by the Court of Queen's Bench, which in that case held that "the minister for the time being" was the curate who had been appointed by the bishop to perform the ecclesiastical duties of the parish, and the court also held that the curate was entitled to make the appointment, not by virtue of the bishop's licence, but by virtue of the canon, and that, on the true construction of this canon, inasmuch as the vicar had been suspended from his functions, the term "minister" applied to and included the curate. It follows, therefore, from that case, that if the rector in the present case had been suspended or inhibited, he would have no authority to appoint a parish clerk. But the rector has not been suspended or inhibited, though he has been adjudicated bankrupt and a sequestration has been issued, and I therefore turn to the Sequestration Act, 1871, with a view of ascertaining what is the effect upon the rector in this case of the sequestration. The 1st section provides that, on a sequestration, the bishop may appoint a curate and assign him a stipend; nothing turns on the particular language of that section, which goes on to provide how the stipend is to be paid and the amount; but the 5th section is one of considerable importance; it provides that, "in case any such sequestration remains in force for more than six months, the bishop, if it appears to him that scandal or inconvenience is likely to arise from the incumbent continuing to perform the services of the church while the sequestration remains in force, may, from and after the expiration of such period, inhibit the incumbent from performing any services of the Church within the diocese as long as the sequestration shall remain in force, and the bishop may at any time withdraw such inhibition." From this it seems plain that, during the sequestration, unless the bishop makes inhibition, the incumbent may still perform the services of the church, and, consequently, it appears to follow that sequestration is very different from suspension. In fact, sequestration is this, that the proceeds of the benefice are taken by an officer appointed by the bishop for the purpose, but in other respects the position of the incumbent, except so far as it may be expressly altered by the statute, remains the same. That position is, I think, established, not merely by the 5th section, but by the 6th, which provides that, "during such time as any sequestration remains in force the incumbent shall be absolutely disabled from presenting or nominating to any benefice then vacant of which he may be patron in right of benefice under sequestration." That is to say, one of the rights which belong to the incumbent in virtue of the benefice is taken away in express terms. This is properly made use of by Mr. Willis Bund to show that, except to the extent that the Act in terms interferes with his position, the incumbent in this case still retains the character of rector, as undoubtedly he retains the rights belonging to the rector. For these reasons I hold that the appointment to the office of parish clerk has on this occasion been rightly made by the rector, notwithstanding the sequestration, and I give effect to that opinion to the limited extent asked at the bar —viz., by restraining the defendant, until the trial or further order, from receiving the fees, profits, or emoluments belonging to the office of parish clerk. It will, of course, be open to the court to consider the matter again should there be a further argument upon the trial.

March 23.—The case came on again on this date upon motion for judgment in default of defence, the minutes asking that the defendant might be restrained from acting as parish clerk.

Willis Bund, for the plaintiff, cited the authorities given above.

CHITTY, J., gave judgment accordingly, saying that all the authorities were to the effect that the court had jurisdiction, and that the office was a temporal office.

Solicitors, *Withall, Holland, & Withall.*

Chan. Div. } March 12.
North, J. }

In re COX AND NEVE'S CONTRACT AND THE VENDOR AND PURCHASER ACT, 1874. (*a.*)

Vendor and purchaser—Title—Defect not disclosed by abstract—Restrictive covenant—Discovery of restriction by purchaser after expiration of time for delivering requisitions upon abstract.

A purchaser at a sale by auction discovered that a deed immediately preceding the deed which, by the conditions of sale, was made the root of title, and which gave a title of thirty-eight years only, contained a restrictive covenant affecting the right of building upon part of the property purchased by him, which covenant was not disclosed by the abstract. The discovery was made after the expiration of the time fixed for delivering requisitions upon the abstract. The purchaser did not immediately acquaint the vendor with his objection to the restrictive covenant, but, the vendor's replies to the requisitions sent in not being satisfactory, the purchaser took out a summons under the Vendor and Purchaser Act, 1874, *for a declaration that the requisitions had not been sufficiently answered, and that a good title had not been shown to the property, and in his affidavit in support of the summons stated his objection with respect to the restrictive covenant.*

Held, that the objection was not taken too late, and that it was a good objection to the title.

Adjourned summons.

This was a summons under the Vendor and Purchaser Act, 1874, by a purchaser of real estate, asking for a declaration that the requisitions and objections made by him in respect of the title to the property had not been sufficiently answered, and that a good title had not been shown in accordance with the particulars and conditions of sale; and that the vendor might be ordered to return the deposit made by the purchaser and to pay his costs of investigating the title and the costs of the summons.

On the 11th of June, 1890, W. T. Neve purchased at a sale by auction two houses in Great Queen-street, Holborn, with buildings consisting of a boiler-room and warehouse at the back, and a right of way or passage running by the side of one of the houses and connecting the back buildings with Great Queen-street, the vendor being Louisa E. Cox. The property was described in the particulars as "freehold." The 4th condition of sale provided that the title should commence with a mortgage deed dated the 29th of July, 1852. The 5th condition provided that the purchaser should, within fourteen days from the delivery of the abstract, send in to the vendor's solicitors a statement of all his objections to and requisitions upon the title, and that subject thereto the title should be deemed to be accepted, that any answer to such objections and requisitions should be replied to within ten days after the delivery thereof, and if not so replied to should be considered as satisfactory, and that time should be deemed to be of the essence of that condition. The 7th condition provided for the case of any incorrect statement, error, or omission in the particulars, but had no application to the matter in question in the case.

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

On the 24th of June the abstract of the vendor's title was delivered to the purchaser. It commenced with a mortgage deed dated the 29th of July, 1852, by which J. L. Cox, through whom the vendor derived her title to the property, mortgaged it to D. S. Bockett. The mortgage deed contained numerous recitals, among which was the recital of a deed of exchange dated the 3rd of March, 1847, and made between W. L. Farrer and J. L. Cox, whereby a portion of the property—viz., the boiler-room and warehouse—was conveyed to J. L. Cox in fee in exchange for other property conveyed by J. L. Cox to W. L. Farrer.

On the 8th of July the purchaser's requisitions were sent in to the vendor's solicitors. They included one requisition respecting the ownership of the right of way; and another was as follows:—Is the vendor, or are her solicitors, aware of any document or thing affecting the title or the property which is not noticed in the abstract, and which, if undisclosed, may prejudicially affect the purchaser?

On the 12th of July the vendor's solicitors sent in their replies to the purchaser's requisitions, their reply to the requisition set out above being, "We are not bound to answer this requisition."

The purchaser was not satisfied with the vendor's reply to the requisition with respect to the ownership of the right of way, and made inquiries of Messrs. Farrer & Co., the solicitors to the owner of the adjoining house, who produced the deed of exchange of the 3rd of March, 1847.

On the 23rd of July the purchaser sent in further requisitions upon the title, one of which was as follows:—"Messrs. Farrer & Co. have shown to the purchaser a deed of exchange dated the 3rd of March, 1847, which appears to show that J. L. Cox was not then entitled to any right of way."

On the 28th of July the vendor's solicitors delivered replies to the further requisitions, which replies were not regarded by the purchaser as sufficient.

On the 9th of August the purchaser took out the present summons. On the 13th of August the purchaser's solicitors wrote to the vendor's solicitors stating that they would not file their evidence until towards the end of the vacation, and informing them them they had obtained from Messrs. Farrer & Co. a copy of the deed of exchange of the 3rd of March, 1847, which they alleged ought to have formed part of the abstract of title.

On the 15th of October the purchaser filed an affidavit in support of his summons, in which, after stating that he had obtained from Messrs. Farrer & Co. a copy of the deed of exchange of the 3rd of March, 1847, he alleged at paragraph 23: "From the copy so obtained it appears that J. L. Cox thereby entered into a restrictive covenant with respect to the buildings that might be erected on the site of the boiler-room and warehouse. If I had known of the existence of such covenant at the time of sending my requisitions on the title I should have required the vendor to procure the release thereof." This was the first intimation received by the vendor that the purchaser objected to the restrictive covenant contained in that deed, and the vendor did not cross-examine the purchaser upon the allegation or make any reference to it in any affidavit in answer to the purchaser's affidavit.

The covenant in the deed of the 3rd of March, 1847, was as follows: "And the said John Lewis Cox, both for himself, his heirs, executors, administrators, and assigns, doth hereby ~~covenant,~~ promise, and agree with and to the said William Loxham Farrer, his heirs and assigns, in manner following—that is to say, that he, the said John Lewis Cox, his heirs or assigns, or any of them, will not, nor shall at any time or times hereafter, build or erect, or permit or suffer to be built or erected, or remain or be upon the said hereditaments hereinbefore conveyed, or any part or parts thereof, any building or erection whatsoever other than and except the present buildings and erections, or other erections or buildings of the same size, height, and dimensions which may be hereinafter erected or built in lieu or in place of the present buildings and erections."

It was in evidence that the buildings known as the boiler-room and the warehouse which were comprised in, and conveyed by, the deed of the 3rd of March, 1847, and to which the above covenant referred were only two floors in height, while the houses to which they were attached contained four or five floors, and consequently those buildings were capable of considerable improvement.

On the hearing of the summons it was arranged that the objection taken by the purchaser to the vendor's title on account of the existence of the restrictive covenant should be first disposed of, as, if decided in favour of the purchaser, it would be fatal to the vendor's title.

Everitt, Q.C., and *Gaselee*, for the summons.—The restrictive covenant in the deed of the 3rd of March, 1847, is still applicable to the boiler-room and the warehouse, which constitute a material portion of the property which the vendor professed to sell as freehold free from any restriction not shown by the abstract, and is therefore a fatal blot in the vendor's title. The vendor ought to have set forth that deed in the abstract of title, and so given the purchaser notice of the covenant. The purchaser did not refer to the covenant in his requisitions on the title because he was unaware of its existence, as he states in his affidavit. The deed was produced to him before the 23rd of July with reference to the question of the right of way, but he may have only seen the plan, and not read through the deed.

They referred to *Mackenzie* v. *Childers*, 38 W. R. 243, 43 Ch. D. 265; *In re Ebsworth and Tidy's Contract*, 37 W. R. 657, 42 Ch. D. 23; *In re Higgins and Hitchman's Contract*, 30 W. R. 700, 21 Ch. D. 95; *Nottingham Patent Brick and Tile Co.* v. *Butler*, 34 W. R. 405, 16 Q. B. D. 778.

Cozens-Hardy, Q.C., and *Hadley*, for the vendor.—The restrictive covenant is contained in a deed prior to that at which, by the conditions of sale, the vendor's title is made to commence. If the purchaser had taken the property without notice of the covenant he would not have been bound by it, and if the purchaser looks up old deeds prior in date to that with which the vendor's title is made to commence, and thereby obtains notice of a restrictive covenant, the vendor ought not to be affected by that. If the purchaser intended to raise any objection because of the covenant he should have done so at once, and not waited until he made his affidavit. The objection is too late. The purchaser does not say that the covenant is material to him. It applies to a very small part of the property, and the matter admits of compensation.

NORTH, J.—In this case certain property was put up for sale by auction on the 11th of June, 1890, under conditions which provide:— [His lordship read conditions 4, 5, and 7, and continued:—] I do not find that there was any incorrect statement, error, or omission in the particulars, and therefore I do not think that the 7th condition has any application. An abstract of title was delivered to Mr. Neve, the purchaser, on the 24th of June commencing with a mortgage deed dated the 29th of July, 1852, which was mentioned in the conditions as the

deed with which the title should commence. That deed contains several recitals which are abstracted, including a recital that by an indenture of the 3rd of March, 1847, between William Loxham Farrer of the one part, and the said J. L. Cox of the other part, certain hereditaments (being the residue of the hereditaments intended to be granted by the mortgage of the 29th of July, 1852) were conveyed to the use of the said J. L. Cox, his heirs and assigns. On the 8th of July requisitions on the title were sent in and were answered on the 12th. The question was asked, Is the vendor, or are her solicitors, aware of any document or thing affecting the title or the property which is not noticed in the abstract, and which, if remaining undisclosed, may prejudicially affect the purchaser? The solicitors take advantage of their right to say, "We are not bound to answer this requisition." On the 23rd of July further requisitions were sent in, one of which was, "Messrs. Farrer & Co. have shown to the purchaser a deed of exchange dated the 3rd of March, 1847, which appears to show that John Lewis Cox was not then entitled to any right of way." It is clear that the purchaser's solicitors had then seen the deed of exchange of the 3rd of March, 1847, and must be taken to have known all they thought material, and I cannot say that they had only seen the plan, as was suggested.

On the 23rd of July no requisition relating to that deed beyond what I have read was made. On the 28th of July the vendor's solicitors replied to the further requisitions. Some correspondence ensued, and on the 9th of August the purchaser's summons was taken out, asking that it might be declared that the purchaser's requisitions and objections had not been sufficiently answered, and that a good title had not been shown to the property. I read that as meaning that the requisitions and objections had not been sufficiently answered, and that by reason thereof a good title had not been made out. The latter part does not mean to set up a general objection to the title. The Long Vacation intervened, and the affidavit of the purchaser in support of the summons was not filed until the 16th of October. It states that he had obtained from Messrs. Farrer & Co. a copy of the deed of the 3rd of March, 1847, and adds: "From the copy so obtained it appears that the said J. L. Cox thereby entered into a restrictive covenant with respect to the buildings that might be erected on the site of the said boiler-room and warehouse. If I had known of the existence of such covenant at the time of sending in my requisitions on the title I should have required the vendor to procure the release thereof." I think the purchaser did there clearly and explicitly state his objection that there was a restrictive covenant affecting the property which must be released. His objection was that a good title had not been shown to that which the vendor had professed to sell as freehold, free from any restriction which was not noticed in the abstract. I think that an attempt has been made to take advantage of the purchaser. I am not satisfied with the course adopted by the vendor. The vendor's solicitor has made no affidavit upon the matter. The vendor has not made any affidavit that she has not in her possession a duplicate copy of the deed of the 3rd of March, 1847, which is in the possession of Messrs. Farrer. It is probable that a duplicate copy of that deed was made, and it must have been at some time in the possession of J. L. Cox. Under these circumstances the vendor does not choose to commence the title with an earlier deed than a deed of mortgage dated the 29th of July, 1852, which gives a title of thirty-eight years only. Then they say that the purchaser has been too vigilant—I never heard such an objection before—that if the purchaser had not found out the restrictive covenant he would have been a *bonâ fide* purchaser for value without notice of it, and would not have been bound by the covenant. It was the vendor's duty to set forth the deed of the 3rd of March, 1847, on the abstract, and inform the purchaser of the existence of the covenant; and I think the purchaser would have been bound by it if he had not found it out. If he had taken the property on a thirty-eight years' title he would I think have been bound by the restrictive covenant which would appear in a forty years' title. Otherwise, a man might agree to buy a property without any title, and then say he had not constructive notice of any incumbrance which would appear in an abstract of title. What, in the absence of agreement, a purchaser is entitled to, is a title for forty years, and so much more as it is necessary to go back to for a proper root of title. The purchaser is fortunate in discovering what the vendor ought to have told him. It is said that the purchaser is precluded from making the objection because he did not do so at the earliest possible moment after finding it out. I do not think he was under such an obligation. The condition that the purchaser should, within fourteen days after the delivery of the abstract, send to the vendor's solicitors a statement of all his requisitions upon the title, means that requisitions which arise upon the abstract are to be delivered within the time mentioned in the condition. This objection does not arise upon the abstract. I think the purchaser must be taken to have discovered the existence of the restrictive covenant, or to have had constructive notice of the contents of the deed of the 3rd of March, 1847, very shortly before he sent in his further requisitions on the 23rd of July. I do not see that he is bound to send in his objection within a short time, such as twenty-four hours, after discovering it. I think it was his duty to make this objection within a reasonable time. The conditions of sale allow him fourteen days from the time for delivering the abstract for sending in requisitions. I do not see why he should have a shorter time in case of objections not appearing in the abstract. If the vendor had been prejudiced by the delay of the purchaser in making the objection the case might be different. But there is nothing to show that the vendor has been prejudiced in this case. The parties were already at arms' length. I think, therefore, there was nothing to preclude the purchaser from taking the objection, when he did, by his affidavit.

It is said that the restrictive covenant only relates to a small portion of the property. I think that it relates to a material part of the property, as it prevents part of it from being raised above a certain height. It is useless to ask me to believe that a building near Lincoln's-inn-fields is not capable of being improved by being raised so as to become more valuable. The purchaser, in his affidavit, swears that if he had known of the existence of the restrictive covenant at the time of sending in his requisitions on the title he should have required the vendor to procure the release thereof. I think that a good objection to the title has been made out by the purchaser. The vendor must return the purchaser's deposit and pay the purchaser's costs of investigating the title, and his costs of this application.

Solicitors, *Hughes, Hooker, & Co.; Bockett, Stunt, & Nash.*

Q. B. Div. (Pollock, B., and Charles, J.) Feb. 4.

BEASLEY v. RONEY. (a.)

Married woman—Husband and wife—Joint action for tort to wife—Damages—Separate property—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* (2); *s.* 5.

A husband and wife brought an action for personal injuries sustained by the wife. The jury awarded £25 damages to the wife, and a sum to the husband for his expenses.

Held, that the £25 was the wife's separate property within the meaning of section 5 of the Married Women's Property Act, 1882, *and that a garnishee order attaching the whole sum recovered in the hands of the plaintiff's solicitor, to answer a judgment debt of the husband, was bad.*

Appeal of defendant from a judgment of his Honour Judge Bayley at the Westminster County Court in an interpleader issue arising out of garnishee proceedings.

Beasley, the plaintiff in the issue, had obtained a judgment against James Roney, the defendant's husband, in 1888.

On the 27th of January, 1890, Mr. and Mrs. Roney obtained a verdict in an action brought by them against the London General Omnibus Co. to recover damages for personal injuries to Mrs. Roney. The verdict was for £71 6s. 6d., of which £25 was awarded specially to Mrs. Roney in respect of her injuries, and £46 6s. 6d. to Mr. Roney on account of the medical and other expenses to which he had been put. The £71 6s. 6d. and the taxed costs were paid to the Roneys' solicitor, and upon taxation of his bill it was found that £47 14s. 2d. was due from him to them.

Beasley, as a judgment creditor of the husband, obtained a garnishee order *nisi* charging the sum remaining in the hands of the solicitor, and Mrs. Roney claimed that £25 part thereof was her money. An interpleader issue was directed in which Beasley was plaintiff and Mrs. Roney defendant, in order to decide which of them was entitled to the sum in the hands of the solicitor. The solicitor paid the money into court to abide the result. The county court judge held that the plaintiff was entitled, and the defendant appealed.

Muir Mackenzie, for the defendant.—The £25 is the wife's money, and is not attachable for the husband's debt. If the whole sum had been paid to the husband directly he would have been a trustee of the £25 for his wife, and regard is had to equitable rights in garnishee proceedings: *In re General Horticultural Co., Ex parte Whitehouse*, 34 W. R. 681, 32 Ch. D. 512. The judgment was the joint judgment of the husband and the wife; the husband was not joined merely for conformity, but was suing for his expenses, a different cause of action from that of the wife. A debt due to the judgment debtor jointly with another is not attachable: *Macdonald* v. *Tacquah Gold Mines Co.*, 32 W. R. 760, 13 Q. B. D. 535.

Wildey Wright, for the plaintiff.—The judgment was the husband's, and was not joint. Before the Married Women's Property Acts a wife could not sue without joining her husband as co-plaintiff, and the husband was entitled to the fruits of the action. In section 1, sub-section (2), of the Act of 1882 the words "any damages or costs recovered by her in any such action" relate only to actions in which the wife is suing alone under that section; if the husband is joined as a party the fruits are still his, as before the Act. The expression "money acquired" in section 5 does not include damages recovered in an action.

Muir Mackenzie replied.

POLLOCK, B.—In my opinion this appeal ought to be allowed and judgment entered for the defendant. The material facts are few. There was a verdict for £71 6s. 6d. in an action, as to which all we know is that it was an action for negligence brought by the present defendant, Mrs. Roney, and her husband, against the London General Omnibus Co. Of the amount so recovered the solicitor engaged in that action retained in his hands £47 14s. 2d. after his costs were paid, and it is clear that this amount was due from him to one or both of the plaintiffs. It is clear also that the jury arrived at the sum of £71 6s. 6d. by assessing the damages sustained by the wife at £25, and allowing the husband, speaking roughly, £46 to recoup him for the expenses he had been put to. Under the interpleader issue the question for decision was whether the garnishee, the solicitor, was to pay the whole amount to the present plaintiff, who was a judgment creditor of the husband, and that involved the question whether the amount recovered from the omnibus company was divisible. The county court judge held that it was not, for there was nothing to show that the whole of the money had not been received for the benefit of the male plaintiff. That seems to be contrary to the spirit of the Married Women's Property Act, and if this was a joint debt, owing to the husband and wife jointly, it is clear from *Macdonald* v. *Tacquah Gold Mines Co.* that attachment cannot go against a debt owing to the judgment debtor jointly with another person. Therefore, if the judgment is to be treated as the joint judgment of the husband and the wife, the decision of the county court judge is wrong. But the question arises in the present case whether the wife has a separate right to the damages which she recovered. Looking at the spirit of recent legislation, I think that she is so entitled, and that the £25 is hers, and cannot be attached to satisfy a debt owing by her husband. Whether that be clearly shown upon the construction of section 1, sub-section 2, of the Married Women's Property Act, 1882, may admit of some doubt; but the case is clearly within section 5. Damages given to a married woman by the verdict of a jury are property acquired by her within that section, and she is as much entitled thereto as if she were an independent person altogether. I think there is no difference between the position of the husband and wife in the present case and the position of two persons who, being injured by a common accident, bring a common action in respect of it, each of whom would be entitled to the damages awarded to him in the action. The appeal, therefore, must be allowed.

CHARLES, J.—I am of the same opinion. The only way in which the case of the plaintiff can be successfully argued is by saying that the judgment, which professes to be joint, is really the husband's. It is either a joint judgment, in which case there is no attachment, or else it is the judgment of the husband. Let us assume it to be the husband's judgment; the husband is in that case the trustee of £25 of the amount for the benefit of his wife. It is suggested that the Married Women's Property Act has nothing to do with the case, because the husband was a co-plaintiff with the wife; but in my opinion, even where the husband is joined as plaintiff, damages which are given specially to the wife, as we must take this sum of £25 to have been, are the wife's property. I also

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

entirely agree with the observations of my brother Pollock as to the construction of section 5. For these reasons I am of opinion that the order of the county court judge cannot be sustained.

Appeal allowed.

Solicitors for the plaintiff, *Holder & Wood.*

Solicitors for the defendant, *Houseman & Co.*

Q. B. Div. (Pollock, B., and Charles, J.) Jan. 13, 14.

SURMAN *v.* WHARTON. (*a.*)

Married woman—Husband and wife—Death of wife possessed of separate property—Liability of husband for debt of wife—Legal personal representative—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 23.

Where a married woman possessed of leasehold property for her separate use dies intestate, such property vests in her husband jure mariti, *without any necessity for taking out administration; but he is her legal personal representative within the meaning of section* 23 *of the Married Women's Property Act,* 1882, *and therefore takes the property subject to the liability to pay thereout any debts which his wife may have incurred in respect of her separate property.*

Appeal by the plaintiff from a judgment of the judge of the Birmingham County Court.

The action was brought to recover a sum of money lent by the plaintiff to the defendant's late wife. The defendant's wife had been married twice previously to her marriage with him. Her first husband, by a post-nuptial deed of gift, granted to her some leasehold property to her "own proper use and benefit," with "full power and authority to sue and give receipts." The sum sought to be recovered was lent to her while she was the wife of the defendant, after the Married Women's Property Act, 1882, had come into operation. She died intestate, being at the time of her death still possessed of the leasehold property. The defendant entered into possession of her property without taking out letters of administration. The county court judge held that the plaintiff was not entitled to recover.

Vachell, for the plaintiff.

Graham, for the defendant.

The following cases were cited:—*Hulme* v. *Tenant,* 1 W. & T., 6th ed., 536; *Lee* v. *Prieaux,* 3 Bro. C. C. 381; *Tyler* v. *Lake,* 2 Russ. & My. 183; *In re Bellamy, Elder* v. *Pearson,* 32 W. R. 358, 25 Ch. D. 620; *In re Lambert, Stanton* v. *Lambert,* 39 Ch. D. 626, 37 W. R. Dig. 88; *Cotton* v. *Cotton,* 2 Beav. 67.

POLLOCK, B.—The first question is whether this leasehold property was the separate estate of this lady. It was given to her "to her own proper use and benefit." Such words in a grant to a woman by her husband clearly have the effect of making the property separate estate. The deed also conferred on her "full power and authority to sue and give receipts." The case of *Lee* v. *Prieaux,* where a legacy to a married woman, "her receipt to be a sufficient discharge to the executors," was held to be a gift to her sole and separate use, is an authority to show that by this deed the property in question became separate estate.

The next question is, What was the effect of the wife's death? The decisions show that the course of devolution of a wife's separate property is not altered by the Married Women's Property Act, and that such separate property vests in the husband *jure mariti* without any necessity for taking out administration: *In re Lambert, Stanton* v. *Lambert.* Now comes the question which presents the only real difficulty in the case. The defendant contends that the property vested in him clear of all his wife's liabilities. I think that, under the Married Women's Property Act, 1882, that is not so. Section 1, sub-section 3, says: "Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown." And section 23 says: "For the purposes of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living." I think the true construction is that a woman's husband who takes her property *jure mariti* is her legal personal representative, and, therefore, the defendant took his wife's separate property subject to her liabilities, and he is liable with respect to that property in the same manner as she would have been. The plaintiff is entitled to judgment against him to that extent.

CHARLES, J., concurred.

Appeal allowed.

Solicitor for the plaintiff, *Docker,* Birmingham.

Solicitors for the defendant, *Gamlen & Burdett,* for *Cottrell & Son,* Birmingham.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. Divorce. Jan. 14.

LANDER *v.* LANDER AND OTHERS. (*a.*)

*Divorce—Husband's petition—Order for wife's maintenance—*Dum sola et casta *clause.*

Where the amount allowed for maintenance of a wife guilty of adultery is not a large income, but only a bare allowance, the court will not necessarily insert a dum sola et casta *clause in the order.*

Application to make absolute a decree *nisi* for dissolution of marriage on the ground of the wife's adultery and for the insertion in an order for the wife's maintenance of a *dum sola et casta* clause.

At the hearing of the petition on the 14th of June, 1890, before Hannen, P., without a jury it appeared that the parties were married in 1873, and shortly after the birth of the first child, a boy, the respondent became temporarily insane, and on her recovery in 1874 the petitioner was advised that if his wife became pregnant again it would be dangerous to her health and that of the child. It was thereupon agreed that they should live apart, the petitioner allowing his wife £1 a week for maintenance. They corresponded for some time till in May, 1879, the petitioner took the child away from his mother, and on her requesting an interview refused it, and required her in future to address any communications to his solicitor, but he continued the allowance till 1889, when rumours reached him which resulted in the charge, in the petition, of adultery with three co-respondents. Hannen, P., found the charges proved, and also that the petitioner had not been guilty of neglect conducing to the adultery, and granted a decree *nisi.*

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

He further intimated that some provision should be made for the wife's maintenance.

Searle, in support of the motion.—The petitioner has agreed to allow his wife fifteen shillings a week, but the order ought only to be made as long as she remains chaste and unmarried.

Durley Grazebrook, for the respondent, urged that under the circumstances of the case no such clause should be inserted.

HANNEN, P., made the order, but as it was not a question of a large income, but of a bare allowance, did not think it necessary under the circumstances of the case to insert a *dum sola et casta* clause in the order.

Decree absolute, and order for maintenance of wife without insertion of the dum sola et casta *clause.*

Solicitors for the petitioner, *C. O. Humphreys & Co.*

Solicitors for the respondent, *Ross & Co.*

Court of Appeal

From Chan. Div. Feb. 4.

In re TAYLOR, STILEMAN, & UNDERWOOD. *Ex parte* PAYNE-COLLIER. (a.)

Solicitor—Lien for costs—Extent of lien—Taxable costs, charges, and expenses—Advances—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Taking security for costs—Interest—Waiver of lien.*

A solicitor can only have a lien on his client's documents for taxable costs, charges, and expenses incurred by him as solicitor of the client, which will include all advances, made by the solicitor in the course of his business as a solicitor, which are liable to be moderated by the taxing master; but the lien does not extend to ordinary loans or advances by the solicitor not so made as aforesaid, and not liable to be so taxed or moderated.

As to whether the taking of a security from the client operates as a waiver of the lien where one exists, no fixed rule can be laid down; but it depends on the position of the parties and the circumstances of the particular case, as affording an inference of the intention of the parties. If that position and the circumstances of the case, or the nature of the security, are such that the taking of the security is inconsistent with the continuance of the lien, a sufficient indication is afforded of an intention to abandon the lien and rely on the security so taken.

A solicitor took as security from his client (a married woman) a promissory note (in which her husband joined as surety), with a provision for payment of interest at five per cent., and also a charge on a life policy; and nothing was said about the lien continuing, notwithstanding the taking of the security.

Held, that, inasmuch as a solicitor owes a duty to his client to explain clearly the effect of every transaction between them, and as the security in question gave more than the lien, the taking of it was inconsistent with the continuance of the lien, and afforded an inference of an intention to abandon the lien and rely on the security.

Robarts *v.* Jefferys, 8 *L. J. Ch.* (*O. S.*) 137, *approved.*

Decision of Stirling, J., *reversed.*

Appeal from Stirling, J.

Mrs. Agnes Mary Lawrenson Payne-Collier was, under the will of General John Lawrenson, entitled for her life to one-half the income of his residuary estate, but her interest was subject to a restraint upon anticipation. It appeared that Mrs. Payne-Collier, being in want of money, employed Messrs. Taylor, Stileman, & Underwood, who then acted as her solicitors, to make an application to the court with a view of raising a sum of money to pay debts and for other necessary purposes, notwithstanding the restraint on anticipation. This they carried out for her to the extent that a loan of £500 was allowed to be raised on mortgage for the aforesaid purposes. A further application for leave to raise a further sum of £500 to pay debts and enable her to remove from Bucks to Devonshire was subsequently made, and granted by the court with some reluctance, and only on condition that no further sum was to be raised, and that the present loan should be received and disbursed by her said solicitors. The sum raised proving insufficient to do more than pay the debts, those solicitors, at Mrs. Collier's request, advanced her £100 to pay the expenses of her removal to Devonshire, and to pay the first half-year's rent of her house there.

It appeared also that some furniture in the house had been seized by the sheriff, and that the solicitors, at Mrs. Collier's request, had paid the sheriff out; but during the hearing of the appeal it transpired that the sheriff had seized under a judgment against Mrs. Collier's husband. Messrs. Taylor & Co. had also advanced other sums to Mrs. Collier from time to time, and for the amount owing to them they had taken as security a charge for £200 on a policy of assurance on her life, and also a promissory note for £200 in which her husband joined as surety, and which carried interest at five per cent.

Mrs. Collier, having subsequently changed her solicitors, applied to Messrs. Taylor & Co. to give up all documents in their possession belonging to her; but they, considering that they had a lien on such documents for the amount owing to them from her, objected to give them up unless such amount was paid. The amount they claimed was £81 14s. 2d., of which £20 12s. 9d. was for costs proper, and the balance was in respect of advances, which they said they had only made to her as her solicitors, and would not have made had they not stood in that relation to her.

Her present solicitors tendered £20 12s. 9d. to Messrs. Taylor & Co., but the latter declined to give up the papers unless their full claim was paid.

Mrs. Collier then made an application to the court that she might be at liberty to pay the sum of £20 12s. 9d. into court to the credit of the matter without prejudice to taxation of the bill of costs, and that the solicitors might be ordered to deliver up all her papers in their possession.

Stirling, J., having refused the application, Mrs. Payne-Collier appealed.

Cozens-Hardy, Q.C., and *C. Macnaghten*, for the appellant.—In the first place, solicitors cannot have a lien for money advanced, and, secondly, their lien (if any) is superseded by taking security: *Cowell* v. *Simpson*, 16 Ves. 275, at p. 282, *per* Lord Eldon, C. In any case, the court will order the papers to be given up on payment into court of the amount of costs proper not covered by security: *Balch* v. *Symes*, 1 Turn. & Russ. 87, at p. 92. [LOPES, L.J., referred to *Stevenson* v. *Blakelock*, 1 Maule & Sel. 535.] If a solicitor takes a promissory note for his costs payable on demand he loses his lien: *Robarts* v. *Jefferys*, 8 L. J. Ch. (O. S.) 137, which is on all fours with the present case. [LINDLEY, L.J., referred to *Chase* v. *Westmore*, 5 Maule & Sel. 180.] Solicitor's lien is only for "costs" properly so called, and does not extend to general debts: *In re Galland*, 34 W. R. 58, 158; 31

(a.) Reported by R. H. DEANE, Esq., Barrister-at-Law.

Ch. D. 297. [LOPES, L.J., referred to *Blunden* v. *Desart*, 2 Dr. & W. 405.] The point as to the taking of security operating as a waiver of the lien was not argued before Stirling, J., as we were not at that time aware of the fact.

Graham Hastings, Q.C., and *Maidlow*, for the respondents.—Taking security only destroys solicitor's lien where there is something in the nature of the security taken or in the circumstances, which is inconsistent with the continued existence of the lien: *Angus* v. *McLachlan*, 31 W. R. 641, 23 Ch. D. 330, 335. The present case is distinguishable from *Cowell* v. *Simpson* and *Balch* v. *Symes*. A general lien is not excluded by a special agreement: *Jones* v. *Peppercorne*, 7 W. R. 103, Johnson, 430, 442 (a case of banker's lien), and *Brandao* v. *Barnett*, 12 Cl. & Fin. 787, at p. 809. [LOPES, L.J.—Is there any case in which it has been held that taking security does not destroy a solicitor's lien? Does not the rule "*Expressum facit cessare tacitum*" apply?] What *Robarts* v. *Jefferys* decided was that it was improper to take a security and then insist on the lien; but the ground of that decision was the fact, that interest was not at that time payable upon solicitor's costs; but now, under the Solicitors' Remuneration Act, 1881, s. 5, it may be payable. The £100 advanced to enable this lady to remove to Devonshire was advanced by the solicitors in their character as such, and they certainly would not have advanced it had they not been acting as her solicitors, and therefore it does not come within the description of "general debts" in *In re Galland*, but is protected by the lien. [FRY, L.J., cited the judgment of Sir T. Plumer in *Worrall* v. *Johnson*, 2 J. & W., at p. 218.] The advance was made in consequence of the solicitors having undertaken a duty towards Mrs. Payne-Collier, and in the course of carrying out the arrangement made with the sanction of the court. They had undertaken the responsibility of seeing that the order for removing the restraint on anticipation should be carried out for her benefit. [LOPES, L.J.—The amount was not remuneration for any services rendered by them as solicitors. KAY, L.J.—There could be no obligation on the solicitors to pay for her going down to Devonshire; it was a mere voluntary loan.] Then we paid out the sheriff who was in possession. Eleven guineas were paid him for his charges. [*Cozens-Hardy, Q.C.*, explained that those were not the wife's costs at all, the sheriff having seized the furniture for a debt of the husband's, and the solicitors having paid him out at the request of the wife, their client.] There was nothing in the security given here which was inconsistent with the lien. It is all a question of intention, to be gathered from what was said and done. No doubt it is inconsistent if you take a security payable at a distant date in the future, as in the cases referred to decided by Lord Eldon. There was nothing inconsistent with the lien in the fact of interest being reserved by the security taken.

Cozens-Hardy, Q.C., was not called on to reply.

LINDLEY, L.J.—This is an appeal from a decision of Stirling, J., refusing to direct certain solicitors to hand over their client's papers upon her paying into court the amount due from her to them in respect of their costs. The controversy which has arisen between these parties has assumed rather a serious shape. I will first consider for what a solicitor has a lien at all on his client's documents. I take it that he has such a lien for all his taxed or taxable costs, charges, and expenses incurred by him as the solicitor of his client. I take it that he has no lien for ordinary advances or loans made to the client; but his taxed, or rather his taxable, costs, charges, and expenses will not exclude all advances. He may make advances for his client in the course of his business as a solicitor, as, for instance, for the payment of counsels' fees, and other matters, all of which are taxable by the master in this sense—that they can be moderated. They are subject to the jurisdiction or discretion of the taxing master to moderate, and not merely to require them to be vouched; and whatever advances, costs, charges, and expenses can be so dealt with, for all such, it appears to me, a solicitor can have a lien upon his client's papers. It is a general lien extending to all such papers for all such costs, charges, and expenses, but it does not extend to other advances, such as the advances made in the present case, which do not come under the category which I have described. I arrive at this conclusion, not only upon the authority of decided cases, but upon the express language of section 28 of the Solicitors Act, 1860, which enables a solicitor to obtain a lien for his "taxed costs, charges, and expenses" on "property recovered or preserved through" his "instrumentality." That expresses, in as accurate language as I am able, the kind of costs for which a solicitor can have a lien.

Now, the solicitor claims here for advances which he contends come under that category, and I thought at one time that as to one item—the eleven guineas paid for the sheriff's charges—it was such an advance, because we were told there was a judgment against his client, that the sheriff was in possession, and that he, as solicitor, paid the sheriff out. If that were so, I think that would have been a charge properly taxable by the taxing master. But it now appears that it was a judgment against his client's husband, and that the wife requested the solicitor to pay the sheriff out because he had taken possession of her furniture. The sum advanced by the solicitor for that purpose had nothing to do with costs, charges, or expenses properly taxable as between this solicitor and his client. It was merely a loan. It was not taxable by the taxing master, nor open to moderation by him, and must come into the category of advances for which there is no lien, and not under that of taxable costs, charges, or expenses; on that point, therefore, the judgment below goes too far.

Another point which is important has been raised by Mr. Cozens-Hardy. He says that whatever lien these solicitors may have had, was destroyed by their having taken security from their client. The security taken consisted of a promissory note for £200 given by the solicitor's client, who was a married woman, and by her husband, and bearing interest at five per cent., and also of a charge upon a certain policy of insurance. He says that is a waiver of the lien, if there ever was any, and as authority for that proposition he relies on the case of *Robarts* v. *Jefferys*, a decision of Sir John Leach. The precise point in that case seems to me to be exactly the point which arises here. In that case the solicitor claimed a lien, and the client gave a promissory note payable on demand and bearing interest at five per cent., and Sir John Leach said: "The taking of this promissory note was altogether a waiver of the lien of this solicitor." In my opinion the question whether the taking of a security operates as a waiver of a lien must depend on the intention expressed or to be inferred from the position of the parties, and all the circumstances of the particular case. In this particular case we are dealing with a solicitor and his client, and it strikes me, I confess, that if a solicitor takes from his client such a security as this solicitor has taken, the *primâ facie* inference, in every sense, is that he does waive his lien, if he says nothing to the contrary; and it appears to me that that is a right and proper conclusion to come to, bearing in mind that it is a duty

which a solicitor owes to his client to explain to him the exact effect of what he is about to do. The inference would not be the same in every case. If a banker asked me for a security I think the inference would be different. I should not understand that he was giving up his lien unless there was something expressed to that effect. But bearing in mind the relative position of the parties in the present case, and having regard to that decision of Sir J. Leach, I think, in the absence of all evidence of a contrary intention of the parties, that the true inference to be drawn from the circumstances of this case is that the lien was waived. Upon that point, also, I therefore think that Mr. Cozens-Hardy was right, and that the appeal ought consequently to succeed on both points.

LOPES, L.J.—A solicitor has a lien for all his taxed costs, charges, and expenses, but that clearly does not extend to advances made for any other purposes than purposes for which the solicitor is employed as such. Now in this case there was a sum of eleven guineas paid by these solicitors to release their client's furniture from the sheriff, and I thought at first that that item might be brought within the rule I have laid down. But it turned out, upon investigation, that the judgment under which the sheriff seized the client's furniture was a judgment, not against her, but against her husband. She then applies to the solicitor and asks him to pay out the sheriff, and he does so, not at all, as I understand, in his capacity as a solicitor, but as any ordinary friend might have advanced money to release the furniture. That payment, therefore, it seems to me, was not a taxable item, but a mere voluntary advance made by the solicitor, not as a solicitor, but in the way I have already stated.

In my opinion the costs or advances for which a solicitor may have a lien must be taxable—that is, liable to be reduced or moderated by the taxing master, and upon that point, therefore, Mr. Hardy is right.

Upon the other point raised with regard to a security taken from the client by the solicitor, it is contended that the lien here was lost, because the solicitor took a certain security from his client. As to that I do not think any fixed general rule can be laid down, but each case must be decided on its own circumstances, regard being had to whether those circumstances are sufficient to raise an inference (which may be rebutted) that the parties intended to abandon the old security. I will not go so far as to say that the mere fact that a new security has been taken is in itself sufficient to show an intention to abandon the old one. But if the circumstances are such as to make the one security inconsistent with the other, that, in my opinion, does sufficiently show such an intention. In this case part of the security consisted of a promissory note, with interest running at the rate of five per cent. from the date of the advance. That is more than could be recovered on the lien. There was also a charge on a policy, and the promissory note is not given by the wife alone, but the husband joins as surety. The security taken is a security larger than, and of a different nature from, his lien as a solicitor. I think, therefore, that it is a fair inference that an intention existed between the parties, in taking that security, to abandon the old security of the lien, and rely on that new security taken as I have described. Therefore, in my opinion, Mr. Hardy was right on that point too. The decision on this point, I may say, is in strict accordance with that in *Robarts* v. *Jefferys*, which was a decision of Sir John Leach. It seems extraordinary that his decision is not referred to in any text-book.

KAY, L.J.—I am of the same opinion, but as we are differing from the learned judge below, I think it is right to give my own reasons for doing so in my own words.

The appeal raises two very important points, the first being as to the extent of the ordinary lien of a solicitor, and the second, as to how that lien is affected by taking another security. I do not find in any of the cases cited, or in any of the books to which I have had to refer in the course of this appeal, any exact definition of how far the lien of a solicitor extends. In Morgan and Wurtzburg on Costs it is said, at page 551, "The solicitor has a lien on the papers of his client in his hands for the amount of his costs." Another text-book (Pulling on Attorneys, 3rd ed., at p. 371) substitutes the words "for his professional services" instead of "for the amount of his costs."

The nearest approach to such a definition which I have been able to find is by Sir T. Plumer, and occurs in the case of *Worrall* v. *Johnson* in 2 J. & W., at p. 218, which is this: "There are two kinds of lien that a solicitor has for his bill of costs; one on the funds recovered, and the other on the papers in his hands. If there be no fund and no cause, still the client cannot get back the papers without paying what is due, not only in respect of that business for which the papers were used, but for other business also. This lien, however, does not extend to general debts, but only to what is due to him in the character of attorney. That he has a right to retain, and it is in consequence the general practice for the client when he applies for an order for the delivery of his papers to submit to pay the bills of costs generally."

There the words used are "bills of costs," and I take it, therefore, that the lien extends to all those items properly included in the bill of costs—that is, in other and more definite words, to all such claims or charges by the solicitor as are liable to be considered and reduced or moderated by the taxing master, and I think that definition will be found to be one that works very well indeed in practice.

Upon the second point, which has been fully dealt with, I will only say a word or two about the law. Now as to the sort of security the taking of which will discharge the solicitor's lien we have the very much considered judgment of Lord Eldon in *Cowell* v. *Simpson*, where the security given was a promissory note payable in three years, and Lord Eldon said this in 16 Ves., at p. 281:—"The exigencies of mankind requiring the goods to be delivered for consumption, the implication from an engagement for security of an engagement to deliver the goods without payment is necessary, otherwise, from a promissory note payable in three years, a contract must be implied that the goods are to be retained during that period, destroying the other special contract. So, in this instance, if the solicitor says he will not proceed in the business, and will not deliver up the papers, the consequence is that he destroys the express contract to postpone payment for three years. Therefore, unless from the fact that he has taken this security, you can imply that he is to keep the papers three years, though the vital interests of the owner may depend on the possession of them, the implication is necessary that he is to deliver them up, and rely on the contract."

In *Stevenson* v. *Blakelock*, 1 M. & S., at p. 544, Lord Ellenborough, C.J., says, "It is unnecessary to canvass the doctrine of *Cowell* v. *Simpson*, inasmuch as there is a material distinction between that case and the present; for there the bills were running, and there was no reason to presume that they would not be duly paid; in this case the bills have been refused payment." [His lordship read to the end of Lord Ellenborough's judgment, and proceeded:—] And later, in *Balch* v. *Symes*, Lord Eldon said, "Notwi-

standing the Court of King's Bench has expressed a doubt whether my decision was right in the case of *Cowell* v. *Simpson*, I still entertain the opinion that an attorney who takes a security abandons his lien." That has been read as if he meant that in every case the simple fact of taking security was sufficient to show an intention to abandon the lien. But that was not the meaning. What he meant is shown by what he said in *Cowell* v. *Simpson* (at the top of p. 282 of the report in 16 Ves.). That is to say, he clearly meant that it is only where there is something in the security taken that is inconsistent with the lien, that an intention to abandon the lien can be inferred from the mere fact of taking the security. I take the true doctrine to be that which Lindley, L.J., has expressed, that in every case in which you have to consider whether a lien has been waived or given up you must look at all the circumstances of the particular case, and no doubt it is most material that we are here dealing with, a case between a solicitor and his own client. A solicitor has a duty when dealing with a client to explain to him all the circumstances and legal consequences of the transaction in a clear and intelligible manner, and where, as in this case, you find a solicitor taking from his client such a security as was here given without saying anything more, or expressly reserving his right of lien, or explaining that the lien would still remain notwithstanding the security, I agree with Lindley, L.J., that the inference ought to be against the solicitor and against the continuance of the lien, as being inconsistent with the nature of the security taken. The point which occurred in *Robarts* v. *Jefferys*, that interest was added, is present in this case also. In my opinion, therefore, Mr. Hardy is right on both points.

I think, therefore, that the appeal must be allowed with costs.

Appeal allowed.

Solicitors for the appellant, *Mear & Fowler.*

Solicitors for the respondents, *Taylor, Stileman, & Underwood.*

From Q. B. Div. [and Q. B. Div.] — Feb. 11; March 11.

REEVE AND ANOTHER *v.* GIBSON. (*a.*)

Costs—Taxation—Action for infringement of dramatic copyright—Recovery of less than £10—Statutory right to "full indemnity"—3 & 4 Will. 4, c. 15, s. 2—5 & 6 Vict. c. 97, s. 2—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.

A plaintiff who has recovered penalties in an action brought under 3 & 4 *Will.* 4, *c.* 15, *for infringement of dramatic copyright is entitled to have his costs taxed on the footing of obtaining a "full indemnity" under* 5 & 6 *Vict. c.* 97, *s.* 2, *although the sum recovered be less than* £10, *neither the general provisions of the Judicature Acts and Rules as to costs, nor section* 116 *of the County Courts Act,* 1888, *applying to such a case.*

Hasker *v.* Wood, 33 *W. R.* 697, *followed.*

Appeal from chambers.

The plaintiffs had sued the defendant in the High Court for the recovery of four penalties of forty shillings each under 3 & 4 Will. 4, c. 15, in respect of infringements of their copyright in a play called "The Area Belle." The defendant paid the amount claimed into court, and the plaintiffs took it out in satisfaction of their claim. The plaintiffs thereupon applied to have their costs taxed upon the footing of a "full indemnity" under 5 & 6 Vict. c. 97, s. 2. The master refused to tax, on the ground that the plaintiffs, having recovered less than £10, were not entitled to any costs under section 116 of the County Courts Act, 1888.

Pollock, B., on appeal, referred the question to the court.

3 & 4 Will. 4, c. 15, s. 2, enacts that every offender against the Act "shall be liable for each and every such representation to the payment of an amount not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages to the author or other proprietor of such production so represented contrary to the true intent and meaning of this Act, to be recovered, together with double costs of suit, by such author or other proprietors in any court having jurisdiction in such cases in that part of the said United Kingdom or of the British dominions in which the offence shall be committed."

5 & 6 Vict. c. 97, s. 2, enacts that "so much of any clause, enactment, or provision in any public Act or Acts, not local or personal, whereby it is enacted or provided that either double or treble costs, or any other than the usual costs between party and party, shall or may be recovered, shall be, and the same are hereby, repealed. Provided always, that instead of such costs the party or parties heretofore entitled under such last-mentioned Acts to such double, treble, or other costs shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action, suit, or other legal proceeding as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer."

Section 116 of the County Courts Act, 1888, provides, with respect to "any action brought in the High Court which could have been commenced in a county court," that "if in an action founded on tort the plaintiff shall recover a sum less than ten pounds he shall not be entitled to any costs of the action."

Henn Collins, Q.C., and *Morton Smith*, for the plaintiffs.—This action was brought to recover penalties under a statute; it is not founded on contract or on tort, and section 116 of the County Courts Act, 1888, does not apply. The appellants have a statutory right to have their costs taxed upon the footing of a full indemnity, a privilege which was substituted by 5 & 6 Vict. c. 97 for the privilege of double costs conferred by 3 & 4 Will. 4, c. 15. The County Courts Act has not taken away that privilege.

J. E. Bankes, for the defendant.—Section 116 deals with "any action brought in the High Court which could have been commenced in a county court"; these are governing words, and are not cut down by the sub-division as to actions founded on contract or on tort which follows. Moreover, this action is founded upon a tortious act—the performance of a play without the owner's permission. The sums recovered are not penalties, but damages for the tort: *Adams* v. *Batley*, 35 W. R. 437, 18 Q. B. D. 625. All costs are now in the discretion of the court: R. S. C., 1883, ord. 65, r. 1; *Garnett* v. *Bradley*, 26 W. R. 698, 3 App. Cas. 44. Ord. 22, r. 7, applies in this case, and the taxation there directed means taxation on the ordinary scale.

Henn Collins, Q.C., in reply.—These "double costs" and the substituted indemnity are not costs in the

(*a.*) Reported by T. R. COLQUHOUN DILL and W. F. BARRY, Esqs., Barristers-at-Law.

ordinary sense, but are part of the plaintiff's compensation under the Act, and no subsequent enactments as to mere costs apply. These provisions of the Act of William IV. are treated as still subsisting in, although they are modified as to musical compositions by, the Copyright (Musical Compositions) Acts, 1882 and 1888.

WILLS, J.—In this case we think that the plaintiffs are entitled to the order for which they ask. The foundation of the right is the Act 3 & 4 Will. 4, c. 15, which, by section 2, gives to a person who succeeds in an action for infringement of copyright, damages which may be calculated upon one of three scales—either 40s. in respect of each representation, or the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages. He is also to recover double costs of the action. Then the Act 5 & 6 Vict. c. 97, by section 2, substitutes for double costs a full and reasonable indemnity. Now the sum which the plaintiffs have recovered they have recovered, not at common law, but by virtue of this statute. They have done so by bringing the defendant into court, and by the process of the court afterwards. This sum was paid into court, and the plaintiffs have taken it out under ord. 22, r. 7. That is, I think, a recovery of this sum within the meaning of the Act of William IV.

It is said that if any part of ord. 22, r. 7, is applicable to this case the whole of that rule is applicable, and that the costs are to be taxed accordingly. That would be true if there were any subject-matter to which the latter part of that rule could apply. It deals with costs, but in my opinion that means costs in the ordinary sense of that word; costs incidental to the main subject of relief, not costs provided for by statute; for these, I think, are not ordinary costs. I am much struck by the contrast in the language used in sections 1 and 2 of the Act 5 & 6 Vict. c. 97. By section 1 provisions in certain Acts giving double and treble costs are repealed, and in lieu thereof "the usual costs between party and party" are to be recovered. In section 2 there is a remarkable change of language which must have been intentional. The words are "such full and reasonable indemnity as to to all costs, charges, and expenses incurred in and about any action, suit, or other legal proceeding as shall be taxed." In my opinion the section to which I have last referred puts these costs on a different footing from ordinary costs, and they are not costs in the ordinary sense at all. This, therefore, is something quite different from an ordinary award of costs to which the rules and orders of the Supreme Court or those under the County Court Acts apply.

The question was raised whether this can be considered to be an action founded on contract or tort. It is not necessary to decide that question, for the indemnity asked for here does not fall within the rules as to costs.

I think that, for the reasons given, apart from that question, the plaintiffs are entitled to what they ask.

VAUGHAN WILLIAMS, J.—I agree that this order should be made as prayed. But I do not come to that conclusion upon quite the same grounds as my learned brother. The action was brought to recover damages given by the Act 3 & 4 Will. 4, c. 15, s. 2, which section is amended by 5 & 6 Vict. c. 97, s. 2. Now it is said that the costs recoverable under these two sections are not costs in the ordinary sense, but are an indemnity, and fall outside the scope of the County Courts Acts and the rules as to taxation. I am not sure that I agree with that conclusion. Inasmuch as it was held in *Finlay* v. *Seaton*, 1 Taunt. 210, and in subsequent cases that it is not necessary that the right to such costs as these should appear on the record, and inasmuch as no rule or order of court has been considered necessary to give a right to them, it must have been thought that these were costs in the ordinary sense, and that the statute merely empowered the taxing officer to apply a higher scale. The master must look at the proceedings and judge whether the case falls within the statute, and conduct the taxation accordingly. Under these circumstances I do not feel prepared to say that these costs are intended to be an indemnity so different in its nature from ordinary costs that the County Court Acts shall not apply. I think that these are costs to which ord. 22, r. 7, is applicable, and that, that being so, it is impossible to get rid of the difficulty raised by the County Courts Act in the way suggested. As to ord. 22, r. 7, however, it is a doubtful point whether the section of the County Courts Act applies in a case where a sum has been paid into court, and by that means a sum is recovered of less amount than the amounts fixed in section 116 of that Act. But the court has, in my opinion, a discretion as to ordering what costs shall be paid, and I think that the plaintiff acted wisely in asking the judge for an order as to these costs. I have, therefore, arrived at the conclusion, not that these are not costs because they are an indemnity, but that the court has a discretion in ordering these costs. In this case I think that the order ought to have been made; there was good reason for ordering these costs to be paid. I therefore agree that the order should be made.

The defendant appealed.

March 11.—*J. E. Bankes*, for the defendant.

Henn Collins, Q.C., and *Morton Smith*, for the plaintiffs, referred to *Hasker* v. *Wood*, 33 W. R. 697.

The COURT (Lord HALSBURY, L.C., Lord ESHER, M.R., and FRY, L.J.) held, upon the authority of *Hasker* v. *Wood*, that the plaintiffs' right to a "full and reasonable indemnity," under 5 & 6 Vict. c. 97, s. 2, even assuming it to be the same thing as "costs" (as to which they expressed no opinion), was not affected by the general provisions either of the Judicature Acts and Rules or of the County Courts Act, 1888.

Appeal dismissed.

Solicitor for the plaintiffs, *Tilson*.

Solicitors for the defendant, *Brown & Woolnough*.

High Court of Justice.

Chan. Div. North, J. — April 7.

GREEN v. MOORE. (a.)

Practice—Setting aside judgment in default of defence—Short cause—Length of notice—Chancery Judges' Regulations, 1876.

Under the regulations made by the Master of the Rolls and the Vice-Chancellors in 1876, *motions for judgments in actions are entered in the cause book, and, if marked "short," will be placed in the paper on the first short cause day after the day for which notice has been given.*

The plaintiff gave notice of motion for judgment for the 14th of March, 1891. *The case was marked "short,"*

(a.) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

and the 14th of March was the regular short cause day. The defendant not appearing, judgment was given for the plaintiff.

The defendant moved that judgment be set aside, on the ground that the case was placed in the paper prematurely.

Held, that "the first short cause day after the day for which notice is given" means "the first short cause day available after the giving of the notice"; but, having regard to the circumstances of the case, the judgment was set aside and leave given to defend the action, on payment of costs of the motion and costs subsequent to the statement of claim.

Motion.

This was a motion by the defendant to set aside a judgment obtained against him in default of pleading.

The writ was issued on the 21st of January, 1891. The statement of claim was delivered on the 12th of February.

The defendant having failed to deliver a defence, on the 11th of March the plaintiff served him (by leaving it at his chambers) with notice of motion for Saturday, the 14th of March, for judgment in accordance with the statement of claim. The notice stated that the action would be marked "short." The regular short cause day was the 14th of March.

The defendant, being away, did not receive the notice, and did not appear. Judgment was given in his absence in accordance with the statement of claim.

On the 18th of March the defendant returned and found the notice.

On the 19th of March he delivered a defence, which was returned by the plaintiff's solicitors, on the ground that judgment had already been given in the action.

The defendant now for the first time became aware of the judgment, and gave notice of the present motion on the 23rd of March.

The regulations made by the Master of the Rolls and the Vice-Chancellors in 1876 provide that motions for judgment in actions shall not be brought on as ordinary motions, but shall be set down in the cause book, and can then be marked "short" on production of the usual certificate of counsel, and will then be placed in the paper on the first short cause day after the day for which notice is given.

Ribton, for the defendant.—The case came into the paper prematurely on the 14th of March. According to the regulations, the notice being given for a Saturday, which was a short cause day, the case ought not to have been placed in the paper until the following Saturday, the 21st of March, the next short cause day after the day for which notice was given: *Gibbings* v. *Strong*, 32 W. R. 757, 26 Ch. D. 66.

Vernon R. Smith, for the plaintiff.—Two clear days' notice was given, all that was necessary.

NORTH, J.—I do not think the plaintiff was wrong in his proceedings. There is some ambiguity in the words of the regulations, but I think that "the first short cause day after the day for which notice is given" means "the first available short cause day after the giving of the notice." If the notice is given for a Saturday I do not think it is necessary to lose a whole week. If the notice is given for any other day except Saturday the difficulty could not arise. I do not think the defendant was at all misled, but, having regard to all the circumstances, I think it is fair that he should have an opportunity of defending. The judgment must be set aside, and leave given to the defendant to deliver a defence on his paying the costs of this motion and the costs subsequent to the statement of claim.

Solicitors, *C. R. S. Hooper; Daniel Jones & Linnett.*

Chan. Div. Stirling, J. — June 24—26; July 1, 2; Nov. 4, 1890.

BLYTH v. FLADGATE.
MORGAN v. BLYTH.
SMITH v. BLYTH. (a.)

Solicitor—Trust money passing into hands of firm with notice of trust—Investment by partner on improper security—Negligence—Liability of partners—Notice—Implied retainer—Liability of deceased partner's estate—Contribution—Trustee Act, 1888 (51 & 52 *Vict. c.* 59), *s.* 4 (1).

Trust funds were deposited in 1883 *at a bank in the name of a firm of solicitors (consisting of three partners, of whom S. was one) who acted for the trustees. The last surviving trustee died in* 1883, *and in* 1884 *the trust funds were invested in a mortgage of house property of a hazardous nature. The mortgage was taken in the names of S. and two other persons, all of whom had then agreed to become new trustees of the trust funds, but who were not actually appointed trustees until after the execution of the mortgage.*

S. acted for his firm throughout the whole transaction as to the investment, and the costs of his firm in relation to the transaction were retained out of the trust fund. S. had full knowledge of the nature of the property taken as security, but the other members of his firm had no actual knowledge on the matter. The security proved insufficient, and in 1888, *in an action brought by the beneficiaries against S. and the two other trustees of the fund, it was held that they were jointly and severally liable to make good the loss sustained by the trust fund. This not having been done, the present actions were brought.*

Held (1), *that the trust funds having come into the hands of the firm of solicitors with notice of the trusts, all the partners were affected with knowledge of the nature of the security through S., who acted throughout within the scope of his authority as partner, and were therefore implicated in the breach of trust; that the liability, being joint and several, was not discharged by the judgment, obtained in* 1888, *against S.; that the Trustee Act,* 1888, *s.* 4, *afforded no defence, as the security was one of a class attended with hazard; and that the estate of a deceased partner of S. and the surviving partner personally, were liable to make good the loss.*

Lechmere *v.* Fletcher, 1 *Cr. & M.* 623, 3 *Tyr.* 450, *and* King *v.* Hoare, 13 *M. & W.* 494, *followed.*

Held (2), *that the relation of solicitor and client existed between the firm of S. and each of the two new trustees, although no express retainer had been given, and that S., and through him the firm, having failed in the duty of calling the attention of the trustees to the rules as to investment of trust money, the firm was liable for negligence, and that such liability extended to the estate of the deceased partner.*

The law as to implied retainer, as laid down in Bean *v.* Wade, 1 *Times L. R.* 404, 2 *Ibid.* 157, *followed.*

As to an action for indemnity where no claim had actually been made, Hughes-Hallett *v.* Indian Mammoth Gold Mining Co., 31 *W. R.* 285, 22 *Ch. D.* 561, *distinguished.*

These three actions arose out of an investment on mortgage of funds subject to the trusts of a settlement made on the marriage of Mr. and Mrs. Blyth, which was held by Stirling, J., in a previous action of *Blyth* v. *Smith*, to be a breach of trust.

These three actions were tried separately, and to some extent on independent evidence, but the following facts are common to all.

(a.) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

The settlement in question was dated the 20th of August, 1855, and was made between Philip Thomas Blyth of the first part, William Kemp of the second part, Isabella Mary Blyth (then Isabella Mary Kemp, spinster) of the third part, and Henry George Gordon, Archer Thomas Upton, and Philip Patton Blyth of the fourth part. The last-named parties were the trustees, and were to hold the trust funds upon trust, with the consent of Mr. and Mrs. Blyth, during their joint lives to invest (*inter alia*) at interest on real securities in England or Wales, or upon leasehold securities in England having at least sixty years to run, and from time to time, with the like consent, to vary, and to pay the income to Mrs. Blyth during her life for her separate use without power of anticipation, and after her death for the issue of the marriage as Mr. and Mrs. Blyth should during their joint lives jointly appoint, and in default for sons at twenty-one and daughters at twenty-one or on marriage in equal shares.

The marriage took place shortly after the date of the settlement, and there were issue of the marriage several children, and among them a son, Philip William Blyth, a daughter, Mrs. Morgan, and Mary Ellen Blyth and Francis Ernest Blyth.

Archer Thomas Upton died on the 5th of January, 1875, Philip Patton Blyth on the 30th of January, 1881, and H. G. Gordon on the 7th of June, 1883.

Part of the trust funds had been invested on mortgage, which was paid off in the lifetime of H. G. Gordon. By his direction the mortgage money was received by Messrs. Fladgate, Smith, & Fladgate (a firm of solicitors) who had acted for the trustees, consisting of Wm. Mark Fladgate, Horace Wm. Smith, and William Francis Fladgate. By the like direction the money when received was invested in exchequer bills, which were deposited with Messrs. Drummond, the bankers of the firm of solicitors, in the name of the firm, and remained so deposited at the time of Gordon's death.

After this event Philip Thomas Blyth (the husband) interested himself in seeking a mortgage suitable for the investment of the trust funds, and on the 8th of October, 1883, he wrote to Mr. Horace Wm. Smith, the member of the firm who attended to the affairs of the trust, a letter saying that a Mr. Pocock had proposed to him a security for £11,000, and asking Smith, as a member of the firm, to look into it and see if the money could be safely lent on it. Simultaneously Pocock wrote to Smith with reference to the same proposed mortgage security for the proposed advance by trustees, and Smith took the matter up and procured the property forming the proposed security to be valued by Mr. George Sanders, a surveyor, whose competence was not called in question in any of these proceedings.

Sanders made two unfavourable reports as to the proposed security, and after receiving these reports, Smith himself, in a letter of the 23rd of November, 1883, written by him to Searle, the proposed mortgagor, pronounced against the proposed security on three grounds—(*a*) the depressed state of the property; (*b*) the large amount of ground-rent; and (*c*) the inadequate proportion of the value of the property to the amount proposed to be advanced.

Shortly afterwards, however, Smith reconsidered and altered this determination, and, as was admitted by him in the original action of *Blyth* v. *Smith*, this change was not based on any new facts, but on the opinion of Philip Thomas Blyth and of himself that Sanders had taken too gloomy a view of the situation. In December, 1883, and January, 1884, Smith, acting as a member of the firm of Fladgate, Smith, & Fladgate, corresponded with Searle (the mortgagor) and the mortgagor's solicitors, and received and perused the abstract of the mortgagor's title, and made requisitions thereon.

Prior to the 24th of February, 1884, the exchequer bills were sold, and the proceeds, amounting to £9,658 2s. 8d., placed to the credit of Messrs. Fladgate at Messrs. Drummond's.

During all this time there was no duly appointed trustee of the settlement. On the 9th of January, 1884, Smith had called the attention of Philip Thomas Blyth to the question of the appointment of new trustees, stating that there must be three trustees. On the 19th of January Smith was informed that C. H. Morgan, a son-in-law of Philip Thomas Blyth, would act as one trustee, and Philip William Blyth, a son, as another. Smith himself ultimately (but at what date did not clearly appear from the evidence) agreed to become the third.

On the 13th of March, 1884, Searle executed the proposed mortgages to Smith, P. W. Blyth, and Morgan, and on the same date £11,000 (partly made up of the trust funds, and partly of funds belonging to Mr. and Mrs. Blyth) was transferred to his credit in Messrs. Fladgate's ledger. This was applied as follows:—£1,596 9s. 10d. in payment of a mortgage debt on part of the property; £8,997 10s. 2d. to Searle himself; £21 to Sanders as his fee for surveying the property; £250, one year's interest, to Mrs. Blyth; £115 4s. 7d. was, in pursuance of an agreement in that behalf made between Searle and the Messrs. Fladgate, retained by Messrs. Fladgate for their costs; and £19 5s. 5d. remained in their hands. The appointment of Messrs. Smith, Blyth, and Morgan as trustees of the settlement was not executed until April, 1884, after the mortgage had been executed, and the trust funds dealt with in the way above mentioned.

The security proved an insufficient one, and no interest beyond £250 was ever paid on the mortgage debt.

On the 1st of May, 1884, the partnership between Smith and the Messrs. Fladgates was dissolved.

In October, 1886, an action of *Blyth* v. *Smith* was commenced by Mrs. Blyth against Messrs. Smith, P. W. Blyth, and Morgan for the purpose of obtaining a declaration that they were jointly and severally liable to replace the trust fund. To this action Mary Ellen Blyth and Francis Ernest Blyth (two children of Mrs. Blyth) were added as plaintiffs, and by the judgment given at the trial of the action (dated the 9th of August, 1888) it was declared that the investment of the trust funds (being the sum of £9,658 2s. 8d.) was improper, and that C. H. Morgan, H. W. Smith, and P. W. Blyth were jointly and severally liable to make good any loss sustained by such investment, with interest on the said sum at the rate of £4 per centum per annum from the 13th of September, 1884, up to which date interest had been paid by the mortgagor, George Searle. And it was ordered they should pay to Mrs. Blyth the sum of £1,208 1s. as interest, less £257 0s. 7d. already paid to her. A sale out of court of the property comprised in the mortgages was ordered, and also that the plaintiffs, Mrs. Blyth and her two children, should have a charge on the said property.

This judgment had not yet been fully worked out. Some payments on account of interest were made to Mrs. Blyth, a portion of the property was sold (not on very advantageous terms), but for the greater part no bid was obtained on either of two occasions when it was offered for sale by public auction.

On the 12th of September, 1888, William Mark Fladgate died, and Helen Louisa Fladgate, widow

Maria Frances Fladgate, and William Francis Fladgate were his legal personal representatives.

The first action, *Blyth* v. *Fladgate*, was commenced on the 23rd of February, 1887, by Mrs. Blyth, and her daughter and son, Mary Ellen Blyth and Francis Ernest Blyth (the same plaintiffs as in *Blyth* v. *Smith*), against Helen Louisa Fladgate, Maria Frances Fladgate, and W. F. Fladgate, and Smith, Morgan, and P. W. Blyth, claiming a declaration that the estate of W. M. Fladgate, and that W. F. Fladgate personally, were liable to the payment of the sum of £9,658 2s. 8d. to the defendants Smith, Morgan, and P. W. Blyth as trustees of the settlement, with interest thereon.

The second action, *Morgan* v. *Blyth*, was commenced on the 9th of November, 1888, by Morgan, one of the trustees, against P. W. Blyth, W. F. Fladgate, and Smith, claiming, as trustee, (1) a declaration that the defendants Fladgate and Smith were jointly and severally liable to replace the sum of £9,658 5s., a part of the funds comprised in the settlement, and to indemnify the trust estate against all liabilities in respect of the investment; and (2), if necessary, execution of the trusts of the settlement; and, in his personal capacity, from the same defendants indemnity against all liabilities in respect of the investment, damages against the same defendants for negligence as his solicitors, and a declaration that he was entitled to be recouped out of the share of the defendant P. W. Blyth under the settlement in any sum which he might be called upon to pay in replacing the said sum of £9,658 5s., or in respect of costs in the action of *Blyth* v. *Smith*, and to be entitled to a lien on such share for such sum as aforesaid.

The third action, *Smith* v. *Blyth*, was commenced on the 20th of March, 1889, by Smith against P. W. Blyth, and claimed a declaration that P. W. Blyth, as trustee, was liable to contribute a proportion of all sums necessary to replace, pursuant to the judgment in *Blyth* v. *Smith*, the trust fund of £9,658 2s. 8d. and other liabilities arising out of the same matter; that the plaintiff was entitled to be recouped out of the beneficial interest of the defendant under the settlement; and, until so recouped, to a lien on such interest. A counter-claim was put in by P. W. Blyth against Smith, W. F. Fladgate, and the representatives of W. M. Fladgate, charging negligence against the firm of solicitors, Fladgate & Co., and claiming damages.

It was agreed that the shorthand writers' notes and the *vivâ voce* evidence in *Blyth* v. *Smith* and all documents put in in that action should be admitted in the present action.

Graham Hastings, Q.C., and *R. C. Dobbs*, for the plaintiffs.—Section 4 of the Trustee Act, 1888, does not apply, as the security was an improper one *ab initio*. The solicitors do not discharge themselves of the liability which they incurred by receiving money fixed with a trust. By so acting they are liable as trustees: *Morgan* v. *Stephens*, 3 Giff. 226, 9 W. R. Ch. Dig. 89.

Phipson Beale, Q.C., and *L. H. Jenkins*, for the defendant Morgan, supported the plaintiff's case.

Crackanthorpe, Q.C., and *G. Farwell*, for the legal personal representatives of Wm. Mark Fladgate and for W. F. Fladgate.—The Messrs. Fladgate took no part in the business and had no knowledge of any irregularity. Smith was the negligent party. Smith acted outside his business as a solicitor, and consequently could not implicate his partners, for he acted as a scrivener in receiving the money for investment generally. The Fladgates had, therefore, no notice of the trust: Lindley on Partnership, 5th ed., p. 142. In *Blair* v. *Bromley*, 2 Phill. 354, 5 Ha. 542, the solicitors were held severally liable, but the plaintiffs were their clients. The plaintiffs did not retain Messrs. Fladgate as their solicitors. The case of *Morgan* v. *Stephens* is different, for there the solicitors wilfully allowed an executrix to misappropriate money. Messrs. Fladgate have never received any money into their own hands, so cannot be liable as agents of the trustees: *Barnes* v. *Addy*, 22 W. R. 505, L. R. 9 Ch. App. 244; *Harries* v. *Rees*, 16 W. R. 91. [STIRLING, J., referred to Lindley on Partnership, 5th ed., p. 150.] The liability, if such exist, was joint, and a judgment has been given against Smith in respect of it, which is a bar to any action against Messrs. Fladgate: *Kendall* v. *Hamilton*, 28 W. R. 97, 4 App. Cas. 504; *Ex parte Adamson, In re Collie*, 26 W. R. 890, 8 Ch. D. 807; *Cheetham* v. *Ward*, 1 Bos. & P. 630; *Nicholson* v. *Revill*, 4 Ad. & E. 675, 6 N. & M. 192, 1 H. & W. 756; Co. Litt., ed. 1832, p. 232a; *In re Hodgson, Beckett* v. *Ramsdale*, 34 W. R. 127, 31 Ch. D. 177; *Serrao* v. *Noel*, 15 Q. B. D. 549, 34 W. R. Dig. 70; *Cambefort* v. *Chapman*, 35 W. R. 838, 19 Q. B. D. 229.

H. A. Giffard, Q.C., and *A. Cass*, for the defendant Smith.—These proceedings do not really affect Smith, as he has already been declared liable for the money.

Graham Hastings, Q.C., in reply.—All the partners had full notice through Smith. The mortgagor paying the costs by an arrangement does not affect the fact that the firm were acting as solicitors for the mortgagees. *Kendall* v. *Hamilton* has no application, for the liability is joint and several. Judgment has been recovered against Smith as a trustee, not as a solicitor, and that judgment does not release his partners as solicitors from the liability resulting from their negligence: *In re Davison, Ex parte Chandler*, 13 Q. B. D. 50, 32 W. R. Dig. 18; *Blackwood* v. *Borrowes*, 4 Dr. & War. 441, 475; *In re Blundell, Blundell* v. *Blundell*, 36 W. R. 779, 40 Ch. D. 370.

MORGAN *v.* BLYTH.

Beale, Q.C., and *Jenkins*, for the plaintiff.—The plaintiff relied wholly on Smith, the solicitor to the trust, to find a proper investment, he knew nothing of the nature of the security. Smith was guilty of negligence as solicitor, and the liability must fall upon him and his partners: *Bahin* v. *Hughes*, 34 W. R. 311, 31 Ch. D. 390; *In re Partington, Partington* v. *Allen*, 57 L. T. Rep. 654, 36 W. R. Dig. 210; *Sawyer* v. *Goodwin*, 24 W. R. 493, 1 Ch. D. 351. There was an agreement equivalent to a retainer, so the firm is liable for negligence in having received the trust money and having improperly invested it, and is bound to replace it: *Bean* v. *Wade*, 1 Times L. R. 404; *Craig* v. *Watson*, 8 Beav. 427; *Blair* v. *Bromley*; *Morgan* v. *Stephens*; *Sawyer* v. *Goodwin*; *Dooby* v. *Watson*, 36 W. R. 764. The firm accepted the position of solicitors to the mortgagees: *Rigley* v. *Daykin*, 2 Y. & J. 83. A person who takes part in dealing with the property of others is bound to act in a prudent manner, although he may be acting under a contract: Pollock, Law of Torts, 1st ed., pp. 353, 354. Smith is also liable, apart from his being the solicitor, by his representations to his co-trustees: *Lockhart* v. *Reilly*, 1 De G. & J. 464, 6 W. R. Ch. Dig. 90; *Burrowes* v. *Lock*, 10 Ves. 470; *Cann* v. *Willson*, 37 W. R. 23, 39 Ch. D. 39. The plaintiff is entitled to be recouped what he has to pay in replacing the trust money out of P. W. Blyth's share: *Raby* v. *Ridehalgh*, 3 W. R. 344, 7 De G. M. & G. 104.

Dobbs (*Hastings, Q.C.*, with him), for the defendant P. W. Blyth.—In *Raby* v. *Ridehalgh* the *cestuis que trustent* had instigated the breach of trust. P. W.

Blyth only acquiesced in the investment. In that case the *cestuis que trustent* had to refund the benefit they had received from the breach of trust. P. W. Blyth has received nothing.

Crackanthorpe, Q.C., and *Farwell*, for W. F. Fladgate.—The firm was never instructed by Morgan, and did not act as the plaintiff's solicitors, their client was Philip Thomas Blyth. This is a *quia timet* action, for the plaintiff has as yet paid nothing under the judgment, and he cannot maintain it: *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.*, 31 W. R. 285, 22 Ch. D. 561. [STIRLING, J.—A trustee is clearly entitled to an indemnity against losses sustained by him otherwise than by his own default, in the execution of his trust: Lindley on Partnership, 5th ed., 373, 374. A judgment has been recovered against these trustees. That is different from the case cited.] To make the firm liable, fraud must be proved, for a firm is not liable for the misrepresentation of one of the partners, unless such misrepresentation was fraudulent: Lindley on Partnership, 5th ed., 162, 163. No fraud has been proved against Smith. The cases cited do not apply. This investment was one of a proper class, and Morgan consented to it; the loss is owing to errors of judgment, so the money cannot be followed as if it were still in the possession of the firm.

Giffard, Q.C., and *Cass*, for the defendant Smith.—There was no relation of solicitor and client between Smith and Morgan. Smith was not really a solicitor, trustee. He could not charge profit costs, he did not manage the trust estate. Smith did not undertake to find a fit and proper investment. In *Lockhart* v. *Reilly, In re Partington*, and *Thompson* v. *Finch*, 8 De G. M. & G. 560, 5 W. R. Ch. Dig. 100, a trustee who was held entitled to indemnity against his solicitor co-trustee had been misled by him. Such is not the case here. It is not the ordinary business of a solicitor to receive money for purposes of investment generally: *Harman* v. *Johnson*, 1 W. R. 326, 2 E. & B. 61; *Plumer* v. *Gregory*, L. R. 18 Eq. 621. For that duty a special retainer is necessary. So Smith cannot be made liable for loss by reason of alleged negligence as a trustee. A solicitor who acts for trustees is not solicitor to the trust estate, for no such office exists, but to the trustees personally: *Stanier* v. *Evans*, 35 W. R. 286, 34 Ch. D. 470. When Smith took up the business there were no trustees, and those who have been subsequently appointed were not ascertained or capable at the time of the acts in question, so cannot ratify his acts so as to make him liable on them: *Kelner* v. *Baxter*, 15 W. R. 278, L. R. 2 C. P. 174; *In re Northumberland Avenue Hotel Co.*, 33 Ch. D. 16, 35 W. R. Dig. 38; *In re Empress Engineering Co.*, 29 W. R. 342, 16 Ch. D. 125; *Wilson* v. *Tumman*, 6 Man. & Gr. 236. There could be no retainer till the trustees came into existence.

Jenkins, in reply.—One of two trustees who have both been guilty of breach of trust can sue his co-trustee, so as to make him replace the trust fund: *Baynard* v. *Woolley*, 20 Beav. 583, 4 W. R. Ch. Dig. 99. [STIRLING, J., referred to *Butler* v. *Butler*, 26 W. R. 85, 7 Ch. D. 116.] The fact that the Fladgates' costs were paid by the mortgagor does not relieve them of liability as the solicitors of the trustees: *Young* v. *Wallingford*, 31 W. R. 838. The measure of damage sustained by us is the loss we have incurred, or are likely to incur, by reason of the negligence: Mayne on Damages, 4th ed., p. 442; *Howell* v. *Young*, 5 B. & C. 259. A trustee who commits a breach of trust with the approbation of the *cestuis que trustent* is entitled to indemnity out of the estate of the person consenting to it: *Trafford* v. *Boehm*, 3 Atk. 440, 444.

He also referred to *Wood* v. *Braddick*, 1 Taun. 104; *Pritchard* v. *Draper*, 1 Russ. & M. 191; *Sharland* v. *Mildon*, 5 Ha. 469.

SMITH v. BLYTH.

Giffard, Q.C., and *A. Cass*, for Smith.—Smith has made payments on account of interest to Mrs. Blyth out of his own moneys, and may have to pay more. He is entitled to contribution.

Graham Hastings, Q.C., and *R. C. Dobbs*, for P. W. Blyth, a defendant in the action, and on the counter-claim.—Smith cannot now claim contribution, if at all. The security has not been realized. He cannot set up any right over P. W. Blyth's share any more than Morgan. [Upon the counter-claim the argument was to the same effect as in *Morgan* v. *Blyth*.] As to the Statute of Limitations the principle of *Howell* v. *Young* applies.

They also referred to *Priddy* v. *Rose*, 3 Mer. 6.

Giffard, Q.C., and *Cass*, for Smith, upon the counter-claim.

Crackanthorpe, Q.C., and *Farwell*, for W. F. Fladgate and the representatives of W. M. Fladgate.

Giffard, Q.C., replied for Smith in the action.

Hastings, Q.C., on the counter-claim, replied.

Cur. adv. vult.

BLYTH v. FLADGATE.

STIRLING, J. (after stating the facts and reading and referring to the letters and documents, the effect of which has been above stated, proceeded:—) Mr. Smith appears to have pronounced, from the letter of the 23rd of November, 1883, against the security, on three grounds—(1) the depressed state of the property; (2) the large amount of ground-rent; (3) the inadequate proportion of the value of the property to the amount sought to be advanced; and in my opinion every one of these objections was well founded. [His lordship then referred to the pleadings, and continued:—] Upon the admissions in the pleadings Messrs. Fladgate admit (1) that the exchequer bills were in the custody of the firm, (2) that all the partners knew or were affected with knowledge that these bills formed part of the funds subject to the trusts of the settlement, (3) that the bills were sold by order of the firm, and the proceeds placed to the account of the firm at their bankers. The trust funds, therefore, came into the custody and under the control of the firm with notice of the trusts on which they were held, and as against the plaintiffs it lies with the firm to discharge themselves by showing that the funds were duly applied in accordance with the trust. This Messrs. Fladgate attempt to do by saying that the funds were paid over to Searle by direction of the trustees of the settlement on the security of mortgages of real estate, a mode of investment which was within the power of the trustees, and of the impropriety of which they had no notice. It is to be observed that, at the date of the payment to Searle, Smith, Blyth, and Morgan had not been appointed trustees, and that neither the investment of the funds in their names nor the application of them by their direction could, in the first instance, be a discharge to the firm. Smith, Blyth, and Morgan were, however, shortly afterwards appointed trustees, and never repudiated the transaction or disclaimed any interest under the mortgage deeds, and under these circumstances it is contended (and I think rightly) that they must be treated as having sanctioned the application of the funds.

That sanction, however, would not avail the partners in the firm of Fladgate, Smith, & Fladgate if they had

knowledge or notice that the investment was one which could not properly be made by duly constituted trustees. It is admitted that neither William Mark Fladgate nor William Francis Fladgate had any actual knowledge of the nature of the security taken for the advance made to Searle, but it is contended that each of them was affected with notice through their partner Smith, to whom the whole of the facts were known. This point requires careful consideration. As I have already said, the matter was brought before Smith by Philip Thomas Blyth, who, by his letter of the 8th of October, 1883, asks Smith to "look into this and see whether this money can be safely lent on it." This letter was addressed to Smith as a member of the firm of Fladgate, Smith, & Fladgate, and it is clear from the contemporaneous letter of Pocock that the advance was to be made by trustees, and consequently that what he was asked to do was to advise whether the security was a safe one for trustees, a matter which falls within the scope of a solicitor's ordinary duties. Smith, as a member of the firm, proceeded to investigate the nature of the security, and ultimately placed himself in communication with Searle's solicitors, received and perused the abstracts of title, made requisitions thereon, and prepared the securities (which were made to himself, Blyth, and Morgan, the intended new trustees of the settlement), and saw to their due execution by the mortgagor. In all this he was acting within the scope of his authority as a partner in the firm of Fladgate, Smith, & Fladgate, and for the work done by Smith as such partner, the firm received payment by deducting (in pursuance of an arrangement made with Searle, the mortgagor) the sum of £115 14s. 7d. from the money advanced to Searle, which passed through their hands. Smith, therefore, while acting as a member of the firm, became acquainted with the nature of the security in which the money under the control of the firm, and known by the firm to be a trust fund, was advanced, and the knowledge so acquired by Smith must, as it seems to me, be imputed to the other partners, whose agent he was for the purpose of dealing with this trust fund under their control. I think, therefore, that these other partners must be taken to have had notice that the security was not of a character suitable for the investment of trust funds, and was one which the trustees of the settlement could not properly sanction as an investment of the funds in the custody of the firm. The partners were consequently implicated in the breach of trust which was committed.

It was next contended on behalf of the partners that the liability was a joint liability only, and that, as judgment had been recovered against their copartner Smith, they were discharged, and *Kendall* v. *Hamilton* was cited on this point. To this the answer is that the liability arising out of a breach of trust is not joint merely, but joint and several: see *Wilson* v. *Moore*, 1 Myl. & K. 127, 337. It was, however, said that even if this were so, the judgment against Smith operated as a discharge of the joint and several liability, on the principle laid down in *Cheetham* v. *Ward* and *Nicholson* v. *Revill*. This principle, however, does not apply to the case of a judgment recovered against one of several joint and several debtors. The law is thus stated by Bayley, B., in *Lechmere* v. *Fletcher*, at p. 635 of 1 Cr. & M.:—"There are many cases in the books as to joint and several bonds (*Whitacres* v. *Hamkinson*, Cro. Car. 75; *Higgins' case*, 6 Rep. 45) from which it appears that, though you have entered judgment on a joint and several bond against one obligor, you are still at liberty to sue the other, unless, indeed, the judgment has been satisfied; but so long as any part of the demand remains due you are at liberty to sue the other, notwithstanding you have obtained judgment against one. This, I think, establishes the principle that where there is a joint obligation, and a separate one also, you do not, by recovering judgment against one, preclude yourself from suing the other." This statement of the law is recognized by Parke, B., in *King* v. *Hoare*.

Lastly, the defendants claimed the benefit of the Trustee Act, 1888, s. 4 (1). To this the answer is that the trustees were not charged with a breach of trust "by reason only of the proportion borne by the amount of the loan to the value of such property at the time when the loan was made." They were so charged because the security was (in the language of Lord Watson in *Learoyd* v. *Whiteley*, 36 W. R. 721, 12 App. Cas. 727, see p. 733) one of a "class which is attended with hazard." The property was situated in a new neighbourhood, and its future was uncertain. The mortgagor himself admitted it was "under a cloud." Many of the houses were unlet, there was a heavy groundrent payable, and as Smith pointed out it was possible that the rents might be insufficient to keep down the accruing interest. In *Blyth* v. *Smith* the defendant Smith admitted, on his cross-examination, that, apart from its deficiency in value, he was satisfied it was not a first-class security, not a desirable one for trustees.

In my opinion William Francis Fladgate and the estate of William Mark Fladgate are severally liable to make good the loss occasioned by the investment of the trust fund on such improper security, and the judgment will contain a declaration to that effect. As regards the rest, I feel that the case is in some respects a hard one, and I am willing that the order should be framed so as to press as lightly as may be on the defendants; but two years have elapsed since the judgment in *Blyth* v. *Smith*, and it seems to me that the property comprised in the mortgage ought to be at once realized, and the deficiency be made good. An order for that purpose must be made. As regards the costs, I thought the circumstances were such that the defendants to the action of *Blyth* v. *Smith*, of whom Smith was one, ought not to be fixed with costs. If I was right (and I think I was) in coming to that conclusion, then it seems to me that I ought not in this action to hold Smith's more innocent partners liable for costs. I therefore propose to make no order as to the costs of this action, but the plaintiffs will be at liberty to apply in the action of *Blyth* v. *Smith* for payment of their costs out of the trust funds when replaced. If the legal personal representatives of Mark William Fladgate do not admit assets, there must be the usual order for administration of their testator's estate.

MORGAN v. BLYTH.

This is an action of a different kind. [His lordship referred to and read parts of the pleadings.] One main question raised by these pleadings is whether the relation of solicitor and client subsisted between the plaintiff Morgan and the firm of Fladgate, Smith, & Fladgate. It is quite plain that no formal or express retainer was ever given by him to them, but this is not necessary, for although no such express retainer has been given, the relation may subsist, and its existence may be inferred from the acts of the parties. If authority for this proposition be required it is sufficient to refer to the decision of the Court of Appeal in *Bean* v. *Wade*.

It was agreed between the parties that the evidence adduced in *Blyth* v. *Smith* should be used also in this action, and accordingly in this action no witnesses were examined *vivâ voce*. In dealing with the question to which I have just referred I think it best to commence by referring to the evidence of Smith, the

only member of the firm who was called. I may remark, in the first place, that he distinctly stated in his examination in chief that whatever he did as solicitor with reference to the investment of the money he did as a partner in the firm of Fladgate & Co. Now the matter was first brought before him on the 9th of October, 1883, by Philip Thomas Blyth by the letter which I have already read. It is to me quite plain that what he was asked to do was to advise whether the proposed advance was one which trustees could properly make, and it was to this that he directed his attention. The contemporary entry made by Smith in his journal was under the heading "P. T. Blyth's Trustees," and under the like heading all subsequent entries relating to the advance are placed. These include one relating to an interview between Smith and Morgan on the 7th of March, 1884, in these terms:—"Attending Mr. Morgan, giving him full information as to the nature of the security; and he wished to have twenty-four hours' notice to consider the matter, and proposed to give us his decision by Monday morning." Now until after the advance was made there were no trustees such as are referred to in those entries. In his examination in chief Smith was asked: "On whose retainer, and by whose instructions, were you acting throughout?" Answer: "The person I looked to for instructions was Mr. Philip Thomas Blyth." Question: "Did your firm receive instructions from anyone else in the matter of the sale and investment?" Answer: "No." It is not to my mind insignificant that Smith avoided saying on whose retainer he acted. At the same time it is right to say that in some of his letters he plainly refers to Philip Thomas Blyth as his client in the matter. On the other hand, in a letter written a short time after he had called Philip Thomas Blyth's attention to the necessity of appointing new trustees of the settlement, he refers to "clients" in the plural. There can be no doubt that it was on behalf of the mortgagees that Messrs. Fladgate purported to act. The mortgagor was represented by separate solicitors. It was made a term of the advance that the fees of Fladgate, Smith, & Fladgate (in accordance with a very prevalent custom) be deducted from the advance. Those fees were due to Messrs. Fladgate for work done on behalf of the mortgagees, and in respect of them a deduction was made from the sum advanced to the mortgagor. Further, care was taken (as is shown by the correspondence) to avoid as far as possible the necessity of recourse for payment to any person on whose behalf Messrs. Fladgate could be supposed to be acting. From this portion of the evidence I come to the conclusion that the matter was in the first instance taken up by Smith and his firm without any authority or retainer, in the expectation that his and their acts would be taken advantage of by persons clothed with due authority to deal with the funds to be invested, and that their services would be rewarded by a payment either out of the advance, in accordance with a usual custom, or if necessary out of the trust funds. I next turn to the evidence of Morgan, the plaintiff in the action, on which the defendant's counsel most properly placed great reliance. [His lordship read parts of the evidence given by Morgan as to his relations with the firm, and proceeded:—]

It is to be remembered that when this evidence was given Morgan was disputing his liability to the *cestuis que trustent* in respect of the trust funds, a point which has now been decided against him. I think that his denials of authority given to Smith and the Messrs. Fladgate to act for him are not to be pressed too far. He certainly never gave them any express authority, but it still remains to be considered what obligations arise out of any implied authority which he gave them. He knew that Messrs. Fladgate had been acting with reference to the proposed mortgage, and that as he said, "The mortgage and everything, were all prepared before I gave my consent at all. It was only waiting for my signature and consent to become a trustee." No man of business, no sensible man, could suppose that Messrs. Fladgate's services were given gratuitously. It was with this knowledge that Morgan consented to become a trustee, and authorized the mortgage to be carried out. Now, the law as to implied obligations is discussed by Bowen, L.J., in *Falcke* v. *Scottish Imperial Insurance Co.*, 35 W. R. 143, 34 Ch. D. 234. [His lordship referred to the argument of counsel for the respondents in that case, and to the judgment of Bowen, L.J.] In my opinion, the facts in the present case justify the inference that there was an implied contract on the part of Morgan that Messrs. Fladgate should be paid. It is not necessary, as I think, that the contract should be for payment by him personally; a trustee or executor may retain a solicitor upon the terms that he is to look only to the estate for repayment. The just conclusion from the facts in the present case appears to me to be that Morgan directed Messrs. Fladgate to advance the funds in their hands to Searle, upon the terms arranged between them and Searle, including the stipulation that the work done by Messrs. Fladgate should be paid for by means of a deduction from the advance. If this view is correct it follows that the cases of *Kelner* v. *Baxter* and *Scott* v. *Lord Ebury*, 15 W. R. 517, L. R. 2 C. P. 255, which were relied on in argument, have no application.

In both those cases the defendants were sued on contracts which they had purported to enter into as agents for non-existing principals, and it was held that the defendants were personally liable, on the ground that the contract they had entered into could not be adopted or ratified by a person not ascertained at the time of the act done. Here no contract has been entered into by Messrs. Fladgate as agents for anyone; the question is not whether Morgan is bound by some act purported to be done by Messrs. Fladgate on behalf of the non-existent trustees of the settlement, but whether he has impliedly entered into an agreement with Messrs. Fladgate as to services rendered by them of which he and his co-trustees have had the benefit.

I come to the conclusion, therefore, that Messrs. Fladgate were retained to act as solicitors for Morgan and his co-mortgagees, and I proceed to inquire whether any breach of duty is chargeable against them.

Now (as appears from the letters of the 8th of October, 1883) it was known from the very first that the proposed advance was to be made by trustees, and Smith in fact took on himself the duty of advising whether that advance was one which could properly be made out of trust funds. How is such a duty to be discharged by the person who undertakes it? A trustee may not delegate the execution of the trust; all that he is entitled to do is to avail himself of the services of others in the usual course of business. It is, therefore, the duty of the solicitor not so much himself to form or express an opinion on the value of the property offered to a trustee as security for an advance (though the law does not prohibit him from so doing, if he thinks fit), as to see that the trustee has before him the proper materials for forming a judgment thereon. He ought, therefore, not only to see that the trustee has before him proper valuations of the property, and that he is made acquainted with any facts known to the solicitors, and not actually appearing by the valuation, which may affect the value of the property, but that his attention is directed to any

rules laid down by the courts for the guidance of trustees with reference to such matters. In my judgment Smith entirely omitted to call the attention of Morgan to the rules laid down by the court for the guidance of trustees, and in this respect he failed in his duty. That such rules exist, is shown by the cases of *Learoyd* v. *Whiteley* and *Priest and Uppleby*, 38 W. R. 150, 42 Ch. D. 351. [His lordship read the earlier part of the judgment of Lord Watson in *Learoyd* v. *Whiteley*.] To such rules, therefore, it would be the duty of the solicitor to call the attention of the trustee he was advising. Further, I think that the evidence shows that he omitted to bring to Morgan's attention matters known to him which materially affected the value of the property as a security; as for instance, the fact that the property was in a depressed condition.

It has been seen that down to the 23rd of November Smith advised against the security. The only ground he had for altering his opinion he states to have been from what Philip Thomas Blyth told him: "He seemed to think, and I did too, that Mr. Sanders had spoken rather severely against the property." [His lordship read portions of the evidence at length.] I come to the conclusion that Smith, and through him the firm of Messrs. Fladgate, Smith, & Fladgate, failed to discharge the duty which he and they had undertaken towards Morgan; and that Smith and William Francis Fladgate, the surviving members of the firm, are liable for negligence.

It was contended, however, that if this were so the action was premature, as up to the present time the plaintiff Morgan has suffered no damage, and for this, the case of *Hughes-Hallett* v. *Indian Mammoth Gold Mining Co.* was relied on. That was, however, simply an action for indemnity arising out of an obligation to indemnify against calls in respect of shares standing in the plaintiff's name. The company in which the shares were held had been ordered to be wound up, but there was no evidence to show whether calls were likely to be made in the winding up. The action was dismissed, on the ground that it was merely a *quia timet* one. Here the *cestuis que trustent* under the settlement have brought an action against Morgan, and have recovered judgment against him, though they have not enforced it. I do not think that under these circumstances the action can be treated merely as a *quia timet* one, and consequently the ground of the decision referred to, fails. Further, the action in that case was founded on an obligation to indemnify, here the action is founded on a breach of duty on the part of solicitors. Between the two classes of actions there is a great difference. In an action for indemnity time does not begin to run until the party entitled to the indemnity has made a payment: *Collinge* v. *Heywood*, 9 Ad. & Ell. 633. On the other hand, in an action for negligence time begins to run from the date of the act complained of, and runs from the date of that act until the expiration of six years from its commission: *Howell* v. *Young*, 5 B. & C. 259; and with respect to the damages recoverable, the law is laid down by Holroyd, J., at p. 268: "So here, if the action had been brought immediately after the insufficient security had been taken, the jury would have been bound to give damages for the probable loss which the plaintiff was likely to sustain from the invalidity of the security."

I am of opinion that Smith and William Francis Fladgate, as the surviving members of the firm of Fladgate, Smith, & Fladgate, are liable for the negligence of Smith, and that there must be an inquiry as to the damages sustained by Morgan by reason of such negligence. It remains still to be considered whether the other relief claimed ought to be granted. As regards paragraph 1 of the claim, Messrs. Fladgate, Smith, & Fladgate have no longer the trust fund in their hands. They have paid it to the mortgagor Searle, or to his use, by the direction of the mortgagees, of whom the plaintiff Morgan is one. I fail to see how they can at Morgan's instance be required to replace the fund.

Again, by paragraph 6, Morgan claims a declaration that he is entitled to be recouped out of the beneficial interest of his co-trustee, Philip William Blyth, any sum paid or to be paid by him in replacing the trust fund, or for the costs of *Blyth* v. *Smith*, and to a charge for the same on the said beneficial interest. This relief is sought on the authority of *Raby* v. *Ridehalgh*, where it was held that trustees who had made an improper investment at the instance and request of *cestuis que trustent* were entitled to recover, against the *cestuis que trustent* who instigated the breach, the benefit actually received by them in consequence of such breach of trust. In the present case that authority seems inapplicable. Philip William Blyth's interest in the trust fund is entirely reversionary; he has not received any part of it, he has derived no benefit from the breach of trust. Further, he does not appear to me to have instigated the breach of trust in the sense in which that expression is used in the judgment of Turner, L.J., in *Raby* v. *Ridehalgh*. What he did was to acquiesce as Morgan did himself, in an investment really instigated by Philip Thomas Blyth. Equally with Morgan he neglected his duty as trustee with reference to the investment. The case of *Bahin* v. *Hughes* shows that one of two trustees liable for a breach of trust is not entitled to an indemnity from the other unless there are special circumstances. In the present case there are no circumstances which would entitle Morgan to throw the liability for the breach of trust on Philip William Blyth. Doubtless, it is possible that questions of contribution may hereafter arise between them, but at present Morgan has paid nothing in respect of his liability, nor has he since been called to pay anything; and in this respect the action appears to me to be premature.

Further, it seems to me probable that these rights might be adjusted by means of the proceedings in *Blyth* v. *Smith*; but in case any doubt exists as to that, I am willing, if the plaintiff desires it, to reserve to him liberty to apply with reference to any question of contribution or otherwise which may arise between him and Philip William Blyth, but this ought not to affect Philip William Blyth's right to costs.

I propose, therefore, to direct an inquiry what is the amount of damage which has been occasioned to the plaintiff by the negligence of the firm of Fladgate Smith, & Fladgate, and to order that the amount of such damage, when ascertained, be paid by the defendants Smith and William Francis Fladgate. There will be liberty for the plaintiff to apply as to any question of contribution which may arise between him and the defendant Philip William Blyth. The plaintiff's costs of the action must be borne by the defendants Smith and Fladgate. The plaintiff must pay the costs of Philip William Blyth.

SMITH *v.* BLYTH.

This, the third action, is one by Smith against his co-trustee, Philip Wm. Blyth, for contribution. It is met by a counter-claim on the part of Philip Wm. Blyth against Smith, Wm. Francis Fladgate, and the representatives of Wm. Mark Fladgate, alleging that the firm of Fladgate, Smith, & Fladgate acted as solicitors for the mortgagees, and were guilty of negligence, and seeking relief on that footing.

This raises a question as to whether the relation of solicitor and client existed between the firm and

Philip Wm. Blyth similar to which I have already dealt with in the action of *Morgan* v. *Blyth*. It is necessary, however, to consider it separately, because in this action the evidence is somewhat different. Philip Wm. Blyth was called as a witness. He said he saw Smith on one or two occasions before he executed the deed appointing him trustee, one of these being in the latter part of November or the beginning of December, 1883. On that occasion (according to his evidence in chief) he "was silent or comparatively so." Another interview took place on the 13th of April, 1884, when Philip Wm. Blyth signed the deed appointing himself trustee. He then describes what took place. [His lordship referred to the evidence]. On cross-examination on behalf of the Fladgates he continues to describe himself as "comparatively silent," when he saw Smith on the first two occasions, but on cross-examination on behalf of Smith he gave evidence from which it appears that he maintains that he gave express instructions that the proposed security should be looked into by Messrs. Fladgate on his behalf. Having heard his evidence I am bound to say that I feel considerable doubt whether in this respect it can be relied upon. I do not attribute to Mr. Blyth the intention of wilfully misleading the court, but I think it very possible that his memory may have misled him in speaking of matters which occurred upwards of six years ago, and which has since formed the subject of much discussion and controversy in more than one legal proceeding to which Mr. Blyth has been a party. I, therefore, do not rest my judgment on this part of Mr. Blyth's evidence. Smith was again called, and gave evidence similar to that given by him in *Blyth* v. *Smith*. He stated, as to the entries in the journal, that the heading did not necessarily indicate the client; that I am quite prepared to believe. He further said, that if the mortgage had not gone through, it would have been a matter of grave consideration who would have been charged. That seems to me to confirm the view which I have already expressed as to the circumstances under which the business was undertaken by Messrs. Fladgate.

It appears to me that Philip William Blyth was well aware that Messrs. Fladgate were making investigations into the nature and value of the security, and that in his case, no less than in that of Morgan, the facts are such as to justify the inference that there was an implied contract that Messrs. Fladgate should be paid for their services.

I come, therefore, to the conclusion that Smith, having been guilty of negligence as solicitor to Philip William Blyth, cannot claim from him any contribution in respect of the liabilities imposed by the judgment in *Blyth* v. *Smith* (see *Lockhart* v. *Reilly*, 1 De G. & J. 464), and, further, that Philip William Blyth is entitled to relief similar to that which I have held ought to be given to Morgan. It is however to be observed that Philip William Blyth seeks relief, not only (like Morgan) against Smith and William Francis Fladgate, but also against the representatives of William Mark Fladgate, and it may be right that I should express my views on that part of the case. If the claim of Philip William Blyth be considered to arise *ex delicto*, the maxim *actio personalis moritur cum personâ* affords an answer on the part of the legal personal representatives of the dead partner, William Mark Fladgate. The claim may, however, be regarded as arising *ex contractu*, and as founded on an implied promise on the part of the firm to exercise reasonable care and skill in the performance of their duties as solicitors of the plaintiff in the counter-claim. At law, previously to the Judicature Acts, declarations in actions against solicitors for negligence were frequently framed on this principle of assumpsit, as appears from Bullen and Leake's Pleadings, 3rd ed., p. 83; and *Sawyer* v. *Goodwin*, 36 L. J. Ch. 578, is a decision in equity founded upon it. The contracts of partners are at law joint contracts, not joint and several, as is shown by the case of *Kendall* v. *Hamilton*, and consequently, if an action at law were brought, Smith and William Francis Fladgate would be the proper defendants. It appears, however, from what is laid down in the case just cited, and from the decision of the Court of Appeal in *In re Hodgson, Beckett* v. *Ramsdale*, that in equity a creditor of the firm has a remedy against the estate of a deceased partner, a remedy which was actually applied in the case of *Sawyer* v. *Goodwin*, arising out of a breach of duty on the part of a firm of solicitors. In my opinion, therefore, the legal personal representatives of William Mark Fladgate are properly made defendants to the counter-claim, and his estate is liable for the amount of damages which may be found due to Philip William Blyth. If the executors do not admit assets, there must be judgment for administration on the basis of the form adopted in *Hills* v. *McRae*, 9 Hare, 297, and *In re Hodgson, Beckett* v. *Ramsdale*.

The result is that the action of *Smith* v. *Blyth* must be dismissed, with costs. On the counter-claim there will be an inquiry as to damages similar to that directed in *Morgan* v. *Blyth*, and an order for payment of the amount, when ascertained, by Smith, William Francis Fladgate, and the executors of William Mark Fladgate, by whom the costs of the counter-claim must be paid.

Solicitors, *Upton, Atkey, & Upton; Farebrother; H. W. Smith; Le Brasseur & Oakley.*

Q. B. Div. (Mathew and Vaughan Williams, JJ.) April 14.

BURT v. GRAY. (*a*.)

Landlord and tenant—Forfeiture—Breach of covenant—Application for relief by underlessee against lessor—Underlease of part of premises—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.

An underlessee, whether of the whole or a part of the premises comprised in a lease, is not entitled to apply for relief under section 14 *of the Conveyancing Act,* 1881, *as against the lessor.*

Application for relief under section 14 of the Conveyancing Act, 1881.

The action was brought by the assignees of the lessor of twenty-four houses to recover possession thereof under a proviso for re-entry on breach of the lessee's covenant to repair. Originally, the sole defendant was the lessee; but, the property having been underlet in three lots, the three underlessees were joined as defendants.

One of the underlessees, whose underlease comprised eight houses, all of which were in good repair, applied at chambers for relief under section 14 of the Conveyancing Act, 1881.

A. L. Smith, J., referred the matter to the court.

A. B. P. Gaskell, for the applicant.—By section 14 of the Conveyancing Act, 1881, sub-section 1, a right of re-entry or forfeiture under any proviso in a lease for breach of any covenant is not to be enforceable until the lessee has received notice of the breach complained of, and has had an opportunity of

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

remedying or making compensation for the same. By sub-section 2, where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, the lessor may apply to the court for relief. And by sub-section 3, for the purposes of this section a lease includes an original or derivative underlease, and a lessee includes an original or derivative underlessee. The effect of sub-section 3 is that an underlessee is as much entitled to apply for relief against the lessor as the original lessee would be. Neither does it make any difference that he is underlessee of only a part of the premises included in the original lease. The underlessee of one part of the premises may be liable to have his underlease determined by re-entry by the original lessor for a breach of covenant committed on another part, and that liability is not affected by the Conveyancing Act: *Cresswell* v. *Davidson*, 56 L. T. N. S. 811, 35 W. R. Dig. 110. The intention of the section clearly is that where an underlessee is so liable, he is entitled to apply for relief. [VAUGHAN WILLIAMS, J.—The effect of that construction would be that where the premises comprised in a lease were underlet in two parts, and an order for relief was made in favour of one underlessee and refused in the case of the other, the lease would be put an end to in respect of one part of the premises, while it would still subsist as to the other part.]

McIntyre, for the plaintiffs.—An underlessee is not entitled to apply for relief under the section as against the lessor. The case of *Cresswell* v. *Davidson* is in favour of the plaintiffs on that point. There Kay, J., expressed the opinion that the section did not apply to the lessee of a lessee. The words in sub-section 3 are to be read distributively, that is to say, "lessee" in sub-section 2 is to mean original underlessee in the case of an underlease, and derivative underlessee in the case of a derivative underlease. [VAUGHAN WILLIAMS, J.—Your argument is that the Act was not intended to create a privity where there was none before, but to grant relief where there was privity already.]

MATHEW, J.—I am of opinion that this appeal must be dismissed. There are two objections to the order which has been asked for. I agree with the construction which has been put upon sub-section 3 by Kay, J., in the case cited. I do not think the Act was intended to create a privity of contract between lessor and sub-lessee, or that it in any way affects their relation to one another. Then the other point argued was that a lease includes a sub-lease of part of the premises, and a lessee includes sub-lessee of a part. But such a construction would lead to a most inconvenient result; for, if an order granting relief were made in favour of the sub-lessee of one part of the premises comprised in the lease, the subject-matter of the lease would be dislocated. It is enough to say that the Act does not say that sub-lessee means sub-lessee of a part.

VAUGHAN WILLIAMS, J., concurred.

Application dismissed.

Solicitor for the plaintiffs, *J. E. Shearman.*

Solicitors for the defendant, *Tatham, Oblein, & Nash.*

IN BANKRUPTCY.

Q. B. Div. (Cave and Vaughan Williams, JJ.) Jan. 20.

Ex parte JENKINS.
In re JENKINS. (*a.*)

Bankruptcy—Discharge—Absolute refusal—Rash and hazardous speculations—Stock Exchange transactions—Gambling for differences—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 28.

On application by the bankrupt for discharge, the official receiver reported that the bankrupt had been guilty of rash and hazardous speculations in buying on the Stock Exchange for clients who were speculating for the differences, and had no intention of making bonâ fide *investments, and that the bankruptcy was caused by such clients not paying up their differences at the time, owing to sudden and heavy falls in the markets in which the operations were carried on. The discharge of the bankrupt was absolutely refused by the county court judge, on the ground that to buy for a client who was intending to pay or receive the differences was a transaction of a more rash and hazardous nature than to buy for one who was intending to take up and pay for the shares, and that contracts for differences were in themselves immoral.*

Held, on appeal, that the risk of a purchase by a stockbroker for a client did not depend upon whether the bargain was a bargain for differences or whether it was a purchase for investment, but upon whether the client had the means to pay the differences which might be expected to result; that it was not the duty of the Bankruptcy Court to take into consideration the general morality of transactions for differences; and that, having regard to the particular facts, the case would be sufficiently met by a suspension of the discharge for three years.

Appeal against an order of his Honour Judge Heywood in the county court at Manchester, absolutely refusing an order of discharge.

In September, 1886, the bankrupt commenced business as a stockbroker at Manchester, and in January, 1889, one E. H. Roylance, who had previously been an engineer, joined him in partnership, the business being so carried on down to the date of the receiving order against the firm, which was made in April, 1890.

On application by the bankrupts for their discharge the official receiver reported that the bankrupts had been guilty of rash and hazardous speculations, it being alleged that the bulk of their business consisted of gambling on the Stock Exchange on behalf of clients who were simply speculating for the differences and had no intention of making *bonâ fide* investments; and that the bankruptcy was caused by such clients not paying up their differences at the time, owing to sudden and heavy falls in the markets in which the operations were carried on at the end of February, 1890. It was, however, pointed out that the bankrupt Jenkins appeared to be more blameworthy than Roylance, the latter having been little more than a cypher in the business.

The county court judge suspended the discharge of the bankrupt Roylance for one year, but the discharge of the bankrupt Jenkins was refused absolutely.

The bankrupt Jenkins now appealed.

E. C. Willis, Q.C., for the bankrupt.—The firm of which the bankrupt was a member had several clients, and there was a heavy fall in South African Stock, by which they lost £20,000. The only speculative action

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

was in not selling and closing the contracts earlier than they did, believing their clients would be able to pay. There was no speculation on their own account. The bankruptcy was caused by a sudden run. The bankrupt is doubtless deserving of some punishment, but here the punishment is too great for the offence. The county court judge was influenced by his idea of the morality of the transactions. The case falls within the principle laid down by this court in the case of *In re Rankin, Ex parte Rankin* (5 Morrell's Bankruptcy Cases, 23), that if the highest punishment is imposed for an offence like this, what can the court possibly do in a worse case.

Muir Mackenzie, for the official receiver.—The true ground on which the judgment of the county court judge ought to be supported is that the entering into these transactions without capital, and without ascertaining that the persons the bankrupt represented could pay was a rash and hazardous speculation. [CAVE, J.—There was doubtless a rash and hazardous speculation. The real question is whether the punishment was a proper one. If the discharge is absolutely refused for an offence of this kind, what is to be done when the offence is much worse?] When one of the offences in section 28 of the Bankruptcy Act, 1883, is of a very serious character it is not too much to absolutely refuse the discharge.

CAVE, J.—The order of the county court must be modified. In the first place the county court judge bases his decision upon the ground that it is more risky and more hazardous to buy for a client who is intending to pay or receive the differences, as the case may be, than it is to buy for a client who is intending to take up the shares and pay for them. I cannot see how that can be made out. Whether it is risky at all depends entirely upon whether the client has the means to pay the difference which may be expected to result or has not. If he has the means of paying that difference, then it is absolutely unimportant whether the bargain is a bargain for differences or whether it is a purchase for investment. The only thing the broker makes himself liable for is the difference, and he can never be called upon in either case to pay more than the difference. So that the question of hazardous speculation does not in the least depend upon whether it is a purchase with an intention on the part of the client to take or pay the difference, or whether it is a purchase with an intention on the part of the client to take up the shares. It depends entirely upon the probability that the client will be able to pay the amount of the difference which it may not unreasonably be thought possible will occur, and if he is able beyond all question to pay any difference which is at all likely to occur, then it is impossible to say that it is a rash and hazardous speculation on the part of the broker to buy the shares for him.

The second ground upon which the county court judge bases his decision apparently, is that contracts for differences are immoral, and that it is the duty of the court to discourage them. Now I very much doubt whether that is at all the duty of the Bankruptcy Court, to punish, that is to say, one particular person because a particular class of transactions is thought by the learned judge to be an immoral one. It is not illegal in any sense to go and buy shares for a client on the Stock Exchange with the knowledge that he means to pay only the differences, and with the certainty that if he cannot pay the difference you will be called upon to do so. That is not at all illegal, and I do not think the court has anything to do with the general morality of transactions for differences. Of course, if it could be shown that the particular debtor whose conduct is under consideration had bought on the Stock Exchange to a very large extent for some person whom he must have known could not have paid, and who, if he lost, might possibly be tempted to resort to illegitimate means of attempting to satisfy the claims upon him. If, for instance, he were buying largely for a person whom he knew to have no other means except his salary or wages, or if he were inducing an infant or a person of weak mind to gamble by giving him advice or anything of that kind; all that is perfectly legitimate matter to be looked into and inquired into, and it would have to be seen how far it affected the case of the individual debtor whose case was before the court. But because this kind of thing may be done by other persons, that, therefore, a man who is not shown to have done it at all himself is to be punished with the notion that you are thereby striking a blow at gambling in general, does not seem to me to be at all a legitimate mode of wielding the powers which are conferred upon the court.

Now as far as I can judge those seem to me to be the whole of the grounds upon which the county court judge has come to the conclusion that this debtor ought not to have his discharge. I entirely disagree with those grounds, and I must therefore look for myself and see what it is that this particular man has done, and to what extent it is shown by the report or by the evidence that was before the county court judge that his transactions were rash and hazardous. I think he has not sufficiently explained the fact that he entered into transactions which might not unnaturally eventuate in his becoming liable for a sum larger than he was able to pay; and when a man does enter into a transaction which may have such a result as that, it seems to me that he is indulging in a rash and hazardous speculation. He bought shares which might be expected to fall, and in point of fact did fall, and fall to an extent which he was not able to meet unless his clients were able themselves to pay. If the result of what he did had been that the *bonâ fide* creditors, tradesmen, and others to whom the bankrupt was indebted had lost their money, I should have taken a more serious view of this matter, as being a case in which the man had been gambling practically with the money of other people. But in the present case the list of unsecured creditors shows very few debts to creditors of that description. The great bulk of the debts are owing to stockbrokers, with regard to whom I do not feel quite the same feeling. They know perfectly well when they are dealing with a man of this class that he ought to have a cover; but they know also pretty well that according to the prevailing practice—which is to be regretted I admit—but still according to the prevailing practice he probably will not, in his hurry to get business, ask for sufficient cover.

I do not want to put too low the offence of which this man has been guilty, because, undoubtedly, it has ended in his becoming indebted to a very considerable extent; and although I am not disposed to take so very severe a view of his not having obtained cover, yet it must not be taken that one approves of that course. He ought, if he is carrying on his business in a careful and proper manner, to ascertain that his clients are able to take up or pay for the differences which may go against them upon their Stock Exchange operations; or if he is not satisfied of that he ought to obtain from them cover, and as long as he does that he will not run the risk of being unable to pay the differences and of becoming a bankrupt. The result is, in fact, due to his own careless manner of carrying on his business, and that is a thing which deserves punishment. The case might, however, be much more grave than it is. It really reduces itself to a case of trading with some degree of recklessness

and want of caution, and I think that will be sufficiently punished by the suspension of the order of discharge for three years from the date of adjudication.

VAUGHAN WILLIAMS, J., concurred.

Order accordingly.

Solicitors for the bankrupt, *Pritchard, Englefield, & Co.*, for *Leigh*, Manchester.

Solicitor for the official receiver, *The Solicitor to the Board of Trade.*

Prob. Div. & Adm. Div. } Feb. 17.
Divorce.

WITT *v.* WITT. (*a.*)

Divorce—Custody of children—Innocent wife—Order for custody — Subsequent misconduct — Husband leading moral life—Order for change of custody—General principles.

No hard and fast rule can be laid down as to custody of children, but in every case the court is bound to do what it conceives to be best for their interests.

A wife, on a decree absolute for dissolution of the marriage with her husband for his adultery being made, obtained an order for the custody of the children, including a daughter aged eleven, who was the only child given up to her under the order. Subsequently she lived in the same house with a young man on such intimate terms that the registrar inferred immorality. She gave way to drink and neglected her daughter. The husband meanwhile had married again, and ample proof was given of his present fitness.

The court ordered the custody of the daughter to be taken from the wife and given to the husband.

Motion to rescind or vary an order for custody of children and to reduce the amount of permanent maintenance payable by the husband to his wife.

The motion was originally made on the 16th of December, 1890, when it was referred to the registrar for report.

From his report it appeared that on the 22nd of January, 1889, a decree absolute was pronounced dissolving the marriage on the ground of the husband's adultery and cruelty, and an order was made giving to the mother the custody of the two children of the marriage—a son aged fifteen years, and a daughter aged eleven years. In compliance with this order the mother took charge of the daughter, but it was not complied with in the case of the son, who remained with the father. On the 18th of February, 1889, an order was made by consent that the respondent should pay £75 a year to the petitioner for her maintenance. Since the divorce the petitioner had lived at various places with her daughter, and a young man named Wheale had also lived in the same house, and, although he occupied a separate room, yet was on such intimate terms with the petitioner as, in the absence of explanation, to lead to the conclusion that they lived together as man and wife. The petitioner was given to drink, completely neglected her daughter's education, and was in the habit of sending her out late in the evening. The respondent had married again, and an affidavit was produced from the clergyman of his parish to the effect that he was leading a respectable life and was a fit person to have charge of his daughter.

The registrar was of opinion that the wife was an unfit person to have the custody of her daughter, but he did not recommend that her charge should be given to the husband, because it was unusual to give the custody of children to a father proved to have been guilty of adultery. He was therefore of opinion the custody of the girl should be given to a Mrs. Elizabeth Price, a schoolmistress, of whose fitness he was satisfied. It was suggested the £75 was fixed, on the supposition that the mother would have the custody of her daughter, and was subject to reduction if she was relieved of her charge. The registrar was of opinion that there was no evidence of this, and the order expressly stated that it was for the maintenance of the petitioner. The petitioner's address could not be discovered, and no notice of the reference to the registrar was served, and she did not appear before him.

Powles, for the husband, in support of the motion, cited *Symington* v. *Symington*, L. R. 2 H. L. Sc. 415.

The wife did not appear.

JEUNE, J.—The first question raised here is the most important, and I feel some difficulty about it, because there seems to be no case where, after custody has been given to an innocent wife after decree absolute, an order has been made restoring the custody to the husband. Obviously it ought only to be done in exceptional cases. The language of the Scotch Acts is substantially the same as that of the English Acts, and in 1875, in a Scotch case, *Symington* v. *Symington*, it was held in the House of Lords that no hard and fast rule should be laid down as to the custody of children, but that in every case the court is bound to do what it conceives to be best for the interests of the children. In the present case I have come to the conclusion, on the facts stated in the registrar's report, that it is for the interests of this child that she should be removed from the custody of the mother and placed under the charge of the father, strong evidence of whose present fitness for such custody has been given, rather than in the charge of a stranger. With regard to the reduction of the maintenance, no materials have been placed before me to show that the sum is too large, and the original order was for the maintenance of the mother. I think, therefore, I ought to make no order, but I express no opinion as to whether I could make such an order, if so inclined, on petition, and not by motion.

Order for custody of child to be given to the father.

Solicitor, *Lewis Pass.*

Prob. Div. & Adm. Div. } Jan. 27.
Probate.

In the Goods of STREATLEY. (*a.*)

Will—Probate—Attesting witnesses—Position of signature.

The court granted probate of a will in which the attesting witnesses had written their signatures in the margin, in two separate places, opposite two alterations in the body of the will, without having signed the attestation clause, on being satisfied that the signatures of the witnesses were meant to attest the signature of the testator.

Roberts *v.* Phillips, 4 *E. & B.* 450, 3 *W. R. C. L. Dig.* 219, *followed.*

Application for probate of the will of John Streatley, deceased, who died on January 22, 1890, leaving a will undated, but executed some day in February,

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

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1882. The will was written on the first and second pages of a sheet of foolscap paper. On the first page, a few lines down, the name of John Hawkins had been substituted as executor for that of Frederick Povey, and the same alteration had been made on the second page, about five lines from the end of the will. The attesting witnesses had signed their names in the margin opposite the alterations on both pages. There was a full attestation clause at the end of the will, and the testator had signed his name opposite to it, but the attesting witnesses had not signed there. The attesting witnesses were examined and cross-examined, and stated that on some day in February, 1882, the testator called them into his house and asked them to witness his will. He then wrote his name in the presence of both of them, and they wrote their names where they were told, opposite to the alteration on both pages, intending thereby to attest his signature, and fully believing that they had done so. Nothing was said to them about the alterations.

On account of the smallness of the estate, and by consent of all parties, the court allowed the opinion of the court to be taken on motion.

Deane, for the executors.—Section 9 of the Wills Act only requires the witnesses to "subscribe" the will. In *Roberts* v. *Phillips*, 4 E. & B. 450, 3 W. R. C. L. Dig. 219, decided upon the language of the Statute of Frauds, which is similar to that in the Wills Act, it was held sufficient if the signatures were on the face of the instrument, if it appeared that they were meant to attest the signature of the testator: see also *In the Goods of Davis*, 3 Curt. 748, and *In the Goods of Wilson*, 15 W. R. 229, L. R. 1 P. & D. 269.

W. G. Fellowes, for the next of kin, opposed.

BUTT, J.—*Roberts* v. *Philips* does not appear to have been reversed, and I must, therefore, follow it. The grant will therefore go.

Solicitors for the executors, *Mander & Thorncliffe*, for *Mecey & Sons*, Thatcham.

Solicitors for the next of kin, *Mander & Thorncliffe*, for *W. K. Belcher*, Newbury.

Court of Appeal.

From Chan. Div. March 2.

WHITWOOD CHEMICAL CO. (LIMITED) *v.* HARDMAN. (*a.*)

Agreement—Personal service—No negative covenant—Specific performance—Injunction.

An agreement entered into by H. to act as manager to the W. Chemical Co. for a term of years provided that he should "give the whole of his time to the company's business," but contained no negative covenant by him.

H. intimated to the company his intention of forming and becoming director of a rival company in the immediate neighbourhood, though still willing to act as manager of the original company, who now applied for an injunction to restrain H. from committing any breach of his agreement to give the whole of his time to them.

Held (reversing Kekewich, J.), *that, the contract being one for personal service, of which specific performance would not have been granted, and there being no express negative covenant by the defendant, no injunction could be granted.*

(*a.*) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

Lumley *v.* Wagner, 1 *De G. M. & G.* 604, *discussed.* Webster *v.* Dillon, 5 *W. R.* 867, *and* Montague *v.* Flockton, 21 *W. R.* 668, *L. R.* 16 *Eq.* 189, *dissented from.*

Appeal from Kekewich, J.

The circumstances under which this injunction was granted were as follows:—

By an agreement dated the 25th of September, 1885, the defendant had agreed to act as manager for the plaintiff company for a term of five years at a salary of £300 a year, and a commission of 7½ per cent. on the dividends or profits of the company, and that he should give due diligence to the performance of his duties, conduct himself with propriety, and conform to the reasonable requirements of the board of directors.

By a subsequent agreement between the plaintiff company and the defendant dated the 24th of July, 1889, which recited the former agreement, it was provided that the defendant should be manager for a further term of ten years, determinable at the end of the term, or thereafter by three months' notice given on either side, and that "the said manager shall give the whole of his time to the company's business; he shall give due diligence to the performance of his duties, and shall conform to the reasonable requirements of the board of directors; and he shall reside within two miles of the company's said works." Neither of the agreements contained any negative covenant by the defendant.

The business of the plaintiff company consisted in working a patent process for carbonization of coal and coal shale; and the treatment of coal gas for obtaining benzole, solvent naphtha, and the like. The defendant was a manufacturing chemist, and had a special knowledge of this business.

In January last the plaintiff company became aware that the defendant was engaged in the construction of a rival company to carry on business in the immediate neighbourhood of the plaintiff company's works. The object of the proposed new company was to be the carbonization of coal under the same process as that in use by the plaintiff company. In this company the defendant was to be a director, and was to invest a large sum as capital therein.

The defendant, in a letter addressed to one of the directors of the plaintiff company, stated that he had "decided to instruct (*sic*) a new company . . . and take the position of director, and take up one-third of the capital." Some further correspondence ensued, and ultimately the plaintiff company moved for an injunction to restrain the defendant from setting up any business, or entering into any agreement, or making any engagement with any person or company (other than the plaintiff company), by which the whole of the defendant's time would cease to be devoted to the business of the plaintiff company, or by which the defendant would be prevented from carrying out the agreement of the 24th of July, 1889, and in particular from assisting in the formation of and from becoming a director, manager, or agent of any company or partnership now or hereafter to be formed for the purpose of carrying on a similar business and manufacture to those carried on by the plaintiff company until the hearing of the action or further order.

The defendant professed his willingness to continue to act as manager for the plaintiff company, but at the hearing of the motion he offered to resign his appointment.

Kekewich, J., held that, following *Lumley* v. *Wagner* and *Montague* v. *Flockton*, such a covenant could be enforced, and granted an injunction to

restrain the defendant from giving less than the whole of his time to the plaintiff company's business.

Marten, Q.C., and *A. Brown*, for the appellant.—The decision of Kekewich, J., is contrary to the principles of the court as laid down in all the cases with the exception of the decisions in *Montague* v. *Flockton*, 21 W. R. 668, L. R. 16 Eq. 189, and *Webster* v. *Dillon*, 5 W. R. 867, which should not be regarded.

They cited *Lumley* v. *Wagner*, 1 De G. M. & G. 604; *Johnson* v. *Shrewsbury Railway Co.*, 3 De G. M. & G. 914; *Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Co.*, L. R. 16 Eq. 433, 22 W. R. Dig. 188; *Fothergill* v. *Rowland*, 22 W. R. 42, L. R. 17 Eq. 132; *Donnell* v. *Bennett*, 31 W. R. 316, 22 Ch. D. 835; and *De Francesco* v. *Barnum*, 39 W. R. 5, 45 Ch. D. 430. [KAY, L.J., referred to *De Mattos* v. *Gibson*, 7 W. R. 152, 514, 4 De G. & J. 276, and LINDLEY, L.J., to *Radford* v. *Campbell*, 6 Times L. R. 488.]

Warmington, Q.C., and *Dibdin*, for the respondents.—We rely on *Montague* v. *Flockton*. Further, the force of the word "whole" in the agreement is in effect equivalent to a negative covenant. [KAY, L.J.—Can a man, then, get an injunction to restrain his butler from not giving all his time to his service?] The defendant is more in the position of a partner than of a servant. He is in a position of trust and confidence, and acquires a special knowledge of how the processes of that company's business can be most profitably carried on: *Dean* v. *McDowall*, 26 W. R. 486, 8 Ch. D. 345. No damages can remedy the injury done us by this breach: *Doherty* v. *Allman*, 26 W. R. 513, 3 App. Cas. 709.

LINDLEY, L.J., after stating the facts, continued:—The plaintiff company seek to obtain an injunction to restrain the defendant from giving, in breach of his agreement with them, some of his time to a rival company. This they naturally desire to stop during the ten years he is bound to serve them for. To that extent the plaintiffs are right, and have a good ground of complaint if the defendant has committed a breach of the agreement.

The question is as to what form of remedy they are entitled to. For such a breach there are various remedies—dismissal of the defendant, or an action for damages, or an injunction. The plaintiffs have disregarded the first two remedies, and come to the court for an injunction. The terms of the one for which they asked in the court below differed from those of that which the court granted—to restrain him from giving less than the whole of his time to their business. The question is whether an injunction in these terms ought to have been granted, having regard to the principles upon which the court acts in cases of this nature.

It is first of all to be observed that there is no negative term in the agreement between the plaintiffs and the defendant. The parties have not expressly stipulated that the defendant shall not do that which the plaintiffs now complain of. The agreement is in the affirmative, and this appears to me to be of importance as showing more clearly what the parties had in contemplation when they entered into the agreement—that there was no definite undertaking by the defendant not to do what is now complained of.

In one sense, of course, every positive agreement to do a particular thing includes the negative, that nothing will be done contrary to it. But it does not follow that because a person has agreed to do a particular thing he is to be restrained by injunction from doing something contrary to it. The court is here dealing with an agreement of a particular class—a contract for personal service, of which it will not enforce specific performance, and to restrain a breach of which it will not as a general rule grant an injunction. The exception is, as in such cases as *Lumley* v. *Wagner* and *Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Co.*, where either there is a negative covenant in the agreement or you can see that the parties were actually contracting in this sense. What injunction can be granted in the present case which will not go far beyond the decision in *Lumley* v. *Wagner*, and amount in substance and effect to an order for specific performance of the agreement between the plaintiffs and the defendant, the very thing which the court will not grant in the case of a contract of personal service?

I see nothing in the present case to take it out of this general rule, except the decision in *Montague* v. *Flockton* (for I pass over that in *Webster* v. *Dillon*, which was decided without argument). In *Montague* v. *Flockton* Malins, V.C., did go the length of restraining an actor from performing elsewhere than in pursuance of an agreement, though this contained no negative covenant on his part. I think this decision was founded on a misapprehension by the Vice-Chancellor of the judgment of Lord St. Leonards in *Lumley* v. *Wagner*, for his observations show clearly that he overlooked the positive statement of Lord St. Leonards at p. 622 (of *Lumley* v. *Wagner*): "I may at once declare that if I had only to deal with the affirmative covenant of the defendant J. Wagner that she would perform at Her Majesty's Theatre, I should not have granted any injunction."

Apart from this case of *Montague* v. *Flockton* there is no case which warrants the granting of an injunction in the present case.

Then, is there anything else here which would justify the injunction being granted? The principle is the other way as regards contracts of service, and it lies upon the plaintiffs to show that there is something to create an exception here. I agree with the view expressed by Jessel, M.R., in *Fothergill* v. *Rowland* that no very distinct line is laid down in such cases, or to be found in the authorities; and I also agree with the observations of Fry, L.J., in *De Francesco* v. *Barnum*, that "I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. I have a strong impression and a strong feeling that it is not in the interest of mankind that specific performance should be extended to such cases" (45 Ch. D., p. 438). I confess I look upon the case of *Lumley* v. *Wagner* as an anomaly—an anomaly to be followed in precisely similar cases, but an anomaly not to be extended. In my opinion, the decision of Kekewich, J., is wrong, and the appeal ought to be allowed.

KAY, L.J.—I think that Kekewich, J., has been rather carried away by his desire to prevent the defendant from committing the wrong he is threatening to do, and has not given sufficient consideration to the right of the court to interfere by injunction in this case. In truth, this contract contains no negative covenant whatever, but only a term that he should give the plaintiff company the whole of his time. The plaintiffs are not really seeking to obtain specific performance of that term. They do not want to prevent the defendant by any order of this court from devoting part of his time to some other purpose than the plaintiffs' business; but, apprehending that the defendant is about to assist in founding a company which will carry on a rival business, they wish

to prevent the defendant from acting as a director of that rival company. It is not because they think that the defendant will thereby be prevented from giving his whole time to them, but because he is about to carry on a rival business which will be to their detriment. That is quite plain from the terms of the notice of motion. They are, therefore, in seeking to obtain this injunction, trying to prevent the defendant's setting up a rival business, a thing he has never contracted in any way not to do.

Has the court ever before gone so far as to grant such an injunction as has been granted in this case by Kekewich, J.? The nearest cases are those of *Webster* v. *Dillon* and *Montague* v. *Flockton*. The first of these was decided without argument, and can, therefore, be disregarded. In *Montague* v. *Flockton* Malins, V.C., quite plainly misapprehended the decision of Lord St. Leonards in *Lumley* v. *Wagner*, for while he cites his statement at p. 618—"I am of opinion that if she had attempted, even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered"—he omitted to observe the sentence at p. 622 [quoted by Lindley, L.J., *suprâ*]. The case of *Lumley* v. *Wagner* went to the extreme limit, for it held that, though the contract was one of which the court would not enforce the specific performance, yet the defendant was bound by the terms of his express negative covenant.

There have been cases, such as *De Mattos* v. *Gibson*, where the court has gone so far as to grant an injunction in the absence of a negative covenant; but such cases are very rare, and certainly not to be followed without extreme consideration; and I know of no other cases than *Webster* v. *Dillon* and *Montague* v. *Flockton* where the court has granted an injunction to restrain the breach of a contract of personal service, under such circumstances.

If these cases are to be followed, the court would, for example, have to enforce by injunction a butler's breach of his contract of service for any time he should employ otherwise than in his master's service; for a similar negative term can be clearly implied in every such contract.

I think Kekewich, J., has in the present case gone far beyond any of the previous cases, and I feel strongly disinclined to follow his decision, and all the more so that the form of injunction sought for here is not really wanted *bonâ fide* for the purpose alleged.

I think the appeal must be allowed, and the costs in this court and in the court below will be the defendant's costs in the action.

Solicitors for the plaintiffs, *Vincent & Vincent*, for *North & Son*, Leeds.

Solicitors for the defendant, *West, King, Adams, & Co.*, for *Moxon*, Pontefract.

From Chan. Div. April 9, 10, 21.

BONNARD *v.* PERRYMAN. (*a.*)

Practice — Defamation — Injunction — Application to restrain publication of libel—Jurisdiction of the High Court—Rules upon which court exercises discretion.

Jurisdiction to grant an injunction to restrain the publication of an alleged libel pending trial or after verdict has existed in the common law courts since the Common Law Procedure Act, 1854, and in the Chancery Division since the Judicature Act, 1873, and, by section 25, sub-section 8, of the latter Act any judge of the High Court can grant such an injunction where it shall appear "just or convenient." But the court will be very cautious against granting such an injunction in any action for defamation previous to trial where justification of the defamation is pleaded, and will, as a rule, decline to interfere in such cases.

Per Kay, L.J.—*An affidavit by a defendant pleading justification of a libel in opposition to an interlocutory motion for restraining the publication must show the grounds of his belief in such justification, and, in default of any such grounds being shown, the court is justified in granting such an injunction.*

Appeal from an order of North, J., for an interlocutory injunction restraining the defendant until after trial of action from publishing or circulating in a certain newspaper article alleged by the plaintiffs to be a libel.

An article had been published by the defendant, as proprietor of the *Financial Observer and Mining Herald*, making strong reflections upon the character and honesty of the plaintiffs in the management of certain mining companies. The article appeared in an issue of the 7th of February, 1891, but had been repeated in subsequent issues. The plaintiffs had obtained from North, J., an interlocutory injunction restraining the defendant from any further issue or repetition of the aforesaid article pending the trial of an action for libel entered by the plaintiffs against the defendant in the Chancery Division, and to which the defendant pleaded justification in fact of the statements in the article. Against this order the defendant now appealed.

Cozens-Hardy, Q.C., and *W. E. Vernon*, for the appellant.—There is no jurisdiction in the Chancery Division to grant an interlocutory injunction in an action for libel pending its trial before a jury, and in which the defendant pleaded justification of the libel: *Kelly* v. *Kellond*, 36 W. R. 363, 20 Q. B. D. 569; *The Prudential Assurance Co.* v. *Knott*, 23 W. R. 249, L. R. 10 Ch. App. 142. The jurisdiction of the Chancery Court as to granting injunctions was not extended by the Common Law Procedure Act, 1854, ss. 79 and 82, nor by the Judicature Act, 1873, s. 25, sub-section 8, but was only to be exercised according to previously established principles. The wording of the Common Law Procedure Act, though wide, should not be extended to interfere with any common law rights to a trial of issues by a jury. The cases show the established principles upon which interlocutory injunctions are granted: *Saxby* v. *Easterbrook*, 27 W. R. 188, 3 C. P. D. 339, this was after verdict; *Sutton* v. *South-Eastern Railway Co.*, 14 W. R. 130; *Day* v. *Brownrigg*, 27 W. R. 217, 10 Ch. D. 294; *Beddow* v. *Beddow*, 26 W. R. 570, 9 Ch. D. 89; *Thorley's Cattle Food Co.* v. *Massam*, 28 W. R. 966, 14 Ch. D. 763; *Hermann Loog* v. *Bean*, 32 W. R. 994, 26 Ch. D. 306; *Liverpool Household Stores* v. *Smith*, 36 W. R. 485, 37 Ch. D. 170; *Quartz Hill Gold Mining Co.* v. *Beall*, 30 W. R. 583, 20 Ch. D. 501; *Coulson* v. *Coulson*, 3 Times L. R. 846. Secondly, an injunction, if within the jurisdiction of the Chancery Court, ought not to have been granted in the present case where justification was pleaded, which, if proved, would show the publication to have been for the public interest in warning persons from dealing in the companies mentioned in the article or with the plaintiffs.

The COURT intimated that the respondent's counsel need only answer the latter point.

Napier Higgins, Q.C., and *Dunham*, for the

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

respondents, the plaintiffs.—The discretion of the court in granting an *interim* injunction is to be determined by the balance of justice or convenience, according to the Judicature Act, s. 25, and ord. 50, r. 6. The defendant would not be damnified by the injunction even though, ultimately, the libel were proved true. The plaintiffs would certainly be damnified by the repetition of the libel, even though ultimately successful. A plea of justification cannot oust the discretionary jurisdiction of the court to grant an injunction. The court, in exercising its discretion, will consider the evidence on affidavit in support of the plea of justification. Here the defendant's affidavit shows no facts which the defendant is able, of his own knowledge, to prove, nor his grounds of belief in the facts alleged as required by ord. 38, r. 3, and *vide* Lord Selborne's remarks in *Bidder* v. *Bridges*, 32 W. R. 445, 26 Ch. D. 1, p. 8. The *onus* is on the defendant to show *primâ facie* evidence of justification. Trial by jury in civil actions for libel was not primarily contemplated even by Fox's Libel Act. Since the Judicature Acts, such a tribunal is optional. The plaintiff had a clear right to bring an action for libel in the Chancery Division if he chose, and if neither party took any step to secure a jury, a judge of the Chancery or any other division could proceed to try any action for defamation. R. S. C., 1884, ord. 36, r. 2. The same principles on which the court or judge can grant *interim* injunctions in any other case must be applied in an action for defamation. Here, on the principles of justice and convenience, and in the absence of *primâ facie* evidence in support of the defendant's plea, North, J., granted the injunction, and his order ought to be sustained.

Cozens-Hardy, Q.C., replied.

By consent, apart from the questions of jurisdiction and legal exercise of discretion, the action was arranged to be transferred to the London Special Juries List in the Queen's Bench Division so as to expedite its trial.

Cur. adv. vult.

Lord COLERIDGE, C.J., delivered the following written judgment of the whole court on the question of jurisdiction, and of the majority of the court on the question of the exercise of discretion :—

The plaintiffs in this case are two gentlemen carrying on business as financial agents under the title of the Mercantile and General Trust. The defendant Perryman is the proprietor and publisher of a paper called the *Financial Observer and Mining Herald*. The defendant Allen is in some way (not material to ascertain) connected with this paper, and appears to have printed the particular number which contains the matter of which the plaintiffs complain. In the number of the 7th of February, 1891, appeared the article which the plaintiffs assert to be a libel upon them, and in respect of which, having issued a writ in the Chancery Division, they applied for and have obtained from North, J., the injunction which we are asked upon appeal to dissolve. One point raised in the course of the argument has become immaterial to decide—namely, whether the Court of Appeal, sitting with its full number, can, according to the course and practice of the court, overrule a court consisting of three or any other number of members, if the decision which they are asked to review appears to be clearly wrong. It is unnecessary to discuss or to decide this question, because the previous decisions of this court on the main question before us appear to us to be perfectly correct, and we found our own decision upon them. It is only necessary to decide two questions—(1) is there jurisdiction in the Supreme Court to issue an injunction to restrain the publication of an alleged libel either at all or before the libel has been adjudged to be such? And (2) is this a case in which, as matter of discretion, the jurisdiction should be exercised, if it exists? The decision of the first question is, it appears manifest, independent of the circumstances of any particular case; the decision of the second entirely depends upon them.

As to the first, we are unable to entertain any doubt; the point is clear, and is settled by authority. The authorities, indeed, are few and recent for obvious reasons; but they are uniform and they are clear. Prior to the Common Law Procedure Act, 1854, neither courts of law nor courts of equity could issue injunctions in such a case as this; not courts of equity, because cases of libel could not come before them; not courts of law, because prior to 1854 they could not issue injunctions at all. But the 79th and 82nd sections of the Common Law Procedure Act, 1854, undoubtedly conferred on the courts of common law, if a fit case should arise, the power to grant injunctions at any stage of a cause in all personal actions of contract or tort with no limitations as to defamation. This power by the Judicature Act, 1873, was conferred upon the Chancery Division of the High Court, representing the old courts of equity. Nevertheless, although the power had existed since 1854, there is no reported instance of its exercise by a court of common law till the case of *Saxby* v. *Easterbrook*, which was decided in 1878. In that case the injunction was not applied for, nor, of course, granted, till after a verdict or judgment had ascertained the publication to be a libel. That case was acquiesced in; and about the same time the Chancery Division began and has continued to assert the jurisdiction, which has been questioned before us, of granting injunctions on the interlocutory application of one of the parties to an action. Sir George Jessel in *The Quartz Hill Consolidated Gold Mining Co.* v. *Beall* distinctly asserted the jurisdiction; and it was considered and established in an elaborate judgment of this court in *The Liverpool Household Stores Association* v. *Smith*, in which Cotton, L.J., affirming indeed the refusal of Kekewich, J., to issue the injunction prayed for in that case, asserted the jurisdiction in plain language, and went on to explain the principles on which, in his opinion, the jurisdiction should be exercised. There have been other examples, but these are sufficient; and we do not doubt, upon the true construction of the statutes and upon authority, that as matter of jurisdiction North, J.'s order might lawfully be made.

But it is obvious that the subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment so long as no wrongful act is done; and unless an alleged libel is untrue there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of *interim* injunctions. We entirely approve of and desire to adopt as our own the language of the present Master of the Rolls in *Coulson* v. *Coulson*, "That to justify the court in granting an injunction it must come to a decision on the question of libel or no libel before the

jury have decided whether it was a libel or not; that the jurisdiction, therefore, was of a delicate nature, and ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable." In the particular case before us, indeed, the libellous character of the publication is beyond dispute, but the effect of it upon the defendant can be finally disposed of only by the jury, and we cannot feel sure that in the present case the defence of justification is one which, on the facts which may be before them, the jury may find to be wholly unfounded; nor can we tell what may be the damages recoverable. Moreover, the decision at the hearing may turn upon the question of the general character of the plaintiffs; and this is a point which can rarely be investigated satisfactorily upon affidavit before the trial, on which, further, it is not desirable that the court should express an opinion before the trial. Otherwise an injunction might be granted before the trial in a case in which at the trial nothing but nominal domages, if so much, could be obtained. Upon the whole we think, with great deference to North, J., that it is wiser in this case, as it generally and in all but exceptional cases must be, to abstain from interference until the trial and determination of the plea of justification.

The appeal, therefore, must be allowed and the order discharged, the costs in this court and in the court below to be costs in the cause.

KAY, L.J.—I agree with all the members of the court that since the passing of the Common Law Procedure Act, 1854, by sections 79, 81, and 82 of that Act, courts of common law had, and by sections 16 and 25, sub-section 8, of the Judicature Act, 1873, the High Court of Justice now has, undoubted jurisdiction to grant injunctions at or before the trial in actions of libel. We are also agreed that in such actions this jurisdiction before trial should be very cautiously exercised, especially because the questions of libel or no libel, and of the validity of a justification, if pleaded, are eminently matters to be determined by the verdict of a jury. The only point in this case on which I have felt any difficulty is whether it is expedient or right altogether to discharge the interlocutory injunction which has been granted. The alleged libel is in coarse and abusive language, which would incline anyone reading it to the belief that some personal feeling of spite or malignity against the plaintiffs, and not merely a desire to protect the interests of the public, was among the actuating motives of the defendant. Some of the most serious allegations in the articles are those by which the defendant associates the plaintiffs with a person whom he represents to be of infamous character. I know nothing whatever of the individual except what appears in the evidence before us, and have no means of judging whether the allegations made against him are true or false. It appears from another page in the same paper that since February, 1890, the defendant has been in the habit of publishing concerning this person accusations in some of the strongest language of his well-furnished vocabulary. The individual so traduced is, it seems, the editor or owner of another financial paper published in London, called the *Financial News*, and the defendant's paper states that the defendant intends to repeat the article against him until some notice is taken of it by the London County Council (of which we are told this person is a member), the Incorporated Law Society, the Houses of Parliament, or the police. The article so published, which the defendant intends to repeat, calls the person denounced a City thief, a vulture, speaks of his swindles and his nefarious practices, and says, amongst other choice phrases, that there is no phase of the criminal law that has not been scoffed at by him, and that fraud, conspiracy, burglary, and felony have been used to aid his schemes to despoil and hoodwink the public.

Now in the article complained of in this action it is stated that the plaintiffs have been lucky enough to ingratiate themselves with this person by offering him inducements to puff one of the companies which they promoted, and that the Mercantile and General Trust, which is the style under which the plaintiffs are carrying on business, is composed of themselves, the man so villified, and two other persons named Deakin and Campbell. These statements that the plaintiffs are carrying on business in partnership or in close association with a man who is described in this way as a swindler and a thief are undoubtedly calculated to damage the plaintiffs extremely, if not to ruin them. We are relieved from one of the difficulties which occur in most cases of this kind, because counsel have admitted in the argument before us that if the statements in this article are untrue it is unquestionably a libel. They say, however, that they intend to plead that the statements are true, and the truth or falsehood of them must be determined at the trial by a jury. They decline to give any undertaking not to repeat these statements before the trial, but insist that the defendant has a right to do so. My doubt arises upon the affidavit evidence which is now before the court. What may be the case at the trial I can only judge at present from that evidence, and I do not wish to say anything which can influence the trial in any way. [His lordship then dealt with the affidavits of the plaintiffs and of the defendant, and continued:—] By ord. 38, r. 1, it is provided that an affidavit should be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to belief, with the grounds thereof, may be admitted. Lord Selborne, L.C., in *Bidder* v. *Bridges*, said:—"I do not think this court can for a single moment give countenance to the notion that any common neglect, if there be such common neglect, of the provisions of that order can absolve persons from the consequences of disregarding them when the question is raised, as it is here raised, by a person having a right to raise it. That order requires, in effect, that affidavit evidence as to matters of fact by a person who is not able strictly to prove them must show, not only the fact, but also the grounds of his belief."

To the same effect is the judgment of the late Master of the Rolls in the Court of Appeal in *The Quartz Hill Gold Mining Co.* v. *Beall*, where the injunction in a libel case case was dissolved partly on the ground that the plaintiff's affidavit did not comply with this order. Speaking for myself, I entirely agree with this view of the meaning and effect of this order, and think it essential to the ends of justice that it should be strictly observed. In the case now before us the defendant's answer to the express and categorical denial by the plaintiffs of any kind of association with the person in question is only met by these statements as to the defendant's belief, which do not attempt to show the grounds of his belief otherwise than by stating that the association is through Engel or Campbell, and there is no other evidence in support of the defendant's case on this point.

Now, I agree that in order to justify the court in granting an interlocutory injunction in such a case there must be strong *primâ facie* evidence that the statement is untrue. In my opinion, in this state of the affidavits, there is that strong *primâ facie* evidence. If that is so, according to the ordinary practice, the

court should be actuated in granting or refusing the injunction by consideration of what is commonly termed the balance of convenience and inconvenience. To which side in this case does that balance incline? If this injunction be continued in the whole or in part it will not prevent the defendant from protecting the public by any other statements he can legitimately make against the plaintiffs; it will only prevent him from repeating this particular allegation. Even if at the trial the defendant should be able to adduce evidence showing that the plaintiffs' denial of their association with a person described as a swindler is untrue, it is impossible to conceive that the defendant can be damnified by being restrained meanwhile from repeating it. On the other hand, I can easily believe that this statement, if repeated, as the defendant admits he intends to do in the interval before the trial, may occasion very great injury, if not ruin, to the plaintiffs. If it should turn out at the trial of this action that the plaintiffs' denial on this point is true and that the defendant's allegation is false an irreparable injury may have been done to the plaintiffs by denying them this relief by *interim* injunction. I think the true result of the affidavit evidence is that the defendant has a suspicion of the plaintiffs' connection with the person whom he so defames for which he is not able to allege any substantial foundation. For these reasons I should have granted the injunction, at least as to this part of the libel, and I should have been glad if the Court of Appeal had been prepared to sustain it.

Appeal allowed.

Solicitors for the appellant, *Vernon, Son, & Co.*

Solicitors for the respondents, *Watson & Watson.*

From Q. B. Div. March 21.

BECKETT *v.* TOWER ASSETS CO. (*a.*)

Bill of sale—Assignment and hire and purchase agreement—True nature of the transaction—Bills of Sale Acts, 1878 (41 & 42 *Vict. c.* 31), *s.* 4, *and* 1882 (45 & 46 *Vict. c.* 43).

The plaintiff having applied to the defendants for an advance of £30 upon the security of his furniture, it was arranged that the landlord, to whom the plaintiff owed £25 for rent, should put in a friendly distress, when the defendants would buy the goods from him. The landlord accordingly, at the plaintiff's request, distrained upon the goods in question for £25 rent due, and the goods seized were appraised at £29 5s. The broker then, at the request of the plaintiff, sold the goods to the defendants at the condemned price. The next day the defendants produced an agreement by which the goods were to be hired to the plaintiff's wife upon the terms that, on payment of £50 by monthly instalments, the goods were to become her property, the defendants to have power to take possession upon non-performance of any of the provisions of the agreement. The plaintiff objected to pay £50 for an advance of £29 5s., upon which the defendants said that they had bought the goods, and that the plaintiff knew whether they were worth £50 or not. The plaintiff then said that he saw how he was placed, and his wife signed the hiring agreement. This agreement was not registered as a bill of sale. Default having been made, the defendants took possession, and the plaintiff brought this action to recover damages for trespass to the goods.

Held, that the true inference from the facts was that by the purchase from the landlord the property in the goods passed to the defendants, subject to a resulting trust in favour of the plaintiff until the execution of the hiring agreement; that, as the beneficial interest in the goods remained in the plaintiff until the execution of that agreement, the defendants had no title to the goods independently of that agreement; and that, as the agreement was not registered under the Bills of Sale Acts, the plaintiff was entitled to recover.

Judgment of Cave, J. ([1891] 1 *Q. B.* 1), *reversed.*

Appeal from the judgment of Cave, J., in favour of the defendants, upon the trial of an action to recover damages for trespass to goods.

The facts were as follows:—

In October, 1888, the plaintiff, seeing an advertisement of the defendants', applied to them for a loan of £30 upon the security of his furniture. A man named Collins, from the defendants' office, accordingly made an inventory of the furniture and included in it by consent, though after some objection, the tools and plant of the plaintiff's trade. At this time the plaintiff owed his landlord some rent, but the landlord was not pressing for it. Collins suggested that it would be much better not to have a bill of sale, but to get the landlord to put in a friendly distress, as it would save exposure, give them a better title, and be a better security to the plaintiff against any future creditor. The next day the plaintiff went to the defendants' office and assented to this course. The landlord accordingly, at the request of the plaintiff, put in a friendly distress for £25, rent due on September 29, 1888, and the goods seized were appraised at £29 5s. On October 17 Godbolt, a representative from the defendants, went to the plaintiff's house, and the plaintiff having signed a memorandum requesting the broker to sell the goods to the defendants at the condemned price, Godbolt paid the broker £29 5s., and got a receipt from him. The next day, October 18, the plaintiff and his wife went to the defendants' office, when a hiring agreement of the goods from the defendants to the plaintiff's wife was produced for her signature. By this agreement the hirer was to pay the defendants £1 8s. a month until the sum of £50 was paid, when the goods were to become hers; the hirer was from time to time to pay the rent due in respect of the house where the goods were; and in case the hirer should make default in payment of any money payable under the agreement, or should break or fail to perform or observe any of the provisions of the agreement, the defendants were to be at liberty to enter the house and take possession of the goods and sell them. The plaintiff objected to paying £50 for an advance of £29 5s., on which the defendants' representative said, "You can please yourself; we have bought the goods, and you know whether they are worth £50 or not." The plaintiff thereupon said that he saw "how he was placed," and told his wife to sign the agreement, which she did. The plaintiff then signed another document, guaranteeing the due payment of the sums under the hiring agreement. The monthly instalments were duly paid, but the rent was not punctually paid, and an agreement was made between the plaintiff and his landlord that the quarter's rent due on Lady Day, 1889, should be paid by instalments.

On June 20, instalments of the rent being in arrear, the landlord agreed to forego the whole of the rent from Christmas to Midsummer provided the plaintiff would give up possession of the house on June 24, and on the same day the landlord sent to the defendants an undertaking not to distrain for any rent due to Midsummer if the plaintiff gave up possession of the house on or before that date.

On June 22 the plaintiff wrote to the defendants

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

that he was going to remain in the house with the goods for another week, but was to hand over the keys and turn over the lodgers to the landlord on the 24th. The defendants thereupon asked the landlord to extend his undertaking of the 20th, which was refused. Consequently, on the evening of the 24th, the defendants seized and removed the goods. The plaintiff had on the morning of the 24th delivered up the keys of the house to the landlord. The jury found that the value of the plaintiff's tools was £30; that the value of the furniture was £33; and that the plaintiff sustained damage to the amount of £125 in addition to the value of the goods. It was arranged that all other questions should be decided by the learned judge. The learned judge held that the transaction was a sale by the plaintiff to the defendants with a right of repurchase, and that the transaction was independent of a document; and, further, that, whether the transaction was a sale or mortgage, there was no document requiring registration under the Bills of Sale Acts: see [1891] 1 Q. B. 1.

The plaintiff appealed.

Henn Collins, Q.C., and *W. E. Hume Williams*, for the plaintiff.

Sir Horace Davey, Q.C., *Cock, Q.C.*, and *H. Reed*, for the defendants.

The following cases were referred to:—*In re Watson*, 38 W. R. 567, 25 Q. B. D. 27; and *Madell* v. *Thomas*, *ante*, p. 280, [1891] 1 Q. B. 230.

Cur. adv. vult.

March 21.—FRY, L.J.—The facts have been stated very fully by the learned judge in the court below, and I accept the facts as stated by him. Upon those facts the questions arose whether the defendants had any title to the goods independently of the hire-purchase agreement, and whether that agreement required registration as a bill of sale. A great deal of argument was addressed to us as to how far the court will look into the real transaction between the parties, and how far such an investigation may bear upon the operation of the Bills of Sale Acts. It seems to me to be plain upon the true construction of the statute that, in considering questions under the Act, the court may, and therefore must, inquire into the real nature of the transaction. For instance, the question whether a bill of sale is within the Bills of Sale Act, 1882, turns upon the inquiry whether it was given as security for the repayment of money. If it is so given, however absolute in form it may be, it is a bill of sale within the provisions of that Act. Thus, if A. be the real owner of the goods, and B. the pretended owner, and B. by a document purports to let the goods to A. with a liberty to B. in a certain event to seize, this may be construed as a licence by A., the real owner, to B. to take possession, and requires registration. That was the case of *Madell* v. *Thomas*.

Again, the real truth of the transaction must be applied to the construction of the document, and if the document so construed would be a bill of sale it requires registration. This was the case of *In re Watson*. But if the defendant has a title by some transaction independently of any document, and then a document is executed which, according to its true construction, is a bill of sale, and it is not registered, the mere avoidance of the bill of sale will not deprive the defendant of his independent title. In the present case it is said that the defendants had such an independent title. We must inquire whether they had. I agree with the learned judge in thinking that the answer to the inquiry depends upon this—what was the real intention of the parties? And, in determining that, I also agree that we must have regard to the substance, and not the mere form of the transaction, to the position of the parties, and the whole circumstances under which the transaction came about.

Now, it is to be observed that in the present case the transaction derived its force from the consent of the plaintiff Beckett, and the distress put in by the landlord was a friendly distress, and it might, indeed, almost be deemed a sham distress, including, as it did, the tools, which could not be distrained by law without the consent of Beckett; and in like manner the valuation was not real, as it was the exact amount of the money advanced. It is obvious, therefore, that the transaction depended on the intention of Beckett in conveying. Now, it appears to me that the true construction of the facts is that it was agreed between the parties that there was to be a sale and a hire-purchase agreement; that the sale was to be in appearance absolute; and to operate as a sale if and when the hire-purchase agreement was executed; but that if it was not executed then the beneficial interest in the goods did not pass, the intention being that in such an event the property should pass subject to a resulting trust. To illustrate my meaning, let me take the interval of time between the hour on the 17th of October when the sham sale took place and the hour of the 18th of October when the hire-purchase agreement was executed. How did things stand. If the defendants had refused to execute the hire-purchase agreement, could they have held the property in the goods as against Beckett; or in that interval could he have recovered the goods on his repayment of the sum advanced by the defendants, with expenses? It appears to me that he might have recovered the goods if on the 18th of October the defendants had refused to execute the hire-purchase agreement. I conclude, therefore, that though it was the intention of both parties that the legal estate should pass, it was to pass subject to a resulting trust in favour of Beckett until the hire-purchase agreement was executed. It follows from that view that there was no independent title in the defendants; that the beneficial interest in the goods remained in Beckett until the hire-purchase agreement was executed; that, therefore, the defendants had not any title independent of the bill of sale, and consequently, as they had no title but under that, and it was not registered, the plaintiff was entitled to recover. I think, therefore, that the conclusion of the learned judge was erroneous in not giving effect to the resulting trust, which arose from the real nature of the transaction and the circumstances of the case. The learned judge relied upon the language used by Beckett when his wife was asked to execute the hire-purchase agreement. But it appears to me that the remark that he saw how he was placed only shows that Beckett was ignorant of his true rights, and therefore complied with the terms inserted by the defendants in the hire-purchase agreement. The judge, in my opinion, placed too much reliance upon that remark of Beckett, which merely expressed the difficulty of the position in which he found himself.

There is another ground on which, also, if it were necessary, I am inclined to think that the judgment is erroneous. The defendants justified their seizure by reason of the default of Beckett in paying his rent. But it appears to me that there was evidence to show that there was a course of dealing between the parties which would preclude them from availing themselves of that default; because from December, 1888, to June, 1889, there had been a series of undertakings given by the landlord not to distrain until a certain day, and this had been accepted by the defendants,

and he had given such an undertaking down to June 24, and the defendants had sent to inquire whether it would be enlarged, and, finding no further undertaking would be given, they entered and seized on June 24, when the undertaking was in force. It is not necessary to decide the point, but I am disposed to think the judgment wrong on that ground. The result is that we must set aside the judgment, and give judgment for the plaintiff for the amount found by the jury.

BOWEN, L.J.—I am of the same opinion. It is necessary to bear in mind that the Bills of Sale Act avoids, not the transaction, but the document. If the transaction can stand without the document, there is no provision in the Act avoiding the transaction. To my mind this transaction of purchase and hire might be thought to be a sham but for one thing. The sale cannot be a sham as against the landlord. It is impossible, therefore, to say that no legal effect attaches to that part of the transaction. Still, though that is so as against the landlord, there was an understanding or agreement—and we must so find as a fact—between the debtor and creditor that, while the property in the goods passed to the creditor, the goods were to be held upon trust for the debtor until some other document settling the rights of the parties had been signed. The beneficial property in the goods remained in the debtor until the execution of that document. That being so, the creditor is placed in this dilemma. The goods were only to become his by virtue of a further document. If the hiring agreement gives him the title, it is an assurance of personal chattels, and therefore a bill of sale within the Act. If the hire agreement only operates as a licence to the creditor to take possession of the goods, the beneficial interest being in the debtor, it is a licence to take possession of personal chattels as security for a debt, and a bill of sale within the Act. In either view the hiring agreement is a bill of sale within the Act, and a necessary document as part of the defendant's title. That seems to me to be the true interpretation to be placed upon this transaction. The inference which we are drawing from the facts and circumstances of the case does not seem to have been presented to the learned judge in the court below. Upon the question of waiver I have nothing to add to what has been said by Fry, L.J.

Lord ESHER, M.R., concurred.

Appeal allowed.

Solicitor for the plaintiff, *Pumfrey.*

Solicitors for the defendants, *Evans & Batchelor.*

From Q. B. Div. [and Q. B. Div.] March 2, 12.

REG. v. COMMISSIONERS UNDER THE BOILER EXPLOSIONS ACT, 1882. (a.)

Boiler — Boiler explosion — Explosion in coal mine — Meaning of "boiler" — Jurisdiction of Board of Trade to order inquiry — Boiler Explosions Act, 1882 (45 & 46 *Vict. c.* 22), *ss.* 3, 4—*Boiler Explosions Act,* 1890 (53 & 54 *Vict. c.* 35), *s.* 2.

By section 4 *of the Boiler Explosions Act,* 1882, *the Act was not to apply to "any boiler used exclusively for domestic purposes, or to any boiler used in the service of her Majesty, or any boiler on board a steamship having a certificate from the Board of Trade, or to any boiler explosion into which an inquiry may be held under the provisions of the Coal Mines Regulation Act,* 1872, *and the Metalliferous Mines Regulation Act,* 1872."

By section 2 *of the Boiler Explosions Act,* 1890, "*So much of section* 4 *of the Boiler Explosions Act,* 1882, *as relates to any boiler other than a boiler used in the service of her Majesty, or used exclusively for domestic purposes, is hereby repealed, and the said Act shall apply in the case of any boiler explosion occurring on board a British ship.*"

Held, that the provision in section 4 *of the Act of* 1882 *excepting from the operation of that Act any boiler explosion into which an inquiry may be held under the Mines Regulation Acts,* 1872, *was repealed by section* 2 *of the Act of* 1890, *and therefore the Board of Trade has jurisdiction under the Act of* 1882 *to order an inquiry into such a boiler explosion.*

On the surface of a mine there was a boiler, from which the steam was conveyed by a pipe down the shaft of the mine and along the workings to a receiver, and from the receiver by a pipe to an engine in the mine. Stop-valves were placed upon the pipe at different places, the last valve being close to the engine, the distance from the boiler on the surface to the engine being 1,363 *feet. When all the valves were open steam passed from the boiler to the engine. An explosion having occurred at the valve close to the engine,*

Held (by Lord Halsbury, L.C., *and* Lord Esher, M.R.; Fry, L.J., *doubting), that the place where the explosion occurred was a part of the "boiler" within the meaning of that word as defined by section* 3 *of the Boiler Explosions Act,* 1882—"*a closed vessel used for generating steam.*"

Decision of the Queen' Bench Division *affirmed.*

This was the argument of a rule *nisi* obtained on behalf of the Tyne Coal Co. (Limited), calling upon the commissioners appointed by the Board of Trade under the Boiler Explosions Act, 1882, to show cause why a writ of prohibition should not issue, prohibiting them from further proceeding with any inquiry or formal investigation into the causes or circumstances attending an explosion of a stop valve in a coal mine of the Tyne Coal Co. (Limited.)

The facts were as follows:—

On the 13th of September, 1890, an explosion took place in a pit of the Tyne Coal Co.'s Collieries at Hebburn-on-Tyne. In this pit there was an engine which was used for the purpose of pumping water from the pit to the surface. The engine was driven by means of steam conveyed to it in the following manner:—On the bank or surface of the mine was a boiler to which a metal pipe was attached leading to the top of the shaft, a distance of 122 feet. The pipe then descended the shaft 1,056 feet, and was laid along the workings for a distance of 140 feet to a receiver. A pipe then led from the receiver, a distance of 45 feet to the engine. Stop valves were placed on the pipe near the boiler, and at the bottom of the shaft, and also upon the pipe leading from the receiver to the engine, and another stop valve was placed near the engine. When any one of the valves above mentioned was closed the passage of steam from the boiler to the engine was stopped, and when all the valves were open steam passed from the boiler to the engine.

On the 13th of September all the valves were open with the exception of the valve near the engine. That one was closed so that repairs might be effected to the engine. There was at this time a high pressure of steam in the boiler and in the pipe, and the valve which was closed was blown out. Steam consequently escaped and two workmen were scalded to death.

Upon receiving notice of this explosion the Board of Trade directed one of their engineers to make a

(a.) Reported by T. R. COLQUHOUN DILL and W. F. BARRY, Esqs., Barristers-at-Law.

preliminary inquiry into the matter under section 6 of the Boiler Explosions Act, 1882, and he held an inquiry, though objection was taken by the Tyne Coal Co. on the ground that the occurrence did not come within the Boiler Explosions Acts, 1882 and 1890.

Upon receiving the report of the preliminary inquiry the Board of Trade ordered a formal investigation to be held.

By section 3 of the Boiler Explosions Act, 1882, "In this Act the term 'boiler' means any closed vessel used for generating steam, or for heating water, or for heating other liquids, or into which steam is admitted for heating, steaming, boiling, or other similar purposes."

By section 4, the Act "shall not apply to any boiler used exclusively for domestic purposes, or to any boiler used in the service of her Majesty, or to any boiler on board a steamship having a certificate from the Board of Trade, or to any boiler explosion into which an inquiry may be held under the provisions of the Coal Mines Regulation Act, 1872, and the Metalliferous Mines Regulation Act, 1872, or either of them."

Section 2 of the Boiler Explosion Act, 1890, provides as follows:—"So much of section 4 of the Boiler Explosions Act, 1882, as relates to any boiler other than a boiler used in the service of her Majesty, or used exclusively for domestic purposes, is hereby repealed, and the said Act shall apply in the case of any boiler explosion occurring on board a British ship."

Sir R. E. Webster, A.G., and *Sir E. Clarke, S.G.* (*H. Sutton* with them), on behalf of the commissioners, showed cause.—This was an explosion of a "boiler" within the Boiler Explosions Act, 1882. This pipe is one continuous vessel with the boiler and receiver which it connects; it is a "closed vessel used for generating steam" within the definition of "boiler" in section 3 of the Act of 1882. Secondly, section 2 of the Boiler Explosions Act, 1890, has repealed the exception contained in section 4 of the Act of 1882 as to boiler explosions to which the Coal Mines Regulation Act, 1872, applies, and the Board of Trade now has power to order an inquiry in these cases also. Between the passing of the Coal Mines Regulation Act, 1887, and the Act of 1890 inquiries into boiler explosions in coal mines were regulated by the Act of 1887, which by section 83 was to be read into the Act of 1882, but now by the Act of 1890 the Board of Trade has also power to order an inquiry.

Moulton, Q.C., and *Danckwerts*, in support of the rule.—This is not a "boiler"; it is a pipe, a mere conduit for the passage of steam, not a vessel for generating it. It is a mere steam pipe. The place where the explosion occurred is at a great distance from the boiler itself. Secondly, the Home Office has ample power to direct an inquiry under the Coal Mines Regulation Act, 1887, and it was not intended that separate powers to direct an inquiry should be vested in two different authorities, so as to make two independent inquiries into the same explosion possible. The expression in section 4 of the Act of 1882 is "boiler explosion" not "boiler," and the words used in section 2 of the Act of 1890 are not sufficient to repeal the earlier section.

CAVE, J.—I am of opinion that this rule should be discharged. It was said that section 2 of the Boiler Explosions Act, 1890, does not repeal the last two exceptions in section 4 of the Act of 1882. The section is somewhat difficult of construction and might have been more clearly expressed, but I think that it is impossible to restrict the repeal in the manner suggested. Section 4 relates to any boiler, and it cannot be said that so much of it as refers to boiler explosions does not also refer to boilers. In the same way, if the Act had contained a number of provisions as to cleaning or repairing boilers they would all relate to boilers. It is absurd to say that, because the word "boiler" is used in the earlier part of the section and "boiler explosion" in the later part, the later part does not relate to boilers. Giving the natural construction to the words—although the section is somewhat difficult to construe—I have come to the conclusion that the latter part of section 4 has been repealed by section 2 of the Act of 1890.

As to the second point, it seems to me that the whole of this vessel down to the part where the explosion took place was a "closed vessel used for generating steam." A closed vessel into which steam is received for boiling purposes is clearly a boiler within the Act, and so is that part of the boiler which is close to the fire; but it is said that an explosion in the pipe which leads from the one to the other is not within the Act, although it is certainly as much within the mischief of the Act as an explosion in one of the other places. I think that the proper view is that the whole thing is one closed vessel for generating steam, and is, therefore, a boiler within the Act. The rule must, therefore, be discharged.

CHARLES, J.—I agree. I think that the pipe where this explosion took place was part of a boiler within the Act. As to the other question I had some doubt; but I have come to the conclusion that it would be too narrow a construction of section 2 of the Act of 1890 to limit the repeal thereby effected to a little more than a line of section 4 of the earlier Act. I think it repeals section 4 altogether, except the part which relates to any boiler used exclusively for domestic purposes, or to any boiler used in the service of her Majesty.

Rule discharged.

The Tyne Coal Co. appealed.

Sir H. James, Q.C., Moulton, Q.C., and *Danckwerts*, for the appellants, and

Sir R. E. Webster, A.G., Sir E. Clarke, S.G., and *H. Sutton*, for the respondents, argued as in the court below.

Lord HALSBURY, L.C.—I am of opinion that this appeal must be dismissed. The first question is as to the true construction of section 2 of the Boiler Explosions Act, 1890. Section 4 of the Boiler Explosions Act, 1882, provides that the Act "shall not apply to any boiler used exclusively for domestic purposes, or to any boiler used in the service of her Majesty, or to any boiler on board a steamship having a certificate from the Board of Trade, or to any boiler explosion into which an inquiry may be held under the provisions of the Coal Mines Regulation Act, 1872, and the Metalliferous Mines Regulation Act, 1872, or either of them." Section 2 of the Boiler Explosions Act, 1890, provides that "so much of section 4 of the Boiler Explosions Act, 1882, as relates to any boiler other than a boiler used in the service of her Majesty, or used exclusively for domestic purposes, is hereby repealed, and the said Act shall apply in the case of any boiler explosion occurring on board a British ship." It was contended that an inquiry into a boiler and an inquiry into a boiler explosion were two distinct things. The Act of 1882, however, has no operation, and no inquiry can take place, except in the case of a boiler which has exploded. The contention is that the Act of 1890 has struck out of section 4 of the Act of 1882 the exception of a boiler on board a steamship, and has left in

the exception of a boiler explosion capable of being inquired into under the Coal Mines and the Metalliferous Mines Acts. It was urged that a double inquiry into the same explosion would be not only unnecessary, but also the cause of friction. I myself cannot see that it would. The Legislature has, under the Mines Acts, provided for an inquiry into all accidents in mines. As a distinct head of inquiry, the Legislature has thought it right, under the Boiler Explosions Act, 1882, to provide for an inquiry into a boiler explosion. The Legislature has intrusted those two distinct inquiries to two different departments of the Government. I think one may safely conclude that where the Government itself, by two of its departments, is the authority to conduct the two inquiries, there will be no fear of any friction. But even if I thought that it was inconvenient or likely to cause friction that there should be two inquiries into one subject-matter, I should still be unable to escape from the plain language of the Act. In my opinion section 2 of the Act of 1890 has repealed the particular exception which is now insisted on as still in existence.

What I have said upon the first point assumes that this was an explosion of a boiler within the meaning of the Act of 1882. It remains now to consider whether this was a "boiler explosion" within the meaning of the Act. The word "boiler" is not a scientific, but a popular term. For my own part, I should be disposed to take the popular view of a boiler, that it is something to boil water whereby steam is generated. I think the spout of a kettle, however long the spout may be, is part of the kettle in which the steam is generated. If, instead of having a long pipe leading down the mine, as in this case, there had been a large pipe immediately over the place where the water was boiled, would that pipe be the less a part of the boiler, it being part of the instrument in which the stream was generated, which, if the pressure of the steam were too great, might explode. We must not forget that the whole policy of the Act is to have an inquiry into accidents producing loss of life or injury to person by reason of imperfect and insufficient instruments for the purpose of containing steam where steam is generated. I am by no means prepared to say that, if the word "boiler" were the only word in the Act, I should not come to the conclusion that this pipe was part of the boiler, inasmuch as, if I understand the facts rightly, this vessel has a continuous flow of steam from the place where the steam rises from the water to the place where the explosion occurred. If that were not so, there would be this strange result, that if an explosion occurred close to the place where the steam rose from the water it would be an explosion of a boiler, whereas if it occurred some yards away, where the shape of the vessel containing the steam had altered into a pipe, it would not be an explosion in any part of the boiler, though equally within the mischief aimed at by the Act. But it is not necessary to construe the Act in that way, because the interpretation clause (section 3) provides that the term "boiler" means "any closed vessel used for generating steam, or for heating water, or for heating other liquids, or into which steam is admitted for heating, steaming, boiling, or other similar purposes." In my opinion the facts of this case bring this instrument within that description. In my opinion this pipe was a closed vessel—not, indeed, absolutely closed, for no boiler is ever absolutely closed, but closed in the sense in which any engineer would use the word—so confined as to keep the steam within it and to give rise to danger of explosion. In the case of the particular instrument with which we are dealing, the steam generated by the boiling of the water is conducted from the surface of the water at first by a larger vessel and then by a smaller one until it gets below into the mine for the purpose of being admitted into the piston which drives the engine. I am therefore of opinion that it is a boiler in that enlarged sense, "a closed vessel used for generating steam." I also think that it is a vessel "into which steam is admitted for heating, steaming, boiling, or other similar purposes." Although the words may not be happily chosen, it seems to me that they mean any instrument into which the steam itself, which may give rise to an explosion, is admitted for the purpose of being further used for either of the purposes there indicated. What was intended by the word "steaming" seems to be the use of steam for such purposes as a boiler is used for. It seems to me, therefore, that both branches of the definition hit this particular instrument, and that this instrument is a "boiler" within the meaning of the Act.

Lord ESHER, M.R.—This is an application to prohibit the Board of Trade from ordering an inquiry into the cause of an explosion, on the ground that the jurisdiction to make an inquiry is vested in the Home Secretary, and not in the Board of Trade. I cannot help thinking that the Boiler Explosions Act, 1890, is drafted in very indifferent form. The Boiler Explosions Act, 1882, applies to explosions of boilers, and, if there were no exceptions in the Act, it would obviously have included boiler explosions in mines. There is, however, in section 4, an exception of boiler explosions in mines, because the Legislature was aware that they could be inquired into by the Home Secretary under the Mines Regulation Acts. There being this exception in the Act of 1882, section 2 of the Act of 1890 does away with that exception. I read the section thus, because to my mind the difference in the wording between a "boiler explosion" and a "boiler" in that Act cannot have any weight attached to it. The effect of that is to take the exception as to a boiler explosion in a mine out of the Act of 1882, and to make the Act of 1882 include such an explosion. Thus the Board of Trade has, by the Act of 1890, given to it the jurisdiction which it would have had but for the exception in the Act of 1882. It is said that it is inconvenient that the Board of Trade should have jurisdiction, inasmuch as the Home Secretary also has jurisdiction under the Mines Regulation Acts. To my mind it is inconvenient, and if I had been able to do so I should willingly have held that the sole jurisdiction was in the Home Secretary. The province of the court, however, is only to construe the Act, and as, in my opinion, the case clearly comes within the Act of 1882, as amended by the Act of 1890, we must hold that the Board of Trade has jurisdiction.

The next question is whether this was an explosion of a "boiler" within the meaning of the Act of 1882. The draftsman here has inserted a definition clause which says that a boiler shall mean something which in reality is not a boiler. That to my mind is always a dangerous method of drafting. Section 3 says that "in this Act the term 'boiler' means any closed vessel used for generating steam." If the Legislature had used the term "steam boiler," or any other simple term, we should have understood it better. The section goes on: "or for heating water, or for heating other liquids, or into which steam is admitted for heating, steaming, boiling, or other similar purposes." Is this pipe where the explosion occurred within that definition? The purpose of this Act is to deal with explosions of steam. Are we to leave out, unless we are obliged to do so, one of the most common closed vessels in which an explosion of steam may occur? I think not. The words are not

used in a scientific sense, and it was not intended to draw scientific distinctions between the different parts of the machine. The Legislature in using the words, "closed vessel used for generating steam," meant the whole machine in which the steam is produced, and where it is under pressure until it is allowed to go out from that machine into something else for other purposes. It therefore includes in this case the place in which the steam is generated, and the pipe through which the steam goes, and the vessel into which it is received—in fact the whole machine in which the steam is held until it goes out from that machine for other purposes. If that be so the place where the explosion occurred was in that machine, and therefore I agree with the judgment of the Divisional Court and the grounds upon which it is based. Taking this view it becomes immaterial to consider what is meant by the remaining words of section 3.

FRY, L.J.—Upon the first point I entirely concur. The point, indeed, seems to be a very plain one. Upon the second point I have great doubt whether the place in the pipe where the explosion occurred was in popular language a part of the boiler, or a part of the boiler within the meaning of that word as defined by section 3 of the Act of 1882. I feel, however, that the construction which the court below, and the Lord Chancellor and Master of the Rolls in this court, have placed upon it is more beneficial than the construction which I should be disposed to place upon it. I therefore confine myself with regard to this point to expressing the doubt which I have entertained.

Appeal dismissed.

Solicitors for the appellants, *Rowcliffes, Rawle, & Co.*, for *Phillipson, Cooper, & Godyer*, Newcastle-on-Tyne.

Solicitor for the respondents, *Solicitor to the Board of Trade.*

From Q. B. Div. Feb. 2, 3, 4.

ALLCOCK v. HALL. (a.)

Practice — Trial — New trial — Court of Appeal — Jurisdiction—Power to enter judgment for party moving, instead of granting new trial—Supreme Court of Judicature Act, 1890 (53 & 54 *Vict. c.* 44), *s.* 1—*R. S. C.*, 1883, *ord.* 58, *r.* 4.

On motion for a new trial under 53 & 54 *Vict. c.* 44, *the Court of Appeal has jurisdiction, instead of granting a new trial, to direct judgment to be entered for the party moving, or to make any order which ought to have been made by the court below, in the same way as it could do upon an ordinary appeal.*

Motion for new trial.

This was a motion by the defendants to set aside part of the finding of the jury at the trial, and for a new trial, on the ground that part of the finding of the jury was perverse and against the evidence.

The motion was made under the Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44).

It appeared that the action was brought against the defendants, who were timber merchants, by the trustees of a chapel which adjoined the defendants' timber yard. The plaintiffs claimed an injunction to restrain the defendants from continuing a trespass on the property of the plaintiffs. The trespass complained of consisted of the insertion of pieces of wood known as "putlogs" into the chapel wall, and the placing of pieces of timber so as to lean against such "putlogs." Damages were also claimed. The defence was that a right to do the acts in question had been acquired under the Prescription Act (2 & 3 Will. 4, c. 71) by continuous user for more than thirty years.

The action was tried before Hawkins, J., with a special jury at Nottingham. The jury found that the wall had been used for more than thirty years for the purpose of supporting the planks in the position described, but that no "putlogs" were inserted prior to 1878. It was the latter part of the finding that the defendants desired to have set aside. Judgment had been reserved by Hawkins, J.

Dugdale, Q.C., and *H. Y. Stanger*, for the defendants.—The finding complained of was against the weight of evidence. We ask to have judgment at once entered for us by this court, so that we may not be needlessly put to the expense and delay of a fresh trial.

Buszard, Q.C., and *Etherington Smith*, for the plaintiffs.

Cur. adv. vult.

Feb. 4.—LINDLEY, L.J.—This is a motion nominally to set aside part of the finding of a special jury, and for a new trial, but the defendants seek, in fact, to have judgment entered for them at once. [His lordship referred to the facts of the case, and proceeded:—] The impression on the minds of my colleagues and myself is that the finding of the jury was unquestionably wrong. They seem to have misapprehended the nature of the evidence. I have also consulted Hawkins, J., because it is extremely difficult for the Court of Appeal to deal with evidence which comes before them only in writing. The demeanour of the witnesses and other matters are very material in estimating the value of the evidence. The learned judge says that in his opinion the verdict was utterly wrong. Under these circumstances the question is, What ought the Court of Appeal to do? The court is always very cautious about setting aside the verdict of a jury.

The principle on which it acts is laid down in various cases, the most recent of which is the *Metropolitan Railway Co.* v. *Wright*, 34 W. R. 746, 11 App. Cas. 152. In giving judgment in the Court of Appeal Lord Selborne, L.C., said: "I have always understood that it is not enough that the judge who tried the case might have come to a different conclusion on the evidence than the jury, or that the judges in the court where the trial is moved for, might have come to a different conclusion; but there must be such a preponderance of evidence, assuming there is evidence on both sides to go to a jury, as to make it unreasonable and almost perverse that the jury, when instructed and assisted properly by the judge, should return such a verdict." And in the same case, when before the House of Lords, Lord Herschell states the principle thus: "The case was one unquestionably within the province of a jury; and, in my opinion, the verdict ought not to be disturbed unless it is one which a jury, viewing the whole of the evidence reasonably, could not properly find." The same principle was recognized by the Privy Council in *Brown* v. *New South Wales Commissioner for Railways*, 15 App. Cas. 240, 38 W. R. Dig. 62. Can we say that the present case falls within the rule thus laid down—viz., that though the question was unquestionably within the province of the jury, yet the jury, if they had viewed the whole of the evidence reasonably, could not possibly have found such a verdict? In my opinion, this case has been brought within that rule. It appears to me that the verdict was so utterly irreconcileable with the evidence, when reasonably considered, that it ought to be set aside.

(a.) Reported by R. H. DEANE, Esq., Barrister-at-Law.

That, however, does not quite dispose of the case. The question now arises whether the court should simply order a new trial, or whether it should exercise the power of entering judgment for the defendants. That is a more difficult matter. Before the passing of Mr. Finlay's Act (53 & 54 Vict. c. 44) this court decided, in *Millar* v. *Toulmin*, 34 W. R. 695, 17 Q. B. D. 603, that, on an appeal from an order of a divisional court upon an application for a new trial, the court had power, under ord. 58, r. 4, of the Rules of the Supreme Court, 1883, if all the facts were before the court, to give judgment for the party in whose favour the verdict ought to have been given, instead of directing a new trial. That rule provides that "The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court," and it goes on to say, "The Court of Appeal shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require." This rule gives the Court of Appeal a much larger power than the Divisional Court have under ord. 40, r. 10, which provides that "upon a motion for judgment, or upon an application for a new trial, the court may draw all inferences of fact not inconsistent with the finding of the jury, and if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly." Upon the latter words of ord. 58, r. 4, the Court of Appeal, in *Millar* v. *Toulmin*, decided that it was competent for this court, upon an appeal from an order of a divisional court on a motion for a new trial, if it thought the verdict ought to be set aside, and was satisfied that it had before it all the evidence that could be reasonably expected to be obtained, not only to set aside the verdict for one party, but also to enter judgment for the other party. In my opinion Mr. Finlay's Act has not deprived the Court of Appeal of this power. Section 1 in that Act enacts that "from and after the commencement of this Act every motion for a new trial or to set aside a verdict, finding, or judgment in any cause or matter in the High Court in which there has been a trial thereof, or of any issue therein with a jury, shall be heard and determined by the Court of Appeal, and not by a divisional court of the High Court." That section does not make a motion to set aside the verdict of a jury technically an appeal; but when the motion comes before this court it can, in my opinion, exercise, with regard to the motion, all the powers which it possesses as the Court of Appeal. I think, therefore, that, though the present application is not technically an appeal, we can and ought to exercise the power conferred on us by rule 4 of order 58, as we are satisfied that nothing will be gained by ordering a new trial. Judgment must, therefore, be entered for the defendants, with costs, in both courts.

LOPES, L.J.—As to the principal question on this appeal, I am satisfied that the verdict was wrong. It was one which twelve men, looking at the evidence reasonably, could not have given. It was a perverse verdict, and in this view I am confirmed by the opinion of Hawkins, J. What, then, ought this court to do? Beyond doubt it ought, at least, to grant a new trial. But it was contended, and rightly as I think, that the court ought to enter judgment for the defendants. I am clearly of opinion that the court has the power to do this, and I am satisfied that if the case were sent to a new trial no fresh evidence could be usefully given on behalf of the plaintiffs. All the materials are before the court to enable it to deal with the case if it has power to do so.

The 1st section of Mr. Finlay's Act has been already referred to; but I would also notice the rule which was made in August last under that Act, and which provides that "every motion for a new trial or to set aside a verdict, finding, or judgment where there has been a trial thereof, or of any issue therein with a jury, shall be entered in the Court of Appeal in the same way as motions by way of appeal to the Court of Appeal are now entered where there has been a trial without a jury. Such first-mentioned motions shall be subject to ord. 39, r. 4, and shall be brought before the Court of Appeal in like manner as an appeal."

I think that the effect of that rule is to put a motion for a new trial in the same position as an appeal, and, if that be so, a motion for a new trial will be governed by ord. 58, r. 4. When we contrast that rule with the corresponding rule which applied to motions for a new trial in a divisional court, ord. 40, r. 10, the difference in the language is very marked. Rule 10 of order 40 contained the words "not inconsistent with the finding of the jury"; but there are no similar words in rule 4 of order 58. This is a most important difference. Therefore, in my opinion, under the circumstances of the present case, the Court of Appeal has power to enter judgment for the defendants. *Millar* v. *Toulmin* is a direct authority upon the construction of ord. 58, r. 4, so far as it related to an appeal to the Court of Appeal before Mr. Finlay's Act; and if I am right in saying that motions for a new trial are now governed by the same rules, that authority is applicable to the present case. I ought to add that when *Millar* v. *Toulmin* came before the House of Lords (12 App. Cas. 746, 36 W. R. Dig. 152) Lord Halsbury, L.C., expressed some doubt whether the Court of Appeal had the jurisdiction which they had assumed under ord. 58, r. 4; but this was but a *dictum*, and the other lords (Lord Watson and Lord Fitzgerald) expressed no opinion on this point. Therefore the decision of the Court of Appeal is still binding on this court.

KAY, L.J.—I feel no doubt that the verdict was unreasonable and cannot stand. The other question is one of great importance and of some difficulty. The case comes before the court, not by way of an appeal proper, but on a motion for a new trial. The other branch of the Court of Appeal, in a recent case of *Heckscher* v. *Crosley*, *ante*, p. 211, [1891] 1 Q. B. 224, held that as it was not the practice in the Queen's Bench Division to order security for costs of a motion for a new trial before Mr. Finlay's Act, the Court of Appeal would not make such an order now. Although I was a party to that decision I felt some doubt about it. That decision certainly went some way to show that motions for a new trial are not to be treated as appeals for all purposes, but now the question is whether the Court of Appeal has the same powers in dealing with applications in the nature of appeals as it would have if they were appeals. The 10th rule of order 40 did not treat a motion for a new trial as an appeal, but the language is changed in rule 4 of order 58. That rule gives certain powers to the Court of Appeal which are not confined to appeals properly so called. The present application, though not strictly an appeal, is very much in the nature of an appeal, and has some of the same incidents. Such a motion may, for instance, ask to have a judgment set aside for misdirection by the judge. The object of Mr. Finlay's Act was to prevent the necessity of going first to the Divisional Court and then to the Court of Appeal—to eliminate, in fact, the Divisional Court. It seems to me to follow logically, according to the true intent and meaning of the Act and the rule, that the Court of Appeal, when such an appli-

cation comes before it, may exercise all the powers which it has as the Court of Appeal, and that in such a case as the present it should, in order to save the parties the trouble and expense of a new trial, where no further evidence can be adduced, make the order which ought to have been made by the court below.

LINDLEY, L.J.—I wish to add that we have consulted our colleagues in the other branch of the court, who have carefully considered the point, and agree in our decision.

Appeal allowed. Judgment entered for the defendants.

Solicitors for the plaintiffs, *Lewis & Sons.*

Solicitors for the defendants, *Torr, Janeways, Gribble, & Oddie,* for *Wells & Hind,* Nottingham.

High Court of Justice.

Chan. Div. Chitty, J. } Jan. 30; Feb. 3, 7.

In re DRUMMOND AND DAVIES' CONTRACT. (*a.*)

Married woman—Acknowledgment by—Tenant in tail—Base fee—Concurrence of husband—Fines and Recoveries Act (3 & 4 *Will.* 4, *c.* 74), *ss.* 1, 15, 19, 40, 77—*Married Women's Property Act,* 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 1; *s.* 2.

By an indenture dated in 1884, *duly enrolled, two ladies, then spinsters and tenants in tail in remainder, barred their estates tail and conveyed certain lands to S. for the base fee thereby created. The two ladies afterwards married after the commencement of the Married Women's Property Act,* 1882. *Subsequently to their marriages the protector of the settlement died, and the base fee fell into possession. The two ladies then executed a deed, unacknowledged and without the concurrence of their husbands, for the purpose of enlarging the base fee into a fee simple absolute.*

Held, that the deed was effectual to pass the fee simple absolute.

Adjourned summons.

By an indenture dated the 21st of August, 1884, and made between Evelina Harriet Fane of the first part, and Christine Louisa Fane of the second part, Constance Edwina Adelaide Fane of the third part, and Marion Elizabeth Stucley of the fourth part, and duly enrolled, every of them, the said E. H. Fane, C. L. Fane, and C. E. A. Fane, as and according to the several parts or shares, estates, and interests to which she was entitled as tenant in tail, whether originally or by way of cross-remainders expectant on the estate tail of any sister of hers, granted to the said M. E. Stucley, her heirs and assigns, the Fane moiety of and in a certain farm and hereditaments, to hold the same unto and to the use of the said M. E. Stucley, her heirs and assigns, subject and without prejudice to the estates, charges, and incumbrances limited by the will of Sir James Williams, or by reference thereto, which were, prior to the estates thereby limited to the daughters of Susan Hester Fane in tail originally, or to the estates thereby limited by way of cross-remainders between such daughters respectively, and to the powers annexed to such preceding estates, and any estates or interests limited in exercise of such powers, or such of them as were then subsisting and capable of taking effect, but freed and discharged from all estates in tail whatsoever of the said E. H. Fane, C. L. Fane, and C. E. A. Fane, and every of them, and all remainders, reversions, estates, rights, titles, interests, powers, to take effect after the determination or in defeasance of such estates tail, or each and every of them.

At the date of the indenture of August 21, 1884, the parties thereto, daughters of Sarah Hester Fane, were tenants in tail in remainder under the will of Sir James Williams.

Two of them—namely, C. E. A. Fane and C. L. Fane—married in the years 1885 and 1889 respectively.

The tenant for life protector of the settlement died on the 15th of August, 1889.

By an indenture dated the 7th of December, 1889, and made between E. H. Fane of the first part, C. L. Hamlyn of the second part, C. E. A. Lady Manners of the third part, and M. E. Stucley of the fourth part, and duly enrolled in order to defeat all remainders, reversions, estates, rights, titles, interests, and powers to take effect after the determination or in defeasance of the base fees into which the estates tail of the said E. H. Fane, C. L. Hamlyn, and C. E. A. Lady Manners were respectively converted by the operation of the indenture of the 21st of August, 1884, and in order to enlarge the base fee of the said M. E. Stucley in the several parts or shares by the same indenture expressed to be granted of the moiety of the hereditaments therein described into a fee simple absolute, and to perfect the title of the said M. E. Stucley to the same shares, the said E. H. Fane, C. L. Hamlyn, and C. E. A. Lady Manners respectively, as and according to the several parts or shares, estates, and interests to which she respectively became entitled as tenant in tail, whether originally or by way of cross-remainders expectant on the estate in tail of any sisters of her, granted, disposed of, and confined to the said M. E. Stucley, her heirs and assigns, the Fane moiety of the said farm and hereditaments, to hold the same to the use of the said M. E. Stucley, her heirs and assigns for ever, subject and without prejudice to the estates, charges, and incumbrances limited by the said will of the said Sir James Williams, or by reference thereto, which were prior to the estates thereby limited to the daughters of the said Susan Hester Fane in tail general originally or to the estates thereby limited by way of cross-remainders between such daughters respectively, and to the powers annexed to such preceding estates and any estates or interest limited in exercise, or such of them subsisting and capable of taking effect, but freed and discharged from all remainders, reversions, estates, rights, titles, interests, and powers to take effect after the determination or in defeasance of the base fees into which such estates tail respectively were converted by the operation of the said indenture of the 21st of August, 1884, and every of them.

This was a summons taken out by a purchaser of part of the lands to determine the question whether the indenture of the 7th of December, 1889, ought to have been acknowledged by Lady Manners and C. L. Hamlyn, the two tenants in tail, who were married women, under section 40 of the Fines and Recoveries Act.

Byrne, Q.C, and *Cruickshank*, for the summons, in support of the contention that the deed ought to have been acknowledged cited section 1, sub-section 1, and section 2 of the Married Women's Property Act, 1882, and *In re Smith's Estate*, 35 W. R. 514, 35 Ch. D. 589; *Cooper* v. *Macdonald*, 26 W. R. 377, 7 Ch. D. 288; *Bankes* v. *Small*, 35 W. R. 765, 36 Ch. D. 716; *Taylor* v. *Meads*, 13 W. R. 394, 4 De G. J. & S. 597;

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Roe v. *Baldwere*, 5 T. Rep. 104; Challis and Hood's Law of Real Property, p. 52.

Maclean, *Q.C.*, and *Maidlow*, for the vendors, argued that the deed passed the fee simple absolute.

They cited Fearne's Posthumous Works, p. 442; Burton's Compendium, s. 706; Preston's Conveyancing, vol. 1, s. 126; Pigott on Recoveries, p. 21.

Byrne, *Q.C.*, replied.

CHITTY, J., after stating the facts, continued as follows:—The question turns upon the effect which the Married Women's Property Act, 1882, has as to women married after its commencement upon the provisions as to married women contained in the Fines and Recoveries Act. The principal sections of these statutes are the 1st (sub-section 1) and the 2nd of the former Act, and the 1st, 15th, 19th, 40th, and 77th of the latter Act. The object of the latter Act, as appears from its title and provisions, was to abolish the cumbrous and expensive proceedings of fines and recoveries and to substitute more simple modes of assurance. In the case of married women, acknowledgment of the deed was substituted for the separate examination in court, and the concurrence of the husband was retained because his consent was required where his wife was a party to the fine or recovery, on the ground of his interest and of the necessity that he should be a party to proceedings in which his wife was concerned. Neither the concurrence of the husband nor the acknowledgment by the married woman was required for the purpose of protecting the settlement; special provisions for that purpose are separately made by the Act. Speaking generally, it was an object of the Married Women's Property Act, 1882, to remove the disability of coverture and to enable a married woman to hold and dispose of property as if she were a *feme sole*.

Now in order to arrive at the right conclusion in this case it appears to be convenient to consider the position of a married woman under the two statutes in reference to real property, first, where she is tenant in fee simple; secondly, where she is tenant in tail in possession or remainder; and, thirdly, where she has barred her estate tail, and the base fee has fallen into possession. As I have to deal only with the case of women married since the commencement of the Act of 1882, I must be understood, when speaking of a married woman, as meaning generally a woman married after the commencement of the Act of 1882.

First, as to the lands of which a married woman is tenant in fee simple in possession or remainder. The 77th section of the Fines and Recoveries Act, in substitution for the old fine, enables her by deed to dispose of such lands as effectually as she could do if she were a *feme sole*, save that no such disposition shall be valid unless the husband concurs in the deed and it is acknowledged. Section 1, sub-section 1, of the Act of 1882, read in connection with the 2nd section of the same Act, enables her to acquire and "dispose of" all real property belonging to her at the marriage, or acquired by or devolving upon her subsequently, as if she were a *feme sole*. It cannot be doubted that the effect of the Act of 1882 is to abolish in such cases the necessity of the concurrence of the husband and of the acknowledgment of the deed, and thus to enable the married woman to make a valid disposition of her fee simple lands, whether in possession or in remainder. If any support could be required for this opinion, it would be found in the decision of Lord Westbury in *Taylor* v. *Meads*, where, overruling the court below, he held that, notwithstanding the 77th section of the Fines and Recoveries Act, a married woman could, without acknowledged deed or the concurrence of her husband, dispose of an equitable estate in fee of lands limited to her in fee simple for her separate use

Secondly, where the married woman is tenant in tail in possession or remainder. By the 40th section of the Fines and Recoveries Act the disposition of the land by tenant in tail must be by deed, but if the tenant in tail is a married woman the same restrictions as to the concurrence of the husband and the acknowledgment as are found in the 77th section are imposed on her disposition to render it effectual. These restrictions, imposed simply in reference to the disability of coverture and the interest of the husband, appear to me to be also removed by section 1, sub-section 1, and section 2 of the Act of 1882. The restrictions being thus removed, her disposition takes effect under and subject to section 15 and the other provisions of the Fines and Recoveries Act just as if she were a *feme sole*. Consequently, where she is tenant in tail in possession her disposition bars the remainders over and passes a fee simple absolute; where she is tenant in tail in remainder her disposition without the consent of the protector bars the estate tail and creates a base fee.

I should not have entered upon the examination of these two questions had I not thought the discussion would assist in arriving at the right answer to the actual question which arises in this case. The precise question turns upon the 19th section of the Fines and Recoveries Act read in connection with the 1st, 15th, and 40th and the other sections of that Act, and the 1st section, sub-section 1, and the 2nd section of the Act of 1882. The 19th section applies where an estate tail has been barred and converted into a base fee, and in such case it empowers the person who, if such estate had not been barred, would have been actual tenant in tail "to dispose" of the lands as against all persons whose estates are to take effect after the determination or in defeasance of the base fee into which the estate tail has been converted, "so as to enlarge the base fee into a fee simple absolute." For the definition of the terms "base fee," "actual tenant in tail," and "tenant in tail," reference should be made to section 1 of the Act. According to that section "actual tenant in tail" means exclusively the tenant of an estate tail which shall not have been barred, and such shall be deemed an actual tenant in tail although the estate tail may have been divested or turned to a right; and "tenant in tail" means not only actual tenant in tail, but also a person who, where an estate tail has been barred and converted into a base fee, would have been tenant of such estate tail if the same had not been barred.

The power or right of enlarging the base fee is, by the 19th section, conferred, not on the person in whom the base fee is vested, but on the person who would have been actual tenant in tail had the estate not been barred. Where such person is a married woman the restrictions imposed by the 40th section apply to her disposition under the 19th section. The 19th section did not create a new right, but merely substituted a new and simpler mode of disposing of the lands for a fee simple absolute than that which previously existed. It was clear when the Act was passed that the tenant in tail, after he had barred the estate tail by fine, could afterwards, by suffering a recovery, bar the remainder over. There was, indeed, a question at one time whether the issue in tail could, after the estate tail had been barred by the ancestor's fine, bar the remainder over, but the better opinion was that the issue could do so. For authority on these points it will be sufficient to refer to the elaborate opinions of Mr. Fearne in his posthumous works and the decision there cited, and to Preston on Conveyancing and Burton's Compendium.

It is not surprising to find that the older lawyers were not agreed as to the reason why the recovery had this effect; perhaps the least fictitious and the

most intelligible to modern lawyers among the many reasons given is that a recovery was, in substance, regarded merely as a conveyance, and that a tenant in tail who, by levying a fine, and thus defeating or divesting the estate tail and turning it into a right had made the less operative conveyance, had not thereby destroyed his right to make the more sweeping conveyance by a recovery. Whether after the conveyance by fine to a third person there remained in the tenant in tail a *scintilla juris* or the estate tail was still deemed to subsist in him so as to make a subsequent recovery suffered by him effectual, by whatever name, more or less artificial, his right was called, and on whatever reason, however fictitious, his right was founded, it is clear that by a subsequent recovery he could convert the base fee created by a fine into a fee simple absolute. This right of completely unfettering the estate and conveying the whole fee may, if not with perfect precision, at all events with sufficient accuracy, be described "as real property belonging to" him.

Now it would be a strange and anomalous result of the two Acts of Parliament under consideration if a married woman can by deed not acknowledged and without the concurrence of her husband dispose of the lands for a fee simple absolute when she is tenant in tail in possession, but cannot dispose of the lands so as to enlarge the base fee into a fee simple absolute when the base fee has fallen into possession merely because she has, either when sole or covert, disposed of the lands for a base fee while her estate tail was in remainder. The argument for the purchaser was that the 19th section of the Fines and Recoveries Act conferred a mere power, and that this statutory power must be exercised strictly according to the statute by a married woman—that is, acknowledged deed and with the concurrence of her husband. This argument, if pressed to its extreme length, would, as it seems to me, result in denying to the married woman (married after the Act of 1882) the right of disposing of the lands of which she is tenant in fee simple or in fee tail. The contention of the purchaser was that the ladies, having disposed of the lands for a base fee to Lady Stucley by the deed of 1884, there remained in them no estate or interest or property at the time of their marriage, and consequently that it cannot be said as to these lands that there was any real property which belonged to them at their marriage or which was acquired by or devolved upon them afterwards within the meaning of the 2nd section of the Act of 1882.

It was urged that these words cut down the meaning of the words in the general enabling section (section 1, sub-section 1, which confers on married women the capacity of "disposing of any real property as her separate estate as if she were *feme sole*." In support of the argument reliance was placed upon the decision of the Court of Appeal in *In re Cuno*, 43 Ch. D. 12, where it was held that the force of the general enabling section was restricted by the 5th section in the case of a woman married before the commencement of the Act, a case with which I am not dealing. Marriage before and marriage after the commencement of the Act stand obviously on different footings. When the marriage had taken place before the Act an interest had already vested in the husband, of which it would be unjust to deprive him by a retrospective enactment.

But I do not question the proposition that in the case of a woman married after the commencement of the Act reference may properly be made to the 2nd section. Taking the two sections together I see no reason for adopting the narrow construction for which the purchaser contends. When Acts of Parliament are open to two interpretations the court is at liberty to adopt that which is the more reasonable and which makes the enactment as a whole consistent. The phrase in the 19th section of the Fines and Recoveries Act is "dispose of the lands," a phrase which constantly occurs in other parts of the Act. It tallies with the phrase "dispose of any real property" in section 1, sub-section 1, of the Act of 1882. The terms "any real property which shall belong to her" in the 2nd section (although terms not unusual among lawyers) are not highly technical terms requiring a perfectly strict construction, such, for instance, as the word "seised." The case of *In re Smith* is distinguishable. There it was held that where a restricted power was conferred on a married woman for a special object by a particular statute (43 Geo. 3, c. 108), which itself created an exception out of a former general prohibitory statute, the restrictions on the power were not removed by a general enabling Act (the Act of 1882). In the case before me I am dealing with two general Acts.

In the result, for the reasons above stated, I hold the deed of December, 1889, was effectual to pass the fee simple absolute. The order should be drawn stating my opinion to that effect. The purchaser must pay the costs.

Solicitors, *Daniel Jones & Linnett*, for *W. Morgan Griffiths*, Carmarthen; *Church, Rendell, Todd, & Co.*, for *Pitts, Tucker, & Sons*, Barnstaple.

Chan. Div. North, J. — Oct. 28, 29; Jan. 14.

In re QUEENSLAND MERCANTILE AND AGENCY CO. (LIMITED).

Ex parte AUSTRALASIAN INVESTMENT CO. (LIMITED).

Ex parte UNION BANK OF AUSTRALIA (LIMITED). (a.)

Conflict of law—Company—Uncalled capital—Debenture—Scotch arrestment—Priority—Notice.

The Queensland Mercantile and Agency Co. issued debentures to the Union Bank of Australia charging the uncalled capital in respect of some of its shares. After call, but prior to payment, the Australasian Investment Co. obtained in Scotland an arrestment on the unpaid calls of shareholders resident in Scotland. Such shareholders had no notice of the debentures.

Evidence was given that a Scotch arrestment was equivalent to an assignment with notice, and had priority to an assignment without notice.

The Queensland Co. was being wound up in Queensland and England, the law in both countries being the same.

Held, that the Australasian Investment Co. had priority, as Scotch law regulated priority on the proceeds of Scotchshares.

Summons.

A summons was issued by the Union Bank of Australia, which was an English company, asking that the English liquidator in the winding up of the Queensland Mercantile and Agency Co. might be ordered to transfer to the bank the sums of New Consols and cash standing in his name which represented the proceeds of calls in respect of the Queensland Co.'s shares numbered 1 to 2500.

Another summons, by the Investment Co., was heard at the same time, asking that, out of the money received from the Scotch shareholders in the Queensland Co. the sum of £12,666 4s. 5d. might be paid to the Investment Co. in priority to all other payments.

The Queensland Co. was registered, and carried on

(a.) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

besiness in Queensland, and issued, in 1866, debentures to the Union Bank, by which the sums secured were made a first charge on the uncalled capital of the shares numbered 1 to 2500, upon each of which £50 was then uncalled.

In 1886 the £50 per share was called up, of which the first instalment was payable in February, 1887.

Notice of the call, but no notice of the debentures was given to the shareholders.

In February, 1887, the Investment Co., which was a Scotch company, obtained in Scotland an arrestment against holders of the Queensland Co.'s shares in Scotland, which made them secured creditors.

Various actions were commenced in England against the Queensland Co., and a receiver appointed to get in the calls.

Winding up proceedings were commenced, and orders made both in Queensland and England.

The official liquidator received from Scotch shareholders about £25,000.

The amount claimed by the bank was ascertained in the Queensland winding up, and, after allowing for securities, amounted to £31,000.

The Investment Co. and the English judgment creditors both claimed priority to the bank.

Sir Horace Davey, Q.C., Buckley, Q.C., and *S. Dickinson*, for the bank. — Priority between claimants to a debt is determined by the law of the domicil of the creditor who owns it: *Hunter* v. *Potts*, 4 T. R. 182; *Sill* v. *Worswick*, 1 H. Bl. 665; Story's Conflict of Laws, ch. 9, s. 374; *Colonial Bank* v. *Cady*, *ante*, p. 17, 15 App. Cas. 267; and *Simpson* v. *Fogo*, 1 H. & M. 195. The law of Scotland does not apply. The arrestment is only a judgment, and does not affect the interest of the debenture-holders. Claimants under judicial process against the assignors can only take subject to the prior debenture charge: *Badeley* v. *Consolidated Bank*, 36 W. R. 745, 38 Ch. D. 238; *Ex parte Whitehouse*, 34 W. R. 681, 32 Ch. D. 512; and *Eyre* v. *McDowell*, 9 H. L. Cas. 619. The doctrine of notice has no application in favour of a judgment creditor.

Crackanthorpe, Q.C., and *Rawlins*, for the Investment Co.—The evidence of Scotch law is clear that the assignment of the calls by the debentures was ineffectual for want of notice at time of arrestment. It is undisputed that the effect of the arrestment and notice was the same as an actual assignment, and the shareholders in Scotland had no notice of the prior assignment, so that even by English law the Investment Co. has priority as assignees by virtue of the arrestment: *Arden* v. *Arden*, 33 W. R. 593, 29 Ch. D. 702.

Everitt, Q.C., and *Swinfen Eady*, for the English judgment creditors.

Cozens-Hardy, Q.C., and *Kenyon Parker*, for the English liquidator.

Buckley, Q.C., replied.

NORTH, J., held that the debentures created a valid charge on the uncalled capital, and had priority to the English judgment creditors, and reserved judgment on the question of priority as between the Investment Co. and the bank.

Jan. 14.—NORTH, J.—The only evidence in this case of the Scotch law is contained in the affidavit of the Scotch solicitor of the Australian Investment Co. I do not think this satisfactory, but as the Union Bank of Australia have not asked me for an opportunity to go into additional evidence, the evidence as to Scotch law, which is here a question of fact, is all one way. By such evidence it appears that an arrestment is equivalent to an actual assignment of the calls in dispute duly intimated, and that this has by the law of Scotland priority over the assignment of the bank, intimation of which had not been given at the date when the assignment by arrestment became complete, and I am compelled to decide accordingly.

On behalf of the bank it was contended that the claim of the Investment Co. could only be valid as against "the sums attached," which was alleged to be what might remain of the calls after satisfying the bank's claims, but this is inconsistent with the language of the arrestment, which applies specifically to the whole sum due for calls from each shareholder on whom the arrestment was served. Further, that after the assignment to the bank all that the Queensland Co. had left was the surplus remaining over after paying the bank; that the rest of the calls belonged to the bank; and that it was contrary to principle and authority to hold that a process of law against the debtor could affect what was the property of the bank. In this case, however, I have not to deal with a mere process of law, but with what is established as a fact to be equivalent to an actual assignment, and which, on the evidence, I must regard as if an actual assignment had been executed and intimated.

The bank also claim priority in another way. They say that whatever the position of matters might be if all the parties had been domiciled in Scotland, they in fact are not so; that the Queensland Co. were creditors in respect of the debt due from the shareholders for calls; that this company was domiciled in Queensland, and therefore the validity of their assignment to the bank depends upon the law of Queensland, and not on that of the debtor's residence; that by the law of Queensland no notice was necessary, and that a transfer of personal or movable property valid by the law of the owner's domicil is valid wherever the property is situated. They rely on the principle *mobilia sequuntur personam*, or as Lord Loughborough states in *Sill* v. *Worswick*, 1 H. Bl. 690: "It is a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession." There is, however, another rule, that a transfer of movable property duly carried out according to the law of the place where it is situated is not rendered nugatory by showing that such transfer as carried out is not in accordance with what would be required by law in the country where its owner is domiciled. Now, the Queensland Co. did certain acts by virtue of which certain legal rights arose in Scotland having identically the same effect in all respects as if the Queensland Co. had on the date of the arrestment executed an assignment of the calls in question to the Investment Co. and such assignment had been forthwith intimated to the persons in whose hands the calls were arrested. Such an assignment would, according to the evidence, clearly have been preferred to another assignment of an earlier date not completed by notice, and in my opinion the right of those who have acquired an unexceptionable title and have recovered the property according to the law of the country where it is found

and arrested cannot be defeated by showing that if the property had been elsewhere the bank's title might have been the better. I speak of the Investment Co. having recovered the calls, though as a matter of convenience they have been received by the official liquidator, because they would have actually received them if the action had not been stayed, and the rights of the parties cannot be affected by the court having stayed the action, as by the order staying the action their right or security was expressly left unprejudiced.

I accede to the summons of the Investment Co., and direct payment of the balance of the Scotch calls to the bank.

Solicitors, *Murray, Hutchins, & Stirling; Clarke, Rawlings, & Co.; Drake, Son, & Parton; Flower & Nussey.*

Court of Appeal.

From Chan. Div. Nov. 18—21; Dec. 16.

SIMMONS *v.* LONDON JOINT-STOCK BANK.
LITTLE *v.* LONDON JOINT-STOCK BANK. (a.)

Banker—Broker—Pledge of securities en bloc*—Negotiable instrument—*Bonâ fide *holder for value—Foreign bonds—Share warrants in English company—Companies Act,* 1867, *s.* 27.

Authority given to a stockbroker by his client to pledge the client's securities does not carry with it in law an implied authority to pledge the client's securities en bloc *with those of others for a lump sum.*

S. had deposited for custody with a stockbroker bonds of a foreign corporation, transferable by delivery from hand to hand. The stockbroker, to raise money for his own purposes, and without the knowledge of S., sold the bonds, but on the same day repurchased similar bonds of equal value, and immediately on their delivery made an entry in his books substituting the numbers of the newly-purchased bonds for the numbers of the original bonds belonging to S. The bonds so purchased were paid for by the stockbroker by means of a crossed cheque (dated the 28th of October, 1887) *drawn by him on his own bank. In order to put himself in funds at the bank to meet the whole of the cheques drawn by him on that day, the stockbroker, on the same day, but after the said alteration of the numbers in his book, pledged the bonds so purchased, together with other securities,* en bloc *to the bank; and the bank thereupon credited his account with a large advance, out of which the whole of the cheques drawn by him on the 28th of October were cashed. The stockbroker subsequently absconded, and S. brought an action against the bank to recover the price of the bonds in question, which had been sold by the bank at a price admittedly fair, together with interest thereon at four per cent.*

The inferences of fact drawn from the evidence by the Court of Appeal were—(a) *that the bank knew that the bonds in question might probably belong to a client of the stockbroker;* (b) *that the bank did not believe that the stockbroker had been expressly authorized by his client to pledge the bonds* en bloc *with the securities of other persons; but* (c) *that the bank, relying on the honesty of the stockbroker, believed that he had been authorized by his client to raise some money on the bonds, and honestly believed that such authority carried with it as a matter of law authority to pledge the bonds* en bloc.

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

Held, on these facts, that the stockbroker had appropriated the newly-purchased bonds to S. before pledging them to the bank, and, even assuming that the bonds in question were negotiable instruments in the full sense of the term "negotiable," yet that the bank never became bonâ fide *holders of the bonds for value without notice, and accordingly that S. was entitled to the relief claimed.*

The same stockbroker, acting on instructions from L., and having received money from him for that purpose, purchased for L. shares in a foreign company, shares in an English company, and bonds of a foreign Government. The share certificates of the foreign company were transferable by delivery from hand to hand, as were also the share warrants of the English company, and the bonds of the foreign Government were payable to bearer.

With respect to the foreign company's shares, those purchased for L. were delivered to the stockbroker, who entered them by their numbers in his book as belonging to L. With respect to the English company's shares, those contracted to be purchased for L. were not delivered to the stockbroker, but he purchased and took delivery of a number of similar shares, and entered them as L.'s in the number book. With respect to the bonds of the foreign Government, they were contracted to be purchased for L. in two lots, and one lot so purchased was actually delivered to the stockbroker, and their numbers entered as L.'s in the number book. The other lot was not delivered to the stockbroker, but he purchased and took delivery of an equal number of similar bonds, and entered them as L.'s in his number book. The stockbroker, without the knowledge of L., pledged these shares and bonds en bloc *with securities belonging to others, to his bank for objects and under circumstances similar to those mentioned with regard to the bonds of S.*

The same inferences of fact were drawn by the Court of Appeal from the evidence in L.'s case as in the case of S.

Held, on these facts, that the shares and bonds taken by the stockbroker in substitution of those contracted to be purchased for L. had been appropriated by the stockbroker to L. before they were pledged to the bank, and, assuming that the bonds and shares in question were negotiable instruments in the full sense of the term, that the bank were not bonâ fide *holders for value without notice, and, accordingly, that the bank should restore them to L.*

Quære, *whether the shares in question were negotiable instruments.*

Decision of Kekewich, J., *affirmed.*

Appeals from Kekewich, J.

SIMMONS *v.* LONDON JOINT-STOCK BANK.

In 1887 the plaintiff Simmons was a customer of the firm of Herapath, Delmar, & Co., who carried on business as stockbrokers on the London Stock Exchange.

On October 12, 1887, the said firm held for safe custody on behalf of the plaintiff, bonds belonging to him of the Buenos Ayres Land Mortgage Bank of the "J" series (generally known on the London Stock Exchange as "Cedulas") for the amount of 15,000dols.

On that day the said firm, desiring to obtain a temporary advance, and without any authority or knowledge of the plaintiff, entered into a contract with Messrs. Prior & Williams (a firm of stock jobbers) for the sale of the said bonds for the next settling day (October 14), and also on the same day (October 12) contracted with Messrs. Prior & Williams to repurchase for October 28 like bonds of the same amount (15,000dols.).

In pursuance of this contract the said firm on October 14 delivered the plaintiff's bonds to Messrs. Prior & Williams, and on October 28 in pursuance of the contract for repurchase the said firm received from a firm of brokers named Greenwell & Co.,

"Cedula" bonds of the "J" series for the same amount but with different denoting numbers.

The defendant bank was the bank with which the said firm dealt; and the said firm paid Messrs. Greenwell & Co. for the bonds delivered by Messrs. Greenwell & Co. to them by a crossed cheque for £1,845 drawn on the defendant bank.

The said firm on receipt of the bonds so purchased from Messrs. Greenwell & Co. immediately entered the same (in the usual course of business) in their number book as belonging to the plaintiff.

On the morning of October 28 the said firm had a balance to their credit at the defendant bank which exceeded the sum of £1,845, but they required to draw other cheques for large amounts on the defendant bank on that day, and accordingly, in order to provide money to meet the various cheques drawn by them on the defendant bank on that day, they, on the same day (October 28), deposited with the defendant bank the bonds delivered to them by Messrs. Greenwell & Co., together with other securities, and the defendant bank thereupon placed the sum of £6,000 to their credit, and the various cheques drawn by the said firm on the defendant bank on October 28 (including the cheque for £1,845) were duly paid.

The bonds so deposited with the defendant bank remained in their custody (Delmar meanwhile paying the plaintiff Simmons the interest thereon) till June, 1888, when Delmar failed and left the country. The defendant bank then sold the bonds, together with the other securities so deposited, for a price admittedly fair. On June 14, 1888, the plaintiff Simmons, having then first discovered what had been done by Delmar, brought this action against the defendant bank to recover the amount of the bonds. Kekewich, J., held that the plaintiff Simmons was entitled to succeed, and that the measure of the liability of the defendant bank was the price which the securities had realized, with four per cent. interest from the date of realization.

The defendant bank appealed.

Sir Horace Davey, Q.C., Finlay, Q.C., and *W. D. Rawlins*, for the appellants.—Two questions arise—First, assuming that the bonds deposited with the bank were the plaintiff Simmons's bonds, can the plaintiff recover them or their proceeds from the bank under the circumstances of the case—*i.e.*, Have not the bank a good title to the bonds as against the true owners? Secondly, were the bonds so deposited in fact ever Simmons's bonds at all? The judge below held as an inference from the course of dealing between the bank and the brokers that the bank were put on inquiry to see whether the bonds did or did not belong to the brokers, and that the bank, not having inquired, did not take the bonds with due care, and he accordingly held that the case was governed by *Sheffield* v. *London Joint-Stock Bank*, 37 W. R. 33, 13 App. Cas. 333. The judgment of the House of Lords in that case, however, depended on the inference of facts drawn from the course of business in that particular case—viz., that Mozley's business consisted in lending his clients' securities to banks at a higher rate of interest than that at which he got them from his clients, and that the bank there knew that was Mozley's business. The essential facts in that case are not to be found here. The evidence only shows that the course of dealing between the bank and the brokers was that the brokers were allowed to withdraw securities they had deposited with the bank and to sell or replace them, provided they kept their securities up to a certain proportion with the advances received from the bank. The bank were entitled to take the securities without presuming fraud or dishonesty on the part of the brokers. These bonds passed by delivery on the Stock Exchange, and they were treated as negotiable instruments according to the admissions made in the court below. [LINDLEY, L.J.—Negotiable in what sense? as instruments passing by delivery, or as negotiable in the sense in which a bill of exchange is negotiable? *Crouch* v. *Credit Foncier*, 21 W. R. 946, L. R. 8 Q. B. 374.] Negotiable in the sense that the title to the property in them passes by delivery: *Goodwin* v. *Robarts*, 24 W. R. 987, 1 App. Cas. 476; *Lorymer* v. *Smith*, 1 B. & C. 1; *Gorgier* v. *Mieville*, 3 B. & C. 45; *Wookey* v. *Pole*, 4 B. & Ald. 1. The course of dealing between brokers and their clients depends on what is called the custom of "continuations": *Bongiovanni* v. *Société Générale*, 54 L. T. N. S. 320, 24 W. R. Dig. 154. But in fact the bonds deposited with the bank were not Simmons's bonds, nor had they been appropriated as Simmons's by Delmar. Delmar had no power to appropriate them to Simmons absolutely, for he had not then paid for them, the cheque which he gave in payment for them not having been then cashed, and it was not cashed until after Delmar had deposited the bonds with the defendant bank; payment by cheque is only conditional payment, and until the cheque is cashed the property does not pass to the purchaser: *Loughnan* v. *Barry*, Ir. Rep. 6 C. L. 457; *Bishop* v. *Shillito*, 2 B. & Ald. 329; Benjamin on Sales, 4th ed., pp. 282, 304; the utmost interest in the bonds that Delmar had power to appropriate to Simmons was the equity of redemption after the lien of the bank had been discharged.

Rigby, Q.C., Warmington, Q.C., and *Grosvenor Woods*, for the plaintiff Simmons.—We have never admitted that these "Cedulas" are negotiable instruments in the legal sense of that term, although we do admit that they pass by delivery from hand to hand on the Stock Exchange. The bank took them subject to the equitable rights of Simmons: *Crouch* v. *Credit Foncier*. The case of *Goodwin* v. *Robarts* was commented on in *Colonial Bank* v. *Cady*, *ante*, p. 17, 15 App. Cas. 267, *per* Lord Bramwell, at p. 282. The present case is governed by *Sheffield* v. *London Joint-Stock Bank*. In the present case the evidence and the admissions together show that it is a well-known course of business for stockbrokers, in addition to buying stocks for their clients, to advance money to their clients, and in order to get the money to pledge their clients' securities *en bloc* to bankers, the bankers, on the other hand, allowing the securities so pledged to be from time to time withdrawn. The bank in the present case knew that this was the practice of the firm of Herepath, Delmar, & Co., and the bank must, from the course of business they had with that firm, be taken to have known that the firm dealt with securities of their clients, and not their own securities, when they pledged the securities *en bloc*. The bank, therefore, were bound to inquire whether the firm had authority from the clients whose securities they pledged to act in that way: *Cooke* v. *Eshelby*, 35 W. R. 629, 12 App. Cas. 271. On the point as to appropriation, the appropriation to Simmons was really complete on the 12th of October, because the direction or destination of the bonds to be repurchased was fixed on that day, and the bonds, when delivered to Delmar & Co. on the 28th of October, were delivered in accordance with the antecedent direction of the 12th of October. [BOWEN, L.J.—The other side say that these bonds could not be appropriated by Delmar to Simmons until they came into Delmar's possession, and that they only did so subject to the lien of the bank.] There is no evidence to show that the cheque given for these bonds was cashed out of the £6,000 advanced by the bank when

these bonds and other securities were deposited with them. On the morning of the 28th of October Delmar had a balance to his credit at the bank, and there is no evidence to show that payment of the cheque he gave for these bonds would or could have been refused by the bank if these bonds had not been deposited with them.

Finlay, Q.C., in reply.—The cheques drawn by Delmar & Co. on the 28th of October were all Clearing House cheques, which came in at the same time, and were all honoured in respect of the £6,000 advanced by the bank. The bank were *bonâ fide* holders for value of the bonds. The bank believed that Delmar & Co. had authority from their clients to pledge the bonds, and that gives them a good title: *Foster* v. *Pearson*, 1 Cr. M. & R. 849; *Haynes* v. *Foster*, 2 Cr. & M. 237.

LITTLE *v.* LONDON JOINT-STOCK BANK.

The securities which formed the subject-matter of this appeal were as follows:—

(1) Certificates for fifty shares in the Imperial Ottoman Bank. These shares passed by delivery of the certificates from hand to hand. They had been bought for the plaintiff Little with Little's money by Herapath, Delmar, & Co., and it was admitted that they had been appropriated to Little by being entered in the books of the firm as Little's before they had been deposited by the firm with the defendant bank.

(2) Share warrants for seventy-five shares in the Rio Tinto Co. This was an English company, and share warrants had been issued with respect to these shares under section 27 of the Companies Act, 1867, stating that the bearer was entitled to the shares therein specified. In April, 1887, Little had instructed Delmar & Co. to purchase for him 100 Rio Tinto shares. The said firm accordingly, on the 9th of April, contracted to buy 100 such shares from Messrs. Prior & Williams. When the time for delivery came it was found that, in the state of the transactions between the said firm and Messrs. Prior & Williams, that the former were bound to deliver to the latter 110 Rio Tinto shares, and accordingly the said firm received no Rio Tinto shares from Messrs. Prior & Williams, but they obtained, on 26th of April, the seventy-five Rio Tinto shares in question from another firm, Messrs. Gregg & Argenti. Little paid the said firm the price of the shares by two cheques given on the 26th and 27th of April respectively. The said firm, without Little's authority or knowledge, on the 26th of April deposited the share warrants for the seventy-five shares, along with other securities, with the defendant bank in order to cover their account there. The shares had been appropriated to Little by being entered in the books of the said firm as belonging to Little, but whether such appropriation took place before or after the advance was made by the bank was a matter of dispute.

(3) Bonds of the Republic of Uruguay Five per Cent. Unified Loan of 1883. Each bond was in the following form:—"The bearer of this bond is entitled to the principal sum of £—, part of the above-mentioned loan, and will be entitled to receive payment of the said principal sum on presentation, and against remainder hereof and of all unmatured coupons, at the counting house of —— in London."

These bonds had been bought by the said firm for Little in two lots. The first lot (of the nominal value of £1,500) was contracted to be bought on the 9th of March, 1888, for the next account day (March 14), and were received by the said firm on that day, and deposited on the next day with the defendant bank as security for advances. They were appropriated to Little by the said firm in their books on the 14th of March. The second lot (of the nominal value of £2,000) was purchased under circumstances similar to those already stated with regard to the Rio Tinto shares. The contract for purchase was made on the 4th of April, 1888, but Delmar & Co. did not receive them till the 26th of April, on which day the said firm deposited them with the defendant bank. They were entered in the books of the said firm, under the date of the 26th of April, as purchased for Little. The said firm paid for these bonds and other securities by cheques drawn on the defendant bank, and but for the advances obtained from the bank on the 26th of April, by means of the securities deposited with the bank on that day, the said firm would not have had sufficient funds at the bank to meet all the cheques drawn by the said firm on that day.

When Delmar absconded in June, 1888, the plaintiff Little for the first time discovered what had been done by Delmar, and then brought this action against the defendant bank.

Kekewich, J., decided in favour of the plaintiff Little, and held that the defendant bank should hand over to the plaintiff Little the various securities in question (which had not been realized), and should account to the plaintiff for any difference in the value of the securities on the 14th of June, 1887 (the date of the issue of the plaintiffs' writ in the action), and the date of trial.

The defendant bank appealed.

Finlay, Q.C., and *W. D. Rawlins*, for the appellants.—First, as to the Uruguayan bonds. According to the law of Uruguay these bonds pass by mere delivery, and therefore they are negotiable instruments in the full sense of that term—*e.g.*, so that a person taking them honestly and for value, even from a thief, acquires a good title to them: *Miller* v. *Race*, 1 Smith's L. C., 9th ed., p. 491; *Glyn* v. *Baker*, 13 East, 509; *Gorgier* v. *Mieville*, 3 B. & C. 45; *Lang* v. *Smyth*, 7 Bing. 284; *Crouch* v. *Credit Foncier*, 21 W. R. 946, L. R. 8 Q. B. 374. *Goodwin* v. *Robarts*, 24 W. R. 987, 1 App. Cas. 476, is in our favour, the terms of the special case there stated are given in the report in the *Law Journal*: 44 L. J. Ex. 57. [BOWEN, L.J., referred to the observations made by Lord Selborne, L.C., in *France* v. *Clark*, 32 W. R., at p. 468, 26 Ch. D., at p. 264, as to *Goodwin* v. *Robarts*. LINDLEY, L.J., referred to *Rumball* v. *Metropolitan Bank*, 25 W. R. 366, 2 Q. B. D. 194.] It is a matter of law whether the transferee has a better title than the transferor. Secondly, the Rio Tinto shares are negotiable instruments by virtue of section 27 of the Companies Act, 1867; and the other documents are negotiable instruments by virtue of the usage showing that, according to the law of the foreign countries in which they issued, they are so treated.

They also referred to *Ware* v. *Lord Egmont*, 3 W. R. 48, 4 De G. M. & G. 460, and *Jones* v. *Smith*, 1 Ha. 43.

Rigby, Q.C., *Warmington, Q.C.*, and *Grosvenor Woods*, for the respondent, the plaintiff Little.—There is no evidence to show that the bank would or could have refused to cash the cheque drawn by the brokers on the 26th of April to pay for these securities, unless these securities were deposited with them to cover the advance of £6,000. As to the documents being negotiable instruments, in no case except *Rumball* v. *Metropolitan Bank* has it ever been held that any document other than a security for money could be a negotiable instrument. In *Goodwin* v. *Robarts* the documents were treated as giving the holder a right to the money. Section 27 of the Companies Act, 1867, was never intended to make share warrants and scrip negotiable. There is no evidence

of custom amounting to a growth of the law merchant to show that these securities are negotiable in the full sense of that term.

Finlay, Q.C., in reply, mentioned *Dixon* v. *Bovill*, 4 W. R. 813, 3 Macq. 1.

Dec. 16.—BOWEN, L.J., read the following judgment of the COURT (LINDLEY, BOWEN, and FRY, L.JJ.):—The plaintiff was a customer of Herapath, Delmar, & Co., stockbrokers, and the action is brought against the defendants, who were Herapath, Delmar, & Co.'s bankers, to recover the value of certain Argentine bonds of the Bank of Buenos Ayres, to the value of 15,000dols. The bonds were securities to bearer, issued with a Government guarantee, and circulated on the European markets. The plaintiff had left in the hands of Delmar, one of the members of Herapath, Delmar, & Co., for custody Argentine bonds to the above amount, but on October 12, 1887, Delmar, desiring to raise money for purposes of his own, and without any authority from the plaintiff, contracted to sell the plaintiff's said bonds to Messrs. Prior & Co. for the sum of £1,820, and on the same day made a further contract to repurchase similar bonds to the value of 15,000dols. for the 28th. On the 28th of October Delmar gave delivery of the bonds he had contracted to sell in three separate lots, and on the same day took delivery from a firm named Greenwell & Co. of the similar but different bonds which he had contracted to buy. Delmar's account with the defendants was overdrawn. For the bonds so delivered to him he paid by a crossed cheque, and in order to put himself in funds to meet it he sent the bonds of which he had taken delivery, with other securities, to the defendant bank, on receipt of which the defendants placed £6,000 to his credit. Out of this sum Delmar's cheque was cashed when it arrived through the Clearing House at the defendant bank. The bonds so deposited remained in the custody of the bank till Delmar failed and left the country in June, 1888. Thereupon the plaintiff, on the 14th of June, applied to the bank for the bonds, which, however, had been sold with the rest of Delmar's securities for a price that is admitted to have been fair.

The counsel for the defendants, who are the appellants, contended, in the first place, before us that the bonds deposited on the 28th with the defendants were Delmar's bonds, and not the plaintiff's, and that the plaintiff was not entitled to complain of their being sold by the defendants against Delmar's debt. It is true that they were not the original bonds left by the plaintiff in Delmar's hands. It becomes necessary, therefore, to consider whether they had become the plaintiff's by substitution and appropriation before being pledged by Delmar to the bank. The contention on the part of the appellants was that the property in the newly-purchased bonds did not vest in Delmar till his cheque was cashed, and that even if it did there was no complete appropriation of the bonds by Delmar to the plaintiff until he had raised the money to pay for them by pledging them to the bank. We are of opinion that the property in the bonds passed to Delmar on the delivery of the bonds in exchange for Delmar's cheque. It is, of course, conceivable in law that by the terms of any particular contract the property in goods delivered may be reserved by the vendor until he sees whether the cheque received by him is honoured, but this is not the ordinary effect of a transaction in which goods are paid for by cheque, and we entertain no doubt that the property in the bonds passed to Delmar on their delivery.

Then comes the inquiry whether there was any appropriation by Delmar of the bonds to the plaintiff, and when such appropriation, if any, took place. When Delmar parted in the first instance with the plaintiff's original bonds his real object was to raise money. The transaction was, indeed, effected by a sale of the plaintiff's bonds and a repurchase of others, which he intended to substitute in their place; but Delmar only parted with the plaintiff's bonds because he could not effect his object in any other way, and would be anxious to replace them by others as soon as possible. Before sending the newly-purchased bonds to the bank a correction was, in fact, made in Herapath, Delmar, & Co.'s number book, which earmarked the new bonds as the plaintiff's; and, although it was attempted to be shown that such entry was made without express authority on Delmar's part, we are of opinion that it was made in the course of his business by an agent who had implied authority to make it, and with a view to complete the transaction. We entertain no doubt, accordingly, that before the bonds were deposited with the bank, and before any lien of the bank could attach, the bonds had become, by substitution and appropriation, the property of the plaintiff.

This leads us to the next contention on the part of the appellants—viz., that the bonds were negotiable securities, and that, the bank having taken them for value and in good faith, without notice that they belonged to Delmar's principal, are entitled to hold them against all the world. Whether the bonds in question were negotiable securities in any sense in which such a commercial doctrine could apply was a matter left unproved. A negotiable instrument payable to bearer is one which by the custom of trade passes from hand to hand by delivery, and the holder of which for the time being, if he is a *bonâ fide* holder for value without notice, has a good title notwithstanding any defect of title in the person from whom he took it. A contractual document, in other words, may be such that, by virtue of its delivery, all the rights of the transferor are transferred to and can be enforced by the transferee against the original contracting party, but it may yet fall short of being a completely negotiable instrument, because the transferee acquires by mere delivery no better title than his transferor. An admission was made at the trial to the effect that these bonds were commonly transferred from hand to hand by delivery, and this must be taken to be true. But the admission was carefully limited, and still left uncovered the question whether they are negotiable instruments in the sense in which bills of exchange and promissory notes are negotiable, so that delivery by a person who has no title confers, nevertheless, a title on a *bonâ fide* holder for value without notice. We should require either a more unqualified admission or else more conclusive evidence before we could accept the view that bonds like these had become part of the currency of this country so as to have acquired the peculiar characteristics of a completely negotiable instrument. The appellant's counsel alleged that they had been misled at the trial by the form of the admission, and asked that, before we decided the case on the hypothesis that these bonds were not completely negotiable, an issue might be directed to try that question. For fear of a miscarriage of justice we will, therefore, assume in the appellant's favour, and for the purpose of this case only, that the documents in question had been proved to be completely negotiable instruments, and we proceed to inquire, on that assumption, whether the bank, even if this were so, ever became *bonâ fide* holders of them for value, without notice of the infirmity of the title of Delmar.

The inferences of fact which we draw, partly from the admissions of the bank's officers and partly from the absence of testimony on their part which might

have been given if the fact had been otherwise, are as follows. The bank, we think, were aware that the bonds might very probably belong not to Delmar at all, but to one or more of his clients. The bank took it for granted that, if the bonds did not in fact belong to Delmar, he had been authorized by the real owner to raise money on the bonds, within the limit of their market value. This assumption and belief were based, not on inquiry or investigation, but on the bank's faith in the honesty of Delmar, and was, in fact, erroneous. But the bank did not believe that Delmar had been authorized by the real owner to deposit the bonds *en bloc*, together with other securities, which belonged to other persons, and to raise a lump sum upon the whole. The bank were, indeed, honestly of opinion that Delmar might lawfully do so, but we think that they based this view upon a mistaken assumption that such deposit *en bloc*, without authority from the client, was recognized by the law. In other words, they knew that the bonds in question might probably belong to a third person; they did not know and did not believe that the owner had authorized their being deposited and pledged *en bloc*, but they honestly believed that such an authority from the owner was not necessary in law, if he had sanctioned (as the bank assumed from their faith in Delmar's honesty to be the case) the pledging of the documents for any sum of money whatsoever. If this be the true view of the transaction, the bank never became *bonâ fide* holders for value without notice, since they never believed that Delmar was the true owner, and never, indeed, believed that any authority had been given by the true owner, which alone in law could justify what was being done. On the contrary, they chose to shut their eyes to this necessary part of the inquiry, under a misconception of the law. The case of *Earl of Sheffield* v. *London Joint-Stock Bank* seems to show that, under such circumstances, the bank acquired no title to the bonds as against the true owner. The appeal, therefore, in the case of *Simmons* v. *London Joint-Stock Bank*, must be dismissed with costs.

We come next to the case of *Little* v. *London Joint-Stock Bank*. In this action the plaintiff Little claims to be entitled to relief against the bank in respect of various securities, which may be classified as follows:—Certificates for shares of £20 each, with £10 paid thereon, in the Imperial Ottoman Bank; share warrants for shares in the Rio Tinto Mining Co. (Limited); bonds in the Uruguay Five per Cent. Unified Loan of 1883. We are ready, as in the previous appeal, to assume, for the purposes of the argument, and in the defendants' favour, that all these securities were impliedly negotiable, although it is difficult to see how shares, share warrants, or certificates of shares in a company, which are not securities for money, can be entitled to that description, and although without further evidence or further admission than was given at the trial, we should question much whether any of the securities in question, at all events other than the Uruguay Government bonds, were completely negotiable instruments within the known commercial and legal definition of that term. We assume, however, for the purposes of the case that they all were negotiable instruments. All of these securities were deposited by Delmar with the defendants for objects and under circumstances similar to those under which the bonds of Mr. Simmons in the previous action were deposited.

It follows, therefore, that the rights of the parties in respect of them will be governed by our previous decision in *Simmons* v. *London Joint-Stock Bank*, unless, on examination of the facts in the present action, it should appear that in the case of any of the securities there was no appropriation by Delmar to the plaintiff prior to the deposit with the bank. We proceed, therefore, to examine the question whether there was in fact such an appropriation in respect of all or any of these securities. 1. As to the certificates for shares in the Ottoman Imperial Bank, it was not disputed before us that there had been the necessary appropriation. 2. As to the share warrants for the Rio Tinto shares, on the 9th of April, 1888, Delmar, on the plaintiff's instructions, bought for him from Messrs. Prior & Williams 100 Rio Tinto shares, of which the seventy-five claimed in this action formed a portion. When the time for delivery arrived Delmar received, through the Stock Exchange Clearing House, not the identical shares which he had purchased from Prior & Williams, but an equal number of similar shares from Messrs. Gregg & Argenti. These were received, however, by Delmar in substitution for the actual shares which were the subject of the contract with Prior & Williams, and were appropriated to the plaintiff by number in Herapath, Delmar, & Co.'s number book. They became, thereupon, in our opinion, to all intents and purposes the plaintiff's shares. 3. The Uruguay Five per Cent. Unified Loan bonds. These bonds were divided in the argument before us into two lots, the first consisting of bonds to the value of £1,500; the second of bonds to the value of £2,000. As to lot one, no dispute as to the appropriation was raised before us by the defendants. As to lot two, the circumstances of their purchase were in substance similar to those narrated already in reference to the Rio Tinto shares, and the appropriation to the plaintiff was effected in the same manner. The result is that, with regard to all the securities in respect of which the plaintiff Little claims, the appropriation to him was complete before deposit with the bank, and Little's action comes accordingly within our decision in the case of Simmons. The appeal in Little's case must also, therefore, be dismissed with costs.

Appeals dismissed.

Solicitors, *R. S. Gregson; Clarke, Rawlins, & Co.*

App. Bankruptcy. April 10.

Ex parte BOARD OF TRADE.
In re WALLIS (*a.*)

Bankruptcy—Application by bankrupt for discharge—Leave to withdraw application—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-section* 2.

The Bankruptcy Court has the same inherent jurisdiction as other courts to give leave for the withdrawal of any application previously made to it, and there is no exception in the case of an application by a bankrupt to withdraw a previously-made application for a discharge under section 28 *of the Bankruptcy Act,* 1883.

Appeal from an order of Mr. Registrar Brougham allowing a bankrupt to withdraw an application for his discharge.

The bankrupt, Wallis, had applied under the Bankruptcy Act, 1883, s. 28, for an order for his discharge. The official receiver made the necessary report under section 28, sub-section 2. Upon the case being called on the bankrupt asked for leave to withdraw his application. This the official receiver and a creditor opposed, but the registrar gave his leave.

The Board of Trade appealed.

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

Muir Mackenzie (*Sir E. Clarke, S.G.*, with him), for the appellants.—The registrar had no power to grant a withdrawal of such an application. The report of the official receiver gave reasons against a discharge of the bankrupt.

Sidney Woolf, Q.C., and *F. Mellor*, for the respondent, were not called upon.

Lord COLERIDGE, C.J.—In this case a bankrupt who had applied for his discharge chose to reconsider his decision, and on the hearing before the registrar applied for leave to withdraw his application. The registrar gave him leave so to do, but upon the condition that the bankrupt should not renew his application without paying the costs of the first application. It was admitted that the court could hear such an application. If so, it follows that, as a matter of course, the court will grant or refuse the application. Here the court allowed the applicant to withdraw his application upon certain conditions. We have nothing to do with these conditions, and can only say that the court exercised its inherent jurisdiction in allowing an applicant under, so far as we can see, proper circumstances to withdraw his application.

Lord ESHER, M.R.—I agree. Certain steps were necessarily to be taken before this application could be heard. Notices had to be served by the applicant and a report to be made by the official receiver. Upon the case coming on for hearing the applicant applied for leave to withdraw his application. There is nothing whatever in the Bankruptcy Act depriving the court of its ordinary power of giving leave for a withdrawal.

FRY, L.J.—*Primâ facie* it is clear that every court has the power to allow any application made to be withdrawn, and so far as I can see there is nothing in sub-section 2 of section 28 of this Act to deprive the Bankruptcy Court of that inherent jurisdiction of a court.

Appeal dismissed.

Solicitor for the appellants, *The Solicitor to the Board of Trade.*

Solicitors for the respondent, *Howard & Rumney.*

From Q. B. Div. April 16.

DE SOUZA *v.* COBDEN. (*a.*)

Local government — County council — Qualification of member—Election of women—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 41, 73—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41).

By section 73 *of the Municipal Corporations Act*, 1882 (*which is made applicable to the elections of county councillors by the Local Government Act*, 1888), *every election not called in question within twelve months after the election shall be deemed to have been to all intents a good and valid election. By section* 41 *penalties are imposed on any person acting in a corporate office without due qualification.*

The defendant, a woman, was elected a member of a county council, and, twelve months after her election, which had not in the meanwhile been called in question, she took part in the proceedings of the council.

Held, that, even if the effect of section 73 *were to render her election valid, she was nevertheless disqualified as a woman from acting, and was therefore liable to the penalties imposed by section* 41.

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

Appeal from the decision of Day, J.

The action was brought by a member of the London County Council to recover five penalties under section 41 of the Municipal Corporations Act, 1882, from the defendant for having acted as a county councillor without being duly qualified on five occasions on February 18 and 25, 1890.

The defendant, Miss Jane Cobden, was, on January 17, 1889, elected a member of the London County Council for Bow and Bromley, and on January 23 made the declaration required by the statute. In May, 1889, the case of *Beresford Hope* v. *Lady Sandhurst*, 37 W. R. 548, 23 Q. B. D. 79, was decided in the Court of Appeal, and it was held that a woman was incapable of being elected as a county councillor. After that decision Miss Cobden and another lady who had also been elected on the council took no part in the meetings of the council until February, 1890. On February 18 and February 25, however, Miss Cobden took part in five divisions, and also spoke at the meetings of the council, and on February 28 and March 4 notice of action was served upon her and this action was commenced.

Day, J., held that she was not qualified at the time of making the declaration, and that she was therefore liable to penalties under section 41, and gave judgment accordingly.

Miss Cobden appealed.

Rigby, Q.C., Bigham, Q.C., and *Costelloe*, for the appellant.—Miss Cobden's election is rendered valid by section 73 of the Municipal Corporations Act, 1882, which is incorporated by the Local Government Act, 1888. It provides that every election not called in question within twelve months after the election shall be deemed to have been to all intents a good and valid election. Secondly, section 41 only imposes penalties for acting in a corporate office without being duly qualified. If there was no election, and the disqualification of a woman is absolute, she cannot act in a corporate capacity, and therefore cannot be liable to any penalty. Section 41 does not apply to women at all.

Bosanquet, Q.C., and *S. H. Day*, for the respondent.

Lord COLERIDGE, C.J.—This appeal seems to me a perfectly *bonâ fide* attempt to take the opinion of the court on section 73 and section 41 of the Act of 1882. By section 73, "Every municipal election not called in question within twelve months after election, either by election petition or by information in the nature of a *quo warranto*, shall be deemed to have been to all intents a good and valid election." By section 41, "If any person acts in a corporate office without having made the declaration by this Act required, or without being qualified at the time of making the declaration, or after ceasing to be qualified, or after becoming disqualified, he shall, for each offence, be liable to a fine not exceeding £50, recoverable by action." As far as the seat is concerned, I am clearly of opinion that section 73 is an answer to any attempt to fill the seat after the expiration of a year. The words of the section are imperative, and I think that the election must be treated as a valid election, and Miss Cobden must, in the terms of the section, be deemed to be validly elected. She is, however, subject to the law of the country, including section 41, and she must act according to the law, and if the law is broken by her, the consequences of the breach must follow. It is impossible not to say, after the decision of this court in *Beresford-Hope* v. *Lady Sandhurst*, that, without some enabling section, Miss Cobden cannot, by law, act as a member of the county council because she is not duly qualified. She is subject to an incapacity which section 73 does nothing to

remove. She was, therefore, wrong in acting, and she broke the law by so doing. She is, therefore, in my opinion, subject to the penalties imposed by the section. The appeal must be dismissed.

Lord ESHER, M.R.—I think that, as in this case I entertain a stronger view than the other members of the court, it is my duty to express that view. The county council is a new institution—the creation of an Act of Parliament. We have now to deal, not with the electorate, but with the persons who may be elected. The Act of 1888, which created the county councils, incorporates, after the modern fashion of legislation, a large part of the Municipal Corporations Act, 1882, and it is to that Act that we have to look in deciding the present case. Now, what persons may according to the Act become members of the county council? We have decided that only male persons who are duly qualified may become members. The ground of the decision in the case of *Beresford-Hope* v. *Lady Sandhurst* was that the words used in this enactment, taken together with Lord Brougham's Act (13 & 14 Vict. c. 21), s. 4, were words which would include women as well as men unless from the subject-matter or context of the Act the contrary appeared, and the whole court thought in that case that there was something in the context which prevented women from being elected. The Act contained an express mention of women wherever it was intended to include them in its provisions, and, therefore, we all thought that, since they were not expressly given the power of being elected, the election of a woman was invalid. I went further than the other members of the court. I thought that it was also apparent from the subject-matter of the Act that women could not be elected. In England up to that time women, unless specially mentioned or unless they had obtained the right by well-recognized custom, such as is mentioned in the judgment of Willes, J., in *Chorlton* v. *Lings*, 17 W. R. 284, L. R. 4 C. P. 374, at p. 389, had been considered as incapable of executing public functions. Therefore, whichever ground is taken, the decision in *Beresford-Hope* v. *Lady Sandhurst* was that women had not the power by the Act of being elected as county councillors. And since at common law there never was any such right, the election of a woman was held to be and is absolutely invalid. The judgment went so far in saying that women were disqualified from being elected as to decide that the votes given for a woman were absolutely thrown away, and were as though they had never been given at all. Therefore, applying section 73 to the present case, I am of opinion that Miss Cobden was never elected at all, and that there was no election on which section 73 can have any operation. I am confirmed in this view by a consideration of the subject-matter of the Act. It seems absurd to say that a woman is absolutely incapable of being elected, but that if she is elected, and no proceedings are taken against her for a year, she becomes qualified to sit, vote, or speak. In my opinion section 73 only applies to elections which may be good, but not to such an election as this, which cannot be an election at all.

Then, as to section 41—does that section apply to men only, or to men and women? I think that the context shows that Lord Brougham's Act may apply, and that the words of the section include both men and women. Women may break the law of the Act. They have, in fact, done so, and the breaches aimed at by the section may be committed by women as well as by men. Therefore, in the result, I agree that the appeal must be dismissed.

FRY, L.J.—This case raises two questions under the Act of 1882—the one as to section 73, the other as to section 41. Is this election one which can be rendered valid by section 73? I do not think that it can. Obviously an election of a dead man or of an inanimate thing is not an election on which section 73 can operate. Is the election of a woman such an election? I incline to think that the election of a woman is absolutely null and void and cannot be affected by the section, but I desire to express no concluded opinion on this point because the answer to the second question really decides the case. Section 41 seems to me essentially different from section 73. Everything under it depends on contingencies arising after election. Therefore I think that, even if section 73 does apply, and Miss Cobden's election is made valid by it, yet under section 41 Miss Cobden has become subject to penalties, since, after her election, and at the time of making the requisite declaration, she was not qualified, and she has acted when so disqualified.

Appeal dismissed.

Solicitor for the plaintiff, *Tilleard.*

Solicitors for the defendant, *Pyke & Minchin.*

High Court of Justice.

Chan. Div. Chitty, J. March 17, 18.

In re STANGER.
MOORSOM *v.* TATE. (*a.*)

Will—Construction—Discretionary trust—Residue—All or any portion—Maintenance or benefit of legatee—Non-exercise of discretion—Interest of legatee in fund.

A testator devised a share of his residue, subject to a life interest therein, to trustees upon trust "to pay or apply all or any portion of the income or corpus *of the same in or towards the support or maintenance, or otherwise for the benefit, of their brother, R. T., in such manner and proportions in every respect, and at such times, as they shall deem most conducive to his welfare." R. T. died during the continuance of the life interest. On the fund subsequently falling into possession, the legal personal representative of R. T. claimed it as part of R. T.'s estate. The trustees had not attempted to deal with the fund while reversionary.*

Held, (1) *that the trustees had not waived their discretion, or been guilty of default or refusal to exercise it;* (2) *that no trust could be implied making it their duty to apply the whole fund for R. T.'s benefit, but that they were only bound to apply so much of it as, in their discretion, they thought fit for his personal benefit and welfare; and* (3) *that, under the circumstances, no transmissible interest in the fund ever vested in R. T. so as to pass to his legal personal representative.*

In re Sanderson's Trusts, 5 *W. R.* 864, 3 *K. & J.* 497, *followed.*

Gough *v.* Bult, 16 *Sim.* 45, *and* Gude *v.* Worthington, 3 *De G. & Sm.* 389, *distinguished.*

Adjourned summons.

By will, dated 1854, the testator devised and bequeathed the residue of his real and personal estate to his executors upon trust for sale and conversion, and to invest the proceeds, in trust to permit his wife to receive the income thereof during her life, and after the determination of that trust, as to the principal and future income thereof, upon trust to pay and

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

transfer (*inter alia*) one-twentieth part thereof unto W. Tate and H. Tate upon trust to continue or invest the same as therein mentioned, "and to pay and apply all or any portion of the income or *corpus* of the same in or towards the support or maintenance or otherwise for the benefit of their brother R. Tate, in such manner and proportions in every respect, and at such times, as they shall deem most conducive to his welfare."

The testator died in 1854, R. Tate died in 1866 intestate, and the testator's widow died in 1890. The estate being then divisible, the executors of the surviving trustee of the will took out this summons to determine, *inter alia*, "whether, under the terms of the above bequest, the one-twentieth part had vested in R. Tate so as to pass to his legal personal representative, or whether it had passed to the testator's next of kin."

Freeman, for the executors, stated the point.

Carson, for the person entitled to take out administration to R. Tate's estate.—There is a clear trust in favour of R. Tate. "Benefit" is the widest expression you could employ, as in *In re Breed's Will*, 24 W. R. 200, 1 Ch. D. 226; *Lowther* v. *Bentinck*, 23 W. R. 156, L. R. 19 Eq. 166. If the trustees have any discretion it is a limited one which might operate between two legatees, but not between the legatee and the next of kin, who would take here, as the one-twentieth is residue. The case is covered by *Gough* v. *Bult*, 16 Sim. 45, and *Gude* v. *Worthington*, 3 De G. & Sm. 389.

Vernon R. Smith and *McNeill*, for persons in the same interest.

Philip V. Smith, for the testator's next of kin.—There is no gift to R. Tate, but only a discretionary trust in his favour of so much as the trustees may think fit to apply for his benefit. He is entitled to nothing beyond the amount so applied: *In re Sanderson's Trusts*, 5 W. R. 864, 3 K. & J. 497.

CHITTY, J.—In *Gough* v. *Bult* Lord Cottenham laid it down as a well-known rule that "where a legacy is given, but the application of it is prescribed by the testator himself or left by him to the discretion of some other person, if that discretion is not exercised or an accident happens which prevents the employment of it in the way which is contemplated, the gift prevails. The mode of application may fail, but that will not interfere with the substance of the gift." It is contended that the principle there stated applies in this case in favour of the legal personal representative of R. Tate. So far as there was any discretion vested in these trustees it is plain that there has been no default or refusal to exercise it on their part, and therefore the case does not come within *Gude* v. *Worthington*. In that case there was a trust in favour of Mary Ann Seaman, with a discretionary power in the trustees to pay over the whole *corpus* of the fund to her, or to withhold the whole, as they might think fit, without being accountable therefor, and there was a gift over of so much of the fund as should at her death remain undisposed of. I am not concerned to see whether the Vice-Chancellor's construction of the will in that case was erroneous, nor do I suggest it was; but it is plain that the principle of his decision was that the lady took an absolute interest, subject to a discretionary power in the trustees, which they had either waived or declined to exercise. In the present case the trustees never had a chance of exercising their discretion, because Robert Tate died before the fund fell into possession. It is said they might have mortgaged the fund, though still reversionary, for Robert Tate's benefit. But even if they had the power to do this, on which I express no opinion, it is clear that the non-exercise of a power, not in terms conferred by the will, does not amount to waiver.

It is true, as urged by Mr. Carson, that the word "benefit" is a term of large import, but I must read this discretionary power as a whole, and the cardinal point of the case is that the discretionary power is not so framed as to make it the duty of the trustees to apply the whole of the income or *corpus* for R. Tate's benefit. Had this been so I should have been prepared to hold that he took a vested interest in the whole fund, and that the case fell within the principle laid down by Lord Cottenham in *Gough* v. *Bult*. But I think the true meaning of the gift is that the power is to be exercised for the personal benefit of R. Tate, *i.e.*, that the term "benefit" ought to be construed with reference to the words "support or maintenance," or "for his welfare," which precede it. In *Lowther* v. *Bentinck* a power to advance a son for his preferment, advancement, or benefit, was held to include not merely setting him up in the world, but also the discharge of his debts. In this case the word "benefit" is qualified by the whole terms of the trust, which show that the whole fund is not to go for the benefit of R. Tate unless the trustees, in the exercise of their discretion, think fit so to apply it.

The authority most in point is *In re Sanderson's Trusts*. In that case Page-Wood, V.C., laid great stress on the words "the whole or any part" to be applied for or towards his maintenance, attendance, and comfort. He said the word "comfort" was a large word, but that he had no right to strike out the words "any part," and though he read the power as one of that class which trustees are bound to exercise, and not as a mere arbitrary power, he observed that it was not the whole income that was given, but the "whole or any part," which the court would read as equivalent to "whole or a competent part." Now, even if I were to apply here the principle of the cases where there is a power to apply a fund for somebody's benefit, and the court is asked to imply a trust in favour of the objects in default of exercise of the power, *e.g.*, *Harding* v. *Glyn*, 1 Atk. 469, *In re White's Trusts*, Joh. 656, 8 W. R. Ch. Dig. 102, it seems to me that this gift does not amount to a trust to apply the whole or any part of the fund for the benefit of R. Tate, and in default a trust in his favour as to the whole of it. In the result, I think the gift conferred a discretion on the trustees liable to be controlled by the court, but that the court would not have compelled the trustees to apply any more thereof than was required for the benefit of R. Tate in the manner most conducive to his welfare, and so, following *In re Sanderson's Trusts*, I hold that his legal personal representative has no right to this fund.

Solicitors for the plaintiffs, *Senior, Attree, Johnson, & Sons.*

Solicitors for R. Tate's representatives, *Pitman & Sons.*

Solicitors for the testator's next of kin, *Gedge, Kirby, & Millett.*

Solicitors for the other parties, *Palmer, Eland, & Nettleship; Warren, Gardner, & Murton.*

Chan. Div. North, J. April 14.

In re RADCLIFFE.
RADCLIFFE *v.* BEWES. (*a.*)

Power of appointment—Marriage settlement—Release of power—Benefit of donee of power—Right to transfer of funds.

Under his marriage settlement the plaintiff had a power of appointment amongst children, and, in default of appointment, the children were entitled to funds as therein mentioned. Two children obtained a vested interest, one of whom died a bachelor and intestate. Letters of administration to his estate were granted to the plaintiff, who subsequently released his power of appointment over the fund, and asked for a declaration of his rights and a transfer to himself of one moiety of the trust funds as tenant for life of, and entitled in remainder to, that moiety.

Held, that, in the exercise of its discretion, the court will not assist a donee of a power to obtain a personal benefit through his having released that power.

Cunynghame *v.* Thurlow, 1 *Russ. & My.* 436n, *followed.*

Adjourned summons.

Under his marriage settlement, dated the 26th of July, 1852, a life interest in the funds subject to the trusts was given to the plaintiff, the Rev. John William Radcliffe, and on his decease to his wife, with a joint power of appointment amongst the children of the marriage, and on the decease of either of them as the survivor should by deed or will appoint. In default of appointment the funds were to be held on trust for such of the children as should attain the age of twenty-one years or marry in equal shares.

The plaintiff's wife died on the 9th of July, 1878, the joint power of appointment not having been exercised.

The only issue of the marriage were three sons, one of whom died without having obtained a vested interest.

The other sons attained the age of twenty-one years, and one of them, Derwentwater Radcliffe, died on the 27th of July, 1881, a bachelor and intestate.

Administration to his estate was granted to the plaintiff.

On the 9th of July, 1890, the plaintiff executed a deed-poll absolutely releasing his power of appointment under the marriage settlement, he then called on the defendant, the sole surviving trustee, to transfer to him a moiety of the trust funds. The defendant declined to do so without the direction of the court. The plaintiff issued an originating summons for an order declaring that, under the circumstances, he was entitled to a moiety of the trust funds, and to have the same transferred to him.

Sir H. Davey, Q.C., and *George Lawrence*, for the plaintiff.—The plaintiff is entitled to a declaration and transfer. *Cunynghame* v. *Thurlow*, 1 Russ. & My. 436n, is authority that the release of the power is good, but it has not been followed on the question of the courts refusing to transfer. *Smith* v. *Houblon*, 26 Beav. 482, 8 W. R. Dig. 53, and *Shirley* v. *Fisher*, 47 L. T. N. S. 109, 31 W. R. Dig. 144. The court has a discretion. *In re Little*, 37 W. R. 289, 40 Ch. D. 418. If no transfer can be ordered, the plaintiff asks for a declaration of his rights.

Cozens-Hardy, Q.C., and *Warrington*, for the defendant.

NORTH, J.—In this case the plaintiff has absolutely released his power of appointment. He now comes and calls upon the trustee to transfer one moiety to him as being tenant for life of, and also entitled in remainder to, that moiety. If I were unfettered by authority the order would be for a declaration of his right and a transfer to him, but I cannot do this, being bound by the authority of *Cunynghame* v. *Thurlow*, which has never been doubted, and where it is laid down that, although the power of appointment was released, the court will not assist the tenant for life to obtain a transfer of the funds. It may be that *Smith* v. *Houblon* gently hit at *Cunynghame* v. *Thurlow*, inasmuch as the Master of the Rolls there made a declaration of the rights of the parties, but that case, as the circumstances differ, is not inconsistent with *Cunynghame* v. *Thurlow*. Neither is *Shirley* v. *Fisher*, the headnote of which expresses the law accurately in stating that the donee of a power may deal with it in any lawful way he pleases. In this case the donee of the power owed the advantage he obtained, not to any provision in the settlement, but to a legal accident.

Lastly, *In re Little* shows that it would be wrong for the court, in exercising its discretion, to help the donee of the power.

With regard to the release of the power, the Conveyancing Act, 1881, s. 52, does not help us; it merely prevents the question being raised. The power is released. I am bound by *Cunynghame* v. *Thurlow*, which is in point. I do not make any declaration or order, but the trustee must have his costs, charges, and expenses out of the trust fund.

Summons dismissed.

Solicitors, *Torr & Co.; Bell, Brodrick, & Gray.*

(*a.*) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

Q. B. Div. (A. L. Smith and Grantham, JJ.) April 11.

BOUND *v.* LAWRENCE. (*a.*)

Master and servant—Grocer's assistant—"Workman"—"Manual labour"—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *s.* 10.

A person was employed as an assistant in a grocer's shop, his duties being to serve customers, to make up parcels of goods, and to carry them to a cart at the shop door, and occasionally to assist in bringing up heavier goods from the cellar to the shop.

Held, by Grantham, J. (A. L. Smith, J., *dissenting*), *that he was a workman within the definition in section* 10 *of the Employers and Workmen Act,* 1875.

This was an appeal by way of special case from the decision of the justices of Newport, Mon., under the powers given to them as a court of summary jurisdiction by section 4 of the Employers and Workmen Act, 1875, ordering the appellant to pay to the respondent a sum of £1 as damages for having left his employment without notice.

The question was whether the appellant was a "workman" within the meaning of the Act.

The appellant had been employed by the respondent (a grocer) to assist him in his shop. When the case first came before the High Court it was remitted to the justices in order that they might state what was the precise manual labour which the appellant performed. The case now stated that he served customers in the shop from behind the counter, made up parcels of goods, carried parcels up to

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

eighty-four lbs. in weight to the cart at the door from the shop, occasionally carried sides of bacon from the shop door, where they were hanging, into the shop; that on each Monday he brought up from the cellar bags of sugar, boxes of soap, and sides of bacon; that he occasionally assisted at the pulley in getting up goods from the cellar, and that he occasionally wheeled goods in a truck from the warehouse to the cellar.

The Employers and Workmen Act, 1875, provides (section 8):—"The expression 'workman' does not include a domestic or menial servant, but save as aforesaid means any person who, being a labourer, servant in husbandry, journeyman artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer."

C. M. Bailhache, for the appellant.—"Grocer's assistant" is a well-known term, and the findings of the justices as to the appellant's duties are superfluous, and should be disregarded. But even if those findings are to be considered, it is clear that his main duties are not manual labour, although he may incidentally do acts which come under that category; it is the main duties which are to be looked at: *Morgan* v. *London General Omnibus Co.*, 32 W. R. 759, 13 Q. B. D. 832; *Cook* v. *North Metropolitan Tramways Co.*, 35 W. R. 577, 18 Q. B. D. 684; *Yarmouth* v. *France*, 36 W. R. 281, 19 Q. B. D. 647, per Lord Esher, M.R., at p. 651; and *Hunt* v. *Great Northern Railway Co.*, *Times*, 29th January, 1891. Neither is the appellant a "journeyman," that term is only used with reference to occupations where skill of hand is required.

S. A. T. Rowlatt, for the respondent.—I admit that the appellant is not a "journeyman," but, according to the findings, a substantial part of his duties consist of manual labour, and he is, therefore, a workman within the Act. *Yarmouth* v. *France* is in my favour.

GRANTHAM, J.—I regret that in this case I am unable to agree with my learned brother in the conclusion at which he has arrived. It is true that a person in a grocer's shop who occupies the same position as the appellant in this case is usually called an assistant, but I cannot myself see any difference between such a person in a butcher's shop and in a grocer's shop. They each have to perform the same kind of work. In a butcher's shop he is called a journeyman, and may have to serve customers who come into the shop, and may not have to take part in killing animals or in cutting up meat. His principal duties may be the same as those of the appellant in this case. [His lordship then read the finding of the justices as stated above, and continued:—] He is, in fact, all day employed in weighing out things in the same manner as a butcher, and in serving customers; he has to perform services very similar to those performed by the plaintiff in *Yarmouth* v. *France;* and it was held in that case that the plaintiff was a workman within the meaning of this Act. Suppose that the appellant had been set to work at a machine for cutting up sugar, and that the machine was out of order, and the appellant was injured, surely his labour would be such as to bring him within the intent and benefit of the Employers' Liability Act? Such labour is intended to be dealt with by this statute. The labour of the appellant seems to me to be of the same character as that of a journeyman, and, therefore, within this Act. I accept the language used by the Master of the Rolls in *Morgan* v. *London General Omnibus Co.*, when he says that the test is what is the real and substantial business of the person employed. I think that in this case the real and substantial business of the appellant is such as to bring him within the definition of a "workman" in this Act.

A. L. SMITH, J.—I am sorry to differ from my learned brother in this case. This is a special case stated by justices for the opinion of the court; we must take the facts as found by them, and say upon them whether a grocer's assistant comes within the definition contained in section 10 of the Employers and Workmen Act, 1875. [His lordship read the section.] I think the meaning of the section is that it excludes domestic and menial servants, but includes skilled and unskilled manual labourers. The Legislature evidently intended to include certain persons who might not come in under the definition of engaged in manual labour, and therefore those persons were specifically mentioned. If it had been intended to bring in grocers' assistants it would have been very easy to have mentioned them or to have put in "shopman," which would have included such assistants. I cannot think that a grocer's assistant comes within the term "journeyman." Then the question arises, is the real and substantial business of this grocer's assistant manual labour? Porters are kept to do the heavy manual work, and the principal business of the appellant is to serve customers, and is not manual labour. He was only occasionally employed in manual labour, and his ordinary duties were those of an indoor assistant. Then it was said that in that capacity he used his hands, but there is no service in which a person does not use his hands. A hairdresser and a copyist both use their hands largely in their business, but they cannot be said to be engaged in manual labour. In *Morgan* v. *London General Omnibus Co.* it was held that a conductor was not within this statute, although he was constantly using his hands for the purpose of his business, and the Court of Appeal gave as the reason for their decision that his real and substantial business was to invite persons to enter the omnibus, and to take and keep for his employers the money paid by the passengers as their fares. So, too, a driver of a tramcar has been held to be outside this Act, although he must necessarily be using his hands all day: *Cook* v. *North Metropolitan Tramways Co.* Then, again, in *Yarmouth* v. *France*, it was held that a driver employed by a wharfinger was a workman because, as the Master of the Rolls said, his real labour was the loading and unloading a trolley, which was manual labour. The last case I wish to refer to is that of *Hunt* v. *Great Northern Railway Co.*, in which the court held that a goods guard was not within the Act because he was *ejusdem generis* with a passenger guard, although he occasionally removed goods into or out of his van. I decide this case upon the same grounds as those on which the cases I have referred to seem to me to have been decided—namely, that the ordinary duties of the appellant were those of an indoor assistant, and that he was not engaged in manual labour. As the court is divided in its opinion, the order of the justices will stand.

Appeal dismissed. Leave to appeal was granted.

Solicitors, for the appellant, *Warriner & Kinch*, for *Llewellyn & Moore*, Newport, Mon.

Solicitors for the respondent, *G. S. Warmington*, for *D. R. Evans*, Newport, Mon.

Q. B. Div. (Pollock, B., and Charles, J.) Feb. 6, 9.

REID'S BREWERY CO. (*Appellants*) *v.* MALE (*Respondent*). (*a.*)

Inland Revenue—Income tax—Brewers—Brewers acting as bankers and money-lenders for their customers—Losses or bad debts in the money-lending branch—Deduction of such losses from profits of the brewery business—5 & 6 Vict. c. 35, s. 100, Schedule D.

A firm of brewers carried on, in connection with their brewery business, a branch business of banking and money-lending confined to the customers of the firm, which they were entitled to do under their memorandum of association. They advanced money by way of loan or advance to their customers, upon various classes of security, such as deposit of deeds, mortgage, and promissory notes. They received money on deposit from their customers, and acted generally as bankers for such customers, but in no case was any loan or advance made by way of permanent investment. Losses in the nature of bad debts having been incurred in the banking and money-lending branch of the business,

Held, that the banking or money-lending branch was an adjunct to the brewery business, only one business being carried on; that the loans were not capital invested; and that the brewers were entitled to deduct the losses in the money-lending branch from their gains in the brewery branch in making their return for income tax.

The appellants, Reid's Brewery Co. (Limited), appealed against an assessment of £110,213 made by the special commissioners of income tax, under Schedule D of the Act 16 & 17 Vict. c. 34, for the year ended April 5, 1890, in respect of the profits from trade as carried on by the appellants at the brewery, Clerkenwell-road, in the county of Middlesex.

The return of the appellants for assessment was dated July 17, 1889, and was based upon the average profits of the three years ended December 31, 1888. From accounts rendered in explanation of the profits it was shown that large sums for "bad debts" incurred in 1886, 1887, and 1888 had been deducted in arriving at the balances of profits upon which the return had been computed. These "bad debts" were found to embrace not only ordinary debts arising from the trade of brewers, but also losses sustained on loans advanced by the appellants on the security of public-houses, with which their business is largely connected, to their customers.

The average amount of these losses on loans for the three years, as stated by the appellants, was £16,517. The special commissioners disallowed the deduction of £16,517, and consequently assessed the appellants for their brewery profits in the sum of £110,213, being the amount of profits returned by the appellants with the addition of the £16,517. It was stated that when the company made an advance to a customer on the security of a public-house, and the public-house was sold, if the security did not realize the amount advanced the company wrote off the loss as a bad debt. The following statement of facts was handed in on behalf of the appellants, and was agreed to:—

Messrs. Reid & Co. for many years carried on the business of brewers, and in connection therewith and as part thereof the branch business of bankers and money-lenders limited to the customers and connections of the firm. The appellants took over the business of Reid & Co. as from July 7, 1888, by purchase and valuation, including therein the business or branch business of bankers and money-lenders.

It is the custom and usual practice of manufacturing brewers, at any rate in London, to carry on the business of bankers and money-lenders as a branch or adjunct of their brewing business, such business being strictly carried on with the customers and connections of the brewery.

Since the purchase the appellants have, pursuant to article 4 of their memorandum of association, which gave them power so to act as bankers, also carried on the business of bankers and money-lenders as therein authorized. In the course of such business the appellants advanced money by way of loan or advance to or on behalf of their customers, and upon various classes of security, and, amongst others, on deposit of deeds, on mortgage, on promissory notes and acceptances. They receive money on deposit from their customers, and cheques are allowed to be drawn upon the appellants, which are accepted and treated by other London bankers as ordinary bankers' cheques. They also collect bills for customers when they become due.

In no case is any loan or advance made by way of permanent investment, but the same is taken only in connection with the current dealings of the customers with the appellants, and in the event of such current dealings terminating the loan or advance is required to be paid off and the account closed.

The brewery profits of the appellants and of Reid & Co. have always been greatly increased by reason of the addition of such business of banking and money-lending, and to enable them to realize their extensive profits such loans and advances are essentially necessary, and unless such loans and advances are made for customers the brewing business of London brewers could not be carried on at a profit.

During the three years in question losses were incurred by Messrs. Reid & Co. and the appellants on the banking or money-lending branch, amounting to £16,517, which had partly been written off as bad debts and irrecoverable, and partly charged against the profits as the amount which, it was believed, would prove to be bad.

On the above facts the appellants contended that the assessment of £110,213 was excessive, as they had not made profits or gains to that amount; that they were entitled to write off by way of deduction from their taxable profits such losses as they have sustained in the debts of the branch of the brewing business relating to loans and advances; in the alternative, that, under the 101st section of 5 & 6 Vict. c. 35, if the said debts are not to be considered as part of the assets of the brewing business, the appellants are nevertheless entitled to deduct or set off the excess of the loss sustained as loss occurring in their business of bankers and money-lenders against the profits acquired by them as brewers. The particulars of these losses, as given by the appellants, was: on deposit of deeds, £304; on mortgages, £16,092; on notes and acceptances, £121; total, £16,517.

The commissioners, having regard to the decision in the case of *Watney* v. *Musgrave*, 28 W. R. 491, 5 Ex. D. 241, considered that the sums advanced by the appellants on the security of public-houses were sums employed as capital for the purpose of extending their business as brewers, and that losses arising therefrom were not losses sustained in any trade or concern distinct from such business, and they determined that they could not admit as deductions within the Income Tax Acts the sums claimed by the appellants as losses on deposit of deeds and on mortgage, amounting together to £16,396.

Sir Horace Davey, Q.C. (*Pollard* and *T. Hewitt*,

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

with him), for the appellants.—The appellants here carry on one business, which includes the lending of money to their customers. This banking or money-lending branch is not carried on as an investment of capital, but as a branch or part, and a necessary part, of the brewing business, the whole being one business, and therefore the losses incurred in the money-lending branch may be deducted from the gains in the brewing business. But if I am wrong in saying that they are two departments of one business, and if they are two separate businesses which are carried on by this company, I still say that they are both chargeable under Schedule D., and that the loss on one may be deducted from the profit on the other. The case of *Watney* v. *Musgrave* was entirely different from the present, as there the expenditure was treated entirely as a capital investment, as a capital expenditure. There was no finding in that case that they carried on this investing in public-houses as a part of their trade or business, or that it was carried on as a trade or business, but it was treated entirely as being a capital investment. That case, therefore, is different from the present case, and is no authority against the contention of the appellants.

Sir R. E. Webster, A.G., Sir E. Clarke, S.G., and *Danckwertz*, for the respondent.

POLLOCK, B.—The question is whether a deduction, which the commissioners disallowed, ought now to be allowed. From the facts in the case it appears in substance that the appellants carried on the trade of brewers; that, in addition to that, they carried on a business which they had taken over in 1888 from their predecessors, which is called the business and branch business of bankers and money-lenders, and that that was in accordance with the custom and the usual practice of manufacturing brewers. The character of that business is described in the case in this way: that "the appellants advanced money by way of loan or advance to or on behalf of their customers and upon various classes of security, and amongst others on deposit of deeds, on mortgage, on promissory notes and acceptances."

Upon this and upon the other facts of the case a question has arisen as to whether this money-lending business is to be considered as an independent business, or as part of the business of the brewers. If it had been, or if it is, a separate business, seems to me to be immaterial, because I think it would be included within the provisions of section 101 of the Income Tax Act, and that the appellants would be entitled to deduct the profits acquired in one of the concerns, and set them off against the excess of the losses sustained in the other concerns; but, to my mind, this is really one business. Nobody could suppose that this company carry on business as money-lenders only; but what they do is to carry it on as an adjunct ancillary to their business as brewers. That being so, I think the real question in this case is, whether the money so used or expended is to be treated as capital invested. If it be capital invested, then it comes within the express provision of the Income Tax Act, that no deduction is to be made on that account. That is provided for most clearly by the statute, but I think it would be a fallacy to call this money capital invested. In the first place, the case finds that in no case is any loan or advance made by them as a permanent investment. That, of itself, might not be sufficient, but when we come to read what is the course of dealing, no person can doubt that this is not capital invested. It is capital used by the appellants, but used only in the sense that all money which is laid out by persons who are traders is used; it is used and it comes out of capital, but it is not an investment in the ordinary sense of the word.

If that is so, the cases which have been cited for the purpose of showing what is done in the case of capital invested become immaterial. No doubt, I agree, that we are not to deal with this Income Tax Act as if we were taking an account between partners, or as if we had before us the sale of a going concern. There are cases, such as that of *Gillatt* v. *Colquhoun*, Reports of Tax Cases, vol. 2, pt. 27, where it was held that the depreciation of leasehold premises that were purchased and used for trade purposes could not be deducted. Perhaps the strongest case was that of *Smith* v. *The Westinghouse Brake Co.*, Reports of Tax Cases, vol. 2, pt. 35, where the company had, in the case of very large machinery, to remove, for the purposes of their business, a quantity of machinery from one part of the country to another. That would be a loss between the partners before any profit would be arrived at; but there it was held that that was not a deduction that could be made under the Income Tax Acts. That being so, I cannot see any great difficulty in dealing with this case. It seems to me the ordinary case of persons who, before they can make up their accounts and share their profits, not merely as between partners, but under the Income Tax Act, are entitled to this deduction, because, by Cases 1 and 2, Schedule D., it is clear that what the commissioners have to arrive at is the profit. There is one difficulty in dealing with this case which the court must fairly meet—namely, that in *Watney* v. *Musgrave* it was held that a firm of brewers who, in order to increase the sale of their beer and to increase their profits, purchased the leases of public-houses which they let to tenants, who contracted to buy from the brewers all the beer to be sold in the houses, were not entitled to any allowance in respect of the premiums that were paid upon those leases.

I should have said myself that there could be no real difficulty in that case if you confined it to the case itself. It might be an advantageous investment of the capital of brewers to purchase houses out of their capital, and it might be that they, for the purpose of taking an account between partners, might take such purchases into account before they arrived at the profit of the business. In such a case, that money could not be said to be money expended by the brewer upon the business of brewers. Such an expenditure would not be an expenditure upon the business either of brewers or money-lenders. Therefore, so far as that case is concerned, I think there is no difficulty.

It seems to me, on these grounds, that this appeal must succeed, with costs.

CHARLES, J.—I am of the same opinion. I do not think that any question arises under section 101, because I think that the proper inference of fact to draw from the case is this, that the appellants carry on one business and not two. That appears to me to be clear upon the agreed statement of facts, and I think the legitimate conclusion from those facts is this, that the appellants carry on the brewing business with this business of money-lending as a branch or adjunct to it. Then, it being one business and not two, are the appellants entitled to the exemption of this sum of £16,000 which they claim? I think that they are.

For the Crown it was urged upon us that this payment is a capital expenditure, and, if it be a capital expenditure, then the deduction of it is expressly forbidden by the 3rd rule of Case 1, Schedule D. But it appears to me that it is not an investment of capital at all, but that it is a use of money by the appellants in the course of their business. I agree with my learned brother that, in arriving at the balance of profits and gains upon which the assessment is to be

made, it not being a capital expenditure, it is an expense which they may properly deduct before arriving at the balance of their profits and gains. If, however, in arriving at the balance of profits and gains, they ought to include this sum in the first instance, I think that they are entitled to it by way of actual deduction under the 1st rule applicable to Cases 1 and 2 under Schedule D.

I think that upon the findings this money was money laid out and expended exclusively for the purpose of the brewing trade carried on by the appellants; and, that being so, it is a legitimate subject of deduction in arriving at the balance of the profits and gains, even though it ought not, in the first instance, to be deducted from the profits of the concern.

For these reasons I agree that our judgment ought to be for the appellants, and I also desire to express my concurrence in the observations of my learned brother upon the cases cited.

Appeal allowed.

Solicitors for the appellants, *W. H. Withall & Co.*

Solicitor for the respondent, *The Solicitor of Inland Revenue.*

Q. B. Div. (Pollock, B., and Charles, J.) Feb. 5, 6.

CAWSE (*Appellant*) *v.* COMMITTEE OF THE LUNATIC HOSPITAL, NOTTINGHAM (*Respondents*). (*a.*)

Inland revenue—Income tax—Hospital—Hospital supported substantially by charitable funds—Exemption from income tax—Exemption from inhabited house duty—5 & 6 Vict. c. 35, schedule A—48 Geo. 3, c. 55, schedule B (Exemptions), case 4.

A lunatic hospital had been carried on upon its present site for thirty years; it was a building provided for the reception and relief of lunatics who are not paupers, for whose maintenance and medical attendance sums from 10s. to 40s. a week are paid; it was founded and built with charitable donations, and managed by persons who derive no pecuniary benefit therefrom, but who assist it by their subscriptions. The annual reports showed that the hospital is substantially supported by funds derived from charitable sources, and the real property on which the hospital is carried on is vested in trustees upon trust to be used as a lunatic hospital.

Held, that, as the hospital was substantially supported from charitable sources, it came within the exemption in rule 6 of schedule A of the Income Tax Act, and was not liable to be assessed to income tax under that schedule; also, that it was not liable to inhabited house duty, as it came within the exemption of case 4, schedule B, of 48 Geo. 3, c. 55, as being a "hospital provided for the reception or relief of poor persons."

Needham *v.* Bowers, 37 *W. R.* 125, 21 *Q. B. D.* 436, *distinguished.*

Case stated under section 59 of 43 & 44 Vict. c. 19 as to income tax and inhabited house duties.

The members of the committee of the Lunatic Hospital at the Coppice, Nottingham, the present respondents, appealed to the Income Tax Commissioners against an assessment of £1,000, which had been made upon the committee, under schedule A, and the inhabited house duties, in respect of the said hospital, for the year ending the 5th of April, 1889.

The hospital had been carried on upon its present site for thirty years, and hitherto the only assessment upon it under schedule A of the Income Tax Acts has been upon the resident medical officer's house at £20 a year, and it had also been assessed at the same amount to the inhabited house duty.

The members of the committee of the hospital contended that the hospital, being a charity, is entitled to exemption to income tax by rule 6 of 5 & 6 Vict. c. 35, s. 61, and also comes within the exemption from inhabited house duty of 48 Geo. 3, c. 55, case 4, Exemptions, schedule B, as a hospital or house provided for the reception or relief of poor persons.

The hospital is a building provided for the reception and relief of lunatics, who are not paupers, for whose maintenance and medical attendance sums varying from 10s. to 40s. per week are paid (except that about five patients pay an extra £1 per week for extra room accommodation); it has always been called a hospital, and has all the usual features of a hospital—namely, it was founded and built with charitable donations, it is an institution for the relief of persons suffering from a most distressing disease, and it is managed by charitable persons not deriving any pecuniary benefit therefrom, but, on the contrary, assisting it by their subscriptions.

The assessment had apparently been made under the impression that the hospital is a profit-producing institution, like the Northampton Hospital, where about £7,000 a year profit is made, or the Gloucester (Barnwood) Hospital, where £4,800 is made.

Reference to the annual reports for the three years ended December, 1887, showed that the hospital is partly and substantially supported by funds derived from charitable sources.

The real property on which the institution is carried on is vested in trustees upon trust to be used as a lunatic hospital, and for the benefit of the inmates thereof, and for no other purpose, and in such manner as the rules of the institution shall direct, and there is no power of sale; the endowment funds are also vested in trustees for the benefit of the hospital and the inmates, as a majority of the voluntary subscribers and donors shall direct, and the hospital and its inmates can alone derive benefit from the real or personal estate connected with it.

The surveyor of taxes submitted that the hospital did not come within the exemption claimed, inasmuch as it was earning profit over and above its charitable expenditure, and he cited the cases of *Needham* v. *Bowers*, 37 W. R. 125, 21 Q. B. D. 436, and *St. Andrew's Hospital, Northampton* v. *Shearsmith*, 35 W. R. 811, 19 Q. B. D. 624.

The committee submitted that "profits," as defined by the Income Tax Acts, means what remains after deducting the value of the occupation of the premises where the profit is made, and that the Coppice Hospital, having cost about £30,000, the value of the occupation is at least £1,000, from which, deducting the alleged profit of £580, a loss of £420 would appear instead of a profit.

The committee also directed special attention to the wording of the exemption clauses under schedules A, C, and D, section 61, No. 6, as to rent of lands belonging to hospitals, section 88, schedule C, 3rd exemption, and section 105, in each of which the exemption is given "so far as the same shall be applied to charitable purposes," and they alleged that the whole of the income of the Coppice Hospital is by the trust deeds bound to be, and is in fact, wholly applied to charitable purposes only.

The commissioners were of opinion that the committee of the hospital were entitled to the exemption claimed, and discharged the assessment.

The surveyor of taxes appealed.

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

Sir R. E. Webster, A.G., Sir E. Clarke, S.G., and *Danckwertz*, for the appellant.

Lumley Smith, Q.C., and *W. Graham*, for the respondents.

POLLOCK, B.—This is a question involving important principles, and I think I can state in a very few words my grounds for coming to the conclusion that this, being an assessment under schedule A of the Income Tax Act, is not an assessment that can be sustained. The hospital in question was a lunatic asylum; its original object was for the maintenanne of lunatics of the poorer class. Of late years it had become very different in its support, and very different in the class of patients that it received, in consequence of a number of paying patients, who paid so well that for three years at least there was an occasional balance in favour of the trustees. That being so, the question arises whether this building, which was originally beyond doubt a hospital within the exemption created by rule 6 of the Income Tax Act, had ceased to be so.

I will begin by saying that this is not an assessment under schedule D of profits; if it were so, a very different consideration would arise. My own impression is that when the word "hospital" is used in rule 6, it intends to exempt anything that is practically of the character of a hospital, being of an eleemosynary character, and some assistance is gained by referring (as was done by Denman. J., in *Blake* v. *The Mayor of London*, 35 W. R. 212, 18 Q. B. D. 437) to the early clause of rule 6, where the words used are, "Any college or hall in any of the universities of the United Kingdom." This goes far to show that the one particular college or hall attached to one of the universities may, by money being left, or by actual payments of those who enjoy the advantage of it, have ceased to be of the same eleemosynary character that it was originally. It could not be argued, therefore, that it should come within the province of taxation.

The argument most strongly used on the part of the Crown is that which was adopted in the case of *Needham* v. *Bowers*, and in that case the buildings were assessed to the inhabited house duty, which belonged to the institution for the reception of insane persons, and which were founded by charitable donations, but unendowed. It was vested in trustees and managed gratuitously by a committee, and supported wholly out of the payments made by the patients, of whom some paid more and some less than the cost of their maintenance, and a few were maintained gratuitously. After paying the expenses there was an annual surplus of profit, which was expended in enlarging and improving that institution. In that case the court did but hold that the institution, being wholly self-supporting, was not exempt as a hospital within this exemption. We have no occasion to quarrel with that decision, nor can we say that it governs the decision in the present case, because the whole force of that decision is that the hospital there was supported wholly out of payments made by the patients, that, therefore, is not an authority which governs this case.

I think the case of *Blake* v. *The Mayor of London* is more in point. I agree entirely with what was said by my brother Denman there, that the hospital would not be the less entitled to exemption because certain fees were taken from rich persons who chose to take the benefit of the hospital. It may be that for a few years they may flourish by reason of taking those fees, but the eleemosynary character of the institution is not blotted out, but still exists. That is the distinction which arises between this case and the case of the *Governors of Charterhouse School* v. *Lamarque*, 38 W. R. 776, 25 Q. B. D. 121, which was decided by my brother Hawkins and myself last year.

Now that seems to me sufficient to dispose of the question of the income tax, with this remark, that this is not an assessment under schedule D. If the profits were assessed apart from the buildings as a going concern upon which profit was derived, a very different question would arise. The question, however, does not arise before us now.

Now comes the question under the statute 48 Geo. 3, c. 55, schedule B, with regard to the claim that is made by the Crown for inhabited house duty. By that schedule the exemption is made in these words: "Any hospital, charity school, or house provided for the reception or relief of poor persons." The same argument that I have stated with regard to the Income Tax Act seems to me to apply to this. This hospital, *quoad* the buildings in respect of which the assessment is made, has always been, and still is, a hospital provided for the reception or relief of poor persons, and it is not the less so although considerable moneys have been received by taking in persons who can pay, and whose payments have, during two or three years, led to an annual balance which the trustees are enabled to invest.

It seems to me, therefore, that in neither of those respects can this assessment be maintained.

CHARLES, J.—I am of the same opinion. This is an assessment under schedule A of the Income Tax Act, and the question for our consideration is whether this institution falls within any of the exemptions allowed by clause 6 of that schedule. To answer that question satisfactorily the question, and the only question, which is relevant is to ascertain what is the character of the institutions which are exempt by that clause. Now all colleges and halls of universities are exempt, and I think that they could remain exempt even though it was proved that in any particular year a particular college or hall had paid its way. Then comes the exemptions of hospitals, public schools, or almshouses, and it has been held, with regard to public schools, that those words apply to a public school which has some charitable element in its endowment. To that extent the words "public school" are to be restricted. The same thing has been held with regard to hospitals. The word itself would include such an institution as that now in question; but it has been decided that a hospital which has no charitable element whatever in its endowments is not within the exemption. It was so held in *Needham* v. *Bowers*, where the hospital was held not to be exempt, the only charitable thing about it being that it was started by charity, and it was in no sense endowed with charity. It has been pointed out for the Crown that if the accounts are analyzed the amounts received in this particular year from paying patients, overtops the expenditure of the institution itself, and so it is said that this is in no sense an institution maintained by charity, and that, not being maintained by charity, it falls within the principle of *Needham* v. *Bowers*, and is liable to assessment. The answer appears to me to be this. The question is not whether this institution does or does not in any particular year receive payments from patients which enable it to pay its way; the question is, What is the character of the institution itself? The character of this institution differs from the character of the institution which was under consideration in *Needham* v. *Bowers* in this respect, that whereas, in *Needham* v. *Bowers*, the institution was maintained wholly out of the payments by patients, and had no charitable endowments whatever, in this case there is a substantial charitable endowment, which amounts to many

thousands a year. That makes all the difference between *Needham* v. *Bowers* and the present case.

I think, therefore, that this institution, endowed as it is with a substantial charitable endowment, falls within the word "hospital" used in clause 6 of schedule A.

Then, with regard to the inhabited house duty, I only desire to add one word to what has been said. The words in the exemption of the inhabited house duty are these: "Hospital, charity school, or house provided for the reception or relief of poor persons." It appears to me to be tolerably clear that these words "provided for the reception or relief of poor persons" may apply to the word "house." They certainly do not apply to a charity school, although the clause reads, "Hospital, charity school," &c., but as the word "hospital" is used along with charity school, and along with words indicating a poor house, I think that exemption must be construed in the same manner as the exemption in the Income Tax Act, and that the word "hospital" in the Income Tax Act does not include the case of a hospital with no charitable endowment, but that it does include the case of a hospital which has a substantial charitable endowment.

For these reasons I think our judgment must be against the Crown, and in favour of the respondents.

Appeal dismissed; judgment for the respondents.

Solicitor for the appellant, *The Solicitor of Inland Revenue.*

Solicitors for the respondents, *Field, Roscoe, & Co.*

Q. B. Div. (Pollock, B., and Charles, J.) Jan. 21.

WESTMORE *v.* PAINE. (*a.*)

Justices—Practice—Power to state case—Application in writing—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 33—*Summary Jurisdiction Rules,* 1886, *r.* 18.

A court of summary jurisdiction has no power to state a special case under the Summary Jurisdiction Act, 1879, *s.* 33, *unless an application in writing, according to rule* 18 *of the rules of* 1886, *has been made to the court whose decision it is desired to question. An application in writing to two out of the five justices who composed such court is not an application made in the manner directed by the rules.*

Special case stated by the justices of Dover under 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49, s. 33.

The appellant, a stoker employed on board a steamship, was convicted at a court of summary jurisdiction of having neglected his duties as a stoker, contrary to section 243 of the Merchant Shipping Act, 1854. The court was composed of five justices of the borough. Upon their decision being given oral application was made on behalf of the appellant for a case to be stated on certain questions of law which had arisen, and the court granted the application. Within seven days after the hearing the appellant served upon two of the justices who had constituted the court, at their private residences, a written application, addressed to them only, to state a case, and on the same day he served a copy of the application upon the clerk of the court. The two justices stated the case, but, having a doubt as to whether the requirements of the Act and rules as to the mode of application had been sufficiently complied with so as to give them jurisdiction, stated it subject to the opinion of the court as to their jurisdiction.

The Summary Jurisdiction Act, 1879, s. 33, provides that (1) "any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that it is erroneous in point of law or is in excess of jurisdiction, may apply to the court to state a special case, setting forth the facts of the case and the grounds on which the proceeding is questioned. . . . . (2) The application shall be made and the case stated within such time and in such manner as may be from time to time directed by rules under this Act. . . ."

Rule 18 of the Summary Jurisdiction Rules, 1886, provides that "an application to a court of summary jurisdiction under section 33 of the Summary Jurisdiction Act, 1879, to state a special case shall be made in writing and a copy left with the clerk of the court, and may be made at any time within seven clear days from the date of the proceeding to be questioned."

Corrie Grant, for the appellant.—This case was triable "by a court of summary jurisdiction consisting of two or more justices": Summary Jurisdiction Act, 1879, s. 20, sub-section (9); therefore two justices may constitute a court, and two justices having been served rule 18 has been complied with. All the convicting justices consented to the oral application for a case, and it would be very inconvenient to serve all of them with a written application. In *South Staffordshire Waterworks Co.* v. *Stone*, 19 Q. B. D. 168, 35 W. R. Dig. 110, the justices were not served at all, and so in *Lockhart* v. *Mayor of St. Albans*, 36 W. R. 800, 21 Q. B. D. 188, and *Ex parte Curtis*, 26 W. R. 210, 3 Q. B. D. 13. Those cases are, therefore, distinguishable.

Finlay, Q.C., and *Mansfield*, for the respondent, desired to obtain a decision upon the merits, and did not argue the question of jurisdiction.

POLLOCK, B.—No doubt it is a matter of regret to both parties, who wish for a decision in this case, that we have no power to hear it; but the statutory conditions precedent to the hearing have not been fulfilled. The rule is extremely clear. [His lordship then read rule 18, and continued:—] Leaving the copy with the clerk is a mere matter of convenience, and cannot affect the necessity for making the written application to the court according to the rule. It may no doubt be inconvenient to get the same members of the court together again. But the party desiring the case to be stated might serve a written application for it on each member of the court, and so serve the court. In the present case an oral application was made to the court which was sitting, and they consented to grant a case; but the applicant, instead of serving a written application on the court then sitting, afterwards made an application in writing to two only of the justices at their respective houses, and those two justices stated the case. If that would suffice, any two members of the court, even if they differed from the opinion of the majority, might state a case, and the manner in which it was stated might depend on the views of those members of the court who undertook to state it. The case could not be properly said to have been stated by the court. It is clear from the decisions in *South Staffordshire Waterworks Co.* v. *Stone*, and *Lockhart* v. *Mayor, &c., of St. Albans* that the statutory requirements as to proceeding by case stated are conditions precedent to the right of appeal, and cannot be waived by the parties or the justices, and *Ex parte Curtis* is an authority that "the court" means the court which

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

had decided upon the facts. It is, therefore, clear to us that we have no power to hear this case.

CHARLES, J., concurred.

Appeal dismissed.

Solicitors for the appellant, *Shaen & Roscoe.*

Solicitors for the respondent, *Bower, Cotton, & Bower*, for *Mowll & Mowll*, Dover.

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) Feb. 5, 20.

In re MIRAMS. (*a.*)

Bankruptcy—Special case—Bankruptcy of clergyman—Chaplain of workhouse—Charge given on salary—Validity of charge—Public policy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 97.

The bankrupt, who was chaplain of a workhouse, prior to his bankruptcy gave a charge upon his salary to secure payment of a loan. Upon the bankruptcy taking place, the official receiver, as trustee, applied for an order declaring that the salary of the bankrupt as chaplain vested in him, and to restrain the person to whom the charge had been given from receiving any portion of the salary, on the ground that any assignment of the bankrupt's stipend was void or voidable as being contrary to public policy, because the bankrupt was a public officer holding a public appointment, and paid out of the public funds, and because he was a clerk in holy orders, and his salary was payable to him in respect of the cure of souls and the conduct of the services of the church.

Held, that the charge was not invalid upon the ground alleged, a clergyman having the cure of souls not being a public officer within the meaning of the principle of public policy.

Special case stated by his Honour Judge Chalmers from the county court at Birmingham for the opinion of the High Court under section 97 of the Bankruptcy Act, 1883.

The case arose out of a motion by the official receiver as trustee of the estate of the Rev. Thomas Mirams, which asked for a declaration that the stipend or salary of the bankrupt as chaplain to the Birmingham guardians vested in him as trustee in the bankruptcy, and to restrain one W. G. Coulton from receiving the portion of the said stipend or salary which he claimed in respect of an assignment given to him by the bankrupt to secure payment of the sum of £49. The consideration for the assignment, which was dated December 24, 1889, was admitted.

The bankrupt is chaplain at the Birmingham Workhouse and at the Birmingham Workhouse Infirmary, his joint stipend or salary being £250 per annum.

The joint appointment is solely in the hands of the Birmingham guardians, and the chaplain is elected by a majority of votes, and the salary is paid out of the rates. The appointment is made as regards the infirmary in pursuance of article 23 of the Local Government Board Orders of December, 1888; and as regards the workhouse in pursuance of the General Orders (Consolidated) of July 24, 1847, article 153.

It was contended in the county court on behalf of the trustee that any assignment of the bankrupt's stipend was void or voidable, as being contrary to public policy—(1) because the bankrupt was a public officer, holding a public appointment, and paid out of the public funds; (2) because he was a clerk in holy orders and his salary was payable to him in respect of the cure of souls and the conduct of the services of the church.

It was contended for the respondent (1) that the office held by the bankrupt was not an office of State, to which alone the doctrine of public policy applies; (2) that the alienation of a clerical stipend is only void or voidable under the statute of 13 Eliz. c. 20, which relates solely to charges by beneficed clergy on their benefices.

The questions stated by the county court judge for the opinion of the High Court were:—

1. Whether the assignment to Mr. Coulton was void or voidable in so far as related to the assignment of or charge upon the aforesaid stipend.

2. Whether the said salary or stipend vested in the trustee as and when received by the bankrupt.

Muir Mackenzie stated the case.—The question is whether the salary of this person appointed public chaplain of the workhouse and infirmary is assignable. The duties of the chaplain are prescribed. His remuneration is paid out of the rates and is awarded to him by the guardians. The contention is that an assignment of salary by an officer holding such a public office, and having regard to the public religious duties he has to perform, is invalid on the ground that it is contrary to public policy.

He referred to *Palmer* v. *Bate*, 2 Brod. & Bing. 673; *Cooper* v. *Reilly*, 2 Sim. 560; *Grenfell* v. *Dean and Canons of Windsor*, 2 Beav. 544; *Ex parte Huggins*, 30 W. R. 878, 21 Ch. D. 85.

T. W. Chitty, for the respondent.—In all the cases cited the appointment has been from the State, and has been of a permanent nature. Here the appointment is held at the will of the guardians, and it is not public. At the most, this office of chaplain can only be called *quasi*-public, and in all the cases the appointment was of a permanent character, which this is not.

He referred to *Feistel* v. *King's College, Cambridge*, 10 Beav. 491; *Metcalf* v. *Archbishop of York*, 1 My. & Cr. 547.

Cur. adv. vult.

Feb. 20.—CAVE, J.—The question in this case is whether a charge given by the bankrupt on his salary as chaplain of the Birmingham Workhouse and Workhouse Infirmary is void on the ground of public policy. As we all know, certain kinds of contracts have been held void at common law on this ground, a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy.

I have been referred to *Grenfell* v. *Dean of Windsor* and *Ex parte Huggins* as containing the clearest exposition of the law on this subject. In the former case it was pointed out that in order to avoid the assignment of the pay or salary of an officer on this ground the office must be a public one, or in some way connected with the public service; and that the public is interested, not only in the performance from time to time of the duties of the office, but also in the fit state of preparation of the party having to perform them. On the former ground the pay or salary of persons in the service of the Crown, and on the latter ground the half-pay of officers in the military or naval service, cannot be assigned. Similarly in *Ex parte Huggins* it was laid down that pay given to induce persons to keep themselves ready for the service of the Crown, and pay for actual services rendered to the Crown, cannot be assigned.

On these grounds it has been held that the salary

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

of a clerk of the peace, a freehold office connected with the administration of justice, cannot be assigned: *Palmer* v. *Bate*; nor can the salary of an assistant Parliamentary counsel to the Treasury: *Cooper* v. *Reilly*. It was in consequence of some of the expressions made use of by the Master of the Rolls in *Grenfell* v. *Dean of Windsor* that this case was stated for my opinion, the learned judge of the county court entertaining some doubt whether a clergyman, having the cure of souls, was not a public officer within the meaning of the principle in question. Upon consideration I think that these doubts, though natural, are not warranted by any decided case. It has never been held that a clergyman, having the cure of souls, is a public officer, and, as I have said above, the doctrine in question ought not to be extended. At common law a beneficed clergyman could charge his benefice, and although that was made unlawful by the 13 Eliz. c. 20, yet when that Act was repealed by the 43 Geo. 3, c. 84, in 1803, a charge given between 1803 and 1817, when the 43 Geo. 3, c. 84, was repealed, and the 13 Eliz. c. 20 was revived by the 57 Geo. 3, c. 99, was held valid: *Metcalf* v. *The Archbishop of York*. In this case it is true that the salary is paid out of the poor rate, and that the chaplain, although appointed by the guardians, can only be dismissed by the Local Government Board, but I am of opinion that this is no solid ground of distinction. To make the office a public office the pay must come out of the national, and not out of local, funds—the office must be public in the strict sense of that term. It is not enough that the due discharge of the duties of the office should be for the public benefit in a secondary and remote sense. I must, therefore, answer the questions put to me by saying that, in my judgment, the charge is not invalid on the ground suggested.

With regard to the second point, there is, I think, no question that, during the continuance of the bankruptcy and of the office, the salary, subject to the charge, vests in the trustee as property of the bankrupt within section 44, subject to the power of the court to make an order under section 53, sub-section (2), appropriating the salary in the manner therein pointed out.

Solicitor for the official receiver, *The Solicitor to the Board of Trade*.

Solicitors for the respondent, *Hulbert & Crowe*, for *Coulton*, Birmingham.

Court of Appeal.

From Q. B. Div. April 29.

Ex parte COUNTY COUNCIL OF KENT AND COUNCILS OF THE BOROUGHS OF DOVER AND SANDWICH. (*a*.)

Local government—Transfer of powers to county council—Question for decision of High Court—Right of appeal to Court of Appeal—Local Government Act, 1888 (51 & 52 *Vict.* c. 41), *s.* 29—*Judicature Act,* 1873, *s.* 19.

By section 29 *of the Local Government Act,* 1888, *if any question arises, or is about to arise, as to whether any business, power, duty, or liability is or is not to be transferred to any county council or joint committee under this Act, that question, without prejudice to any other mode of trying it, may, on the application of a chairman of quarter sessions, or of the county council, committee, or other local authority concerned, be submitted for decision to the High Court of Justice.*

Held, that the decision of the High Court upon a question submitted to it under the above section is not a "judgment or order" within section 19 *of the Judicature Act,* 1873, *and that no appeal lies from such decision.*

Appeal from the decision of the Queen's Bench Division, reported [1891] 1 Q. B. 389, upon certain questions submitted to the High Court under section 29 of the Local Government Act, 1888.

The County Council of Kent having appealed,

Henn Collins, Q.C., and *J. V. Austin*, for the council of the borough of Dover, took the preliminary objection that no appeal lay.—Section 29 gives merely a consultative jurisdiction to the High Court, and no appeal lies from the answers given by the court to the questions submitted to it. The decision of the court is not a "judgment or order" within section 19 of the Judicature Act, 1873. There is no machinery to enforce the decision. The question submitted need not have actually arisen, and the decision is to be without prejudice to any other mode of trying the question. The Act provides a convenient mode of obtaining the opinion of the court upon the numerous questions that might arise under the Act.

They referred to *Walsall Overseers* v. *London and North-Western Railway Co.*, 27 W. R. 189, 4 App. Cas. 30; *Bell Cox* v. *Hakes*, *ante*, p. 145, 15 App. Cas. 506; *Haslam Foundry Co.* v. *Hall*, 36 W. R. 407, 20 Q. B. D. 491.

Henn Collins, Q.C., and *H. F. Dickens*, for the council of the borough of Sandwich.

Channell, Q.C., and *Gore*, for the County Council of Kent.—This is not a mere consultative jurisdiction. The words "without prejudice to any other mode of trying it" shows that this is only one of the modes of trying the question. The fact that there is no mode provided for enforcing the decision of the court is not conclusive to show that the decision is not an "order" which can be appealed from.

They referred to *Corporation of Peterborough* v. *Wilsthorpe*, 32 W. R. 548, 12 Q. B. D. 1.

Cur. adv. vult.

April 29.—The judgment of the COURT (Lord HALSBURY, L.C., Lord ESHER, M.R., and FRY, L.J.), which was read by FRY, L.J., was written by

Lord HALSBURY, L.C.—The only thing with which we have to deal is whether in the form in which the question now arises before us there is an appeal to this court. We are of opinion there is not. An appeal must be given, and it is not to be presumed. We do not, of course, mean that it must be given in so many words. If the thing appealed from becomes a judgment or order, decree or rule, of the High Court, it would, of course, be appealable under section 19 of the Judicature Act, 1873, and perhaps something which may fill the character of a judgment or order, although not known by those names, may be subject to appeal as being practically within the words by which a right to appeal is given, although the words themselves be not used. Now the language of section 29 of the Local Government Act, 1888, which we have to construe, provides that the matter (which we shall describe presently) is to be "decided" by the High Court of Justice. If those words are to be taken by themselves, and without reference to the subject-matter dealt with in the section, they certainly imply no right of appeal. In the case of *The Overseers of the Poor of Walsall* v. *The London and North-Western Railway Co.*, though the Court of Appeal was divided on the subject of whether an appeal existed in that case or not, no

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

doubt was (nor, we think, could be) expressed that if the proceeding then in question had been purely of a consultative character, no appeal would lie, but for reasons partly depending upon the forms of the procedure, which involved a rule quashing an order of sessions, the House of Lords ultimately held that an appeal did lie.

Now in this case (again postponing the consideration of the thing to be done under the section, and confining ourselves for the moment to the mere words) there is no rule, there is no order, there is no judgment, there is no decree. The word used in the section is "decision." We think the Legislature must be taken to have been aware of the state of the law as pronounced by the House of Lords in 1878, and if those who framed the Act of Parliament had intended that an appeal should lie they would have either given it by express words, or taken care to use the language the importance of which had been pointed out ten years before by the decision of the House of Lords in the case to which we have referred. But the Legislature has not done so. It has used a popular and not a technical or legal word, and we are of opinion that it must be taken to have intentionally used a word which would exclude the right of appeal. And now, dealing with the subject-matter to which the question relates, we cannot doubt that the nature of the matter referred to is one which itself suggests that the application to the High Court of Justice is intended to be purely consultative. In the first place, it is not necessarily a question that has arisen, but one which may be about to arise. It is to be a question of the transference of the "business, power, duty, or liability" from one set of authorities to another, and it appears to have been thought convenient, without any existing litigation justifying the intervention of a court of justice, that the High Court of Justice might be consulted for their opinion as to which local authority was the proper authority for undertaking such "business, power, duty, or liability." We have used the words "might be consulted" because, although the actual language is "submitted for decision," it is a question which might be "about to arise," and can therefore only be decided in the sense of expressing the opinion of the court how it ought to be decided when it does arise. It is to be "without prejudice to any other mode of trying it," and it can only be submitted on the application of a "chairman of quarter sessions or of the county council, committee, or other local authority concerned." So far as we can see, there is no obligation on the High Court to hear anybody who might be interested as a matter of fact in the decision of the question. And when one sees that the only parties to such a consultation are the authorities which may be charged with the administration of the "business, power, duty, or liability," it is to our minds clear that the Legislature did not contemplate an actual determination of any existing dispute in which a private right was involved, and in which the owner of that private right would have all the ordinary rights of a citizen to maintain it in a court of law, but was solely dealing with the question as to which set of authorities should be charged with such and such portions of administration. The Legislature sufficiently guarded private rights by saying that such an application to the High Court should be without prejudice to any other mode of trying it. They gave discretion to the court to hear such parties as the court itself should think just, and confining the decision, as we think they did, to the High Court of Justice, they appear to us to have carefully avoided the use of any language or any forms of procedure which might involve a right of appeal. For these reasons we are of opinion that this court has no jurisdiction to entertain the questions now raised on appeal, and that this application must be dismissed.

Appeal dismissed.

Solicitors for the Kent County Council, *Palmer & Bull*, for *Brennan & Turner*, Maidstone.

Solicitors for the borough of Dover, *Sharpe, Parkers, Pritchard, & Co.*, for *Knocker*, Dover.

Solicitors for the borough of Sandwich, *Prior, Church, & Adams*, for *Baker*, Sandwich.

From Q. B. Div. April 8.

SMITH, HILL, & CO. v. PYMAN, BELL, & CO. (a.)

Shipping—Advanced freight—"One-third freight, if required, to be advanced, less three per cent. for interest and insurance"—Loss of vessel before requirement of advanced freight.

Where a charter-party contained the clause, "One-third freight, if required, to be advanced, less three per cent. for interest and insurance," and the demand for payment of the advanced freight was not made until after the vessel and cargo had been totally lost,

Held, that the demand had been made too late, and that the charterers were not liable for the advanced freight.

Decision of Charles, J. (ante, *p.* 318, [1891] 1 *Q. B.* 42), *reversed.*

Appeal from the decision of Charles, J., reported *ante*, p. 318, [1891] 1 Q. B. 42.

The action was brought by shipowners against charterers on a charter-party to recover the sum of £245 advanced freight.

On the 30th of November, 1888, the defendants chartered the plaintiffs' ship, *The Gamma*, to load a cargo of coals at Hull and proceed therewith to Odessa, freight to be paid on unloading and right delivery of the cargo. The charter-party contained the following clause: "One third freight, if required, to be advanced, less three per cent. for interest and insurance.

On the 19th of December *The Gamma* left Hull, and the same afternoon she grounded in the Humber, and was, with her cargo, totally lost. Bills of lading had not then been presented or signed, but on these being presented by the charterers after the loss was known the shipowners asked for the payment of one-third freight in advance, and on being refused brought the present action. Charles, J., held that the demand for payment was not too late, and that the charterers were therefore liable.

The defendants appealed.

Lawson Walton, Q.C., and *Robson*, for the appellants.

Cyril Dodd, Q.C., and *Montague Lush*, for the respondents.

The arguments used and cases cited were the same as in the court below.

Lord COLERIDGE, C.J.—I am of opinion that this appeal must be allowed. The contract which is before us for construction is one standing by itself, and our judgment must proceed on the true construction of that contract. Anything, therefore, that I may say leaves the general law on the subject entirely untouched. The ground of my decision is therefore short and simple. We have to deal with a contract containing words which are different from those of any of the decided cases. No doubt for certain purposes advanced freight is freight which, in a

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

general way, and if there is no qualification, cannot be recovered back if it has been paid. The words in the particular contract are: "One-third freight, if required, to be advanced, less three per cent. for interest and insurance." I am clearly of opinion that the fair meaning of those words is that the freight should be advanced if it was required at a time when the three per cent. could be used for the purposes of interest and insurance. The requiring the payment to be made is a condition precedent to its being advanced. It is unnecessary to decide precisely what the nature of the requirement must be. It is clear, I think, that some kind of demand must be made for the freight to be advanced. But it must be a demand for freight which, when paid, is capable of being insured. In this case the demand was not made until a time at which it would have been impossible for the charterer to insure if he had paid it. The demand was not made at a time, therefore, when it could be enforced. The contract is, in my opinion, expressly framed to prevent a further extension of the law laid down in previous cases as to the inability of the charterer to recover advanced freight. The demand was, therefore, in my opinion, too late.

Lord ESHER, M.R.—According to the other terms of the charter-party, the freight which the charterer had to pay was to be paid on the unloading. If, therefore, the vessel never reached its destination, no freight would have been payable. But then comes this stipulation, that part of the freight shall be advanced if required. It is a well-known peculiarity of English law with regard to advanced freight that if the freight is advanced, and both ship and goods are lost, and never reach their destination, nevertheless the freight cannot be recovered, and, further, that, in the absence of any stipulation to the contrary, advanced freight becomes payable the instant the vessel leaves the port of loading, and may therefore be recovered even although she is lost on the voyage. The parties, knowing this to be the law, enter into this contract, which is not in the ordinary and well-known form. It is altered in favour of the charterer, and the part of the freight which is to be advanced freight is not made due when the vessel leaves port, but it is to be due only when demand for it is made by the shipowner.

The demand is, therefore, a condition precedent to the liability of the charterer to pay the advanced freight at all. The shipowner may not demand it, and until he does so the liability to pay it does not arise. Until the charterer has to pay it he has no insurable interest in the freight. But in this case when it was demanded there was no freight that could be insured. I think that the demand must be made at a time when the charterer was in a position to insure the risk he ran—that is to say, at any time before the loss of the vessel. After the loss of the vessel the demand was too late, and the charterers, therefore, were not liable to pay. I think Charles, J., misapprehended Lord Kingsdown's words in *Kirchner v. Venne*, 7 W. R. 455, 12 Moo. P. C. C. 361, and did not give them the interpretation which was put upon them by the House of Lords in *Allison v. Bristol Marine Insurance Co.*, 24 W. R. 1039, 1 App. Cas. 209.

FRY, L.J.—The stipulation in question creates an option in the payee as to the time at which this part of the freight shall be paid. *Primâ facie* such an option can only exist so long as the sum may be payable. Directly the sum becomes unpayable the option ceases to exist. *Primâ facie*, therefore, this option cannot be exercised after the freight has, by the loss of the vessel, become unpayable. But then come in the rules which the Master of the Rolls has mentioned as to advanced freight. I do not think they affect this case. Obviously, this was to be a payment of freight on account. How can there be a payment on account when the freight itself is no longer payable? Again, there is a provision that three per cent. is to be deducted for interest and insurance—interest as compensation to the charterer for paying earlier than he otherwise would have done, and insurance of the risk he ran. But after the loss of the ship he would have to pay no freight, and, therefore, no such compensation would be needed. So, as to insurance, he could not insure in respect of a sum which was already lost. I think, therefore, that this was an option which could only be exercised so long as there was a sum which could be paid. It is clear that it never was so exercised, and that this appeal must, therefore, be allowed.

Appeal allowed.

Solicitors for the plaintiffs, *Pritchard & Sons*, for *J. & T. W. Hearfield & Lambert*, Hull.

Solicitors for the defendants, *Maples, Teesdale, & Co.*, for *Leitch, Dodd, Bramwell, & Bell*, Newcastle-on-Tyne.

From Q. B. Div. March 5.

STOGDON *v.* LEE. (*a.*)

Married woman—Capacity to contract—Separate property—Restraint on anticipation—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-sections* 2-4.

In an action of contract against a married woman under section 1, *sub-section* 2, *of the Married Women's Property Act*, 1882, *the plaintiff must show that the defendant had separate estate at the time of entering into the contract.*

Palliser *v.* Gurney, 35 *W. R.* 760, 19 *Q. B. D.* 519, *affirmed.*

A gift to a woman to her separate use will not be implied from the mere fact that there is a restraint upon the alienation or anticipation of income given to her.

Appeal from the decision of Day, J.

The action was brought against the defendant, who was a widow, to recover £1,320 18s. 6d. due to the plaintiff from the defendant under a covenant.

On the 20th of November, 1875, the defendant, who was then the wife of C. L. Thorpe, executed a deed of separation with her husband, by which her husband covenanted with trustees to pay to them an annuity of £500 (which he had agreed to allow his wife "as for her separate maintenance and support during the joint lives" of himself and his wife), such annuity to be held by them during the continuance thereof, upon trust to pay the same to his wife "as and for her separate use without power of anticipation." Thorpe died in 1877, having by his will left to his executors certain sums of money to be invested in favour of certain ladies therein named, and a sum of £5,000 in trust to invest and to pay the income arising therefrom to his wife, the defendant. The will went on to declare that none of the ladies benefited by the will "shall have power to alienate, charge, or anticipate the income of the several legacies bequeathed for their benefit." On the 26th of April, 1880, the defendant married Philip Lee, and on the 20th of January, 1883, an agreement was executed between Lee and the defendant of the one part and the plaintiff of the other part whereby it was admitted

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

that the defendant was indebted to the plaintiff in the sum of £1,320 18s. 6d. for moneys advanced by him to her, and in consideration thereof, and of the forbearance by the plaintiff to enforce immediate payment, Lee and the defendant jointly and severally covenanted to pay the said sum and interest to the plaintiff on the 8th of February, 1883, and charged the properties contained in the schedule thereto as security for such payment. The schedule comprised the income and arrears owing from the sum of £5,000, to which the defendant, or Lee in her right, was entitled under Thorpe's will, and the arrears due to her under or by virtue of the separation deed.

Lee died in 1886, and the present action was commenced in March, 1889.

Day, J., gave judgment for the plaintiff against the separate estate of the defendant.

The defendant appealed.

Cozens-Hardy, Q.C., *Aspland, Q.C.*, and *Moxon Browne*, for the defendant.—The defendant had no separate estate which she could bind at the time she executed the charges in favour of the plaintiff. In order to bind after-acquired separate property a married woman must have some separate property at the date of the contract: Married Women's Property Act, 1882, s. 1; *In re Shakespear*, 33 W. R. 744, 30 Ch. D. 169; *Palliser* v. *Gurney*, 35 W. R. 760, 19 Q. B. D. 519; *Leak* v. *Driffield*, 38 W. R. 93, 24 Q. B. D. 98. The arrears of the annuity remaining unpaid at the date of the death of the former husband, C. L. Thorpe, were not separate property, because the separate use was only created for the joint lives of Thorpe and the defendant. As to the £5,000, the restraint on anticipation cannot create a separate use. It is only valid when it is added to an interest given to a woman for her separate use: *Baggett* v. *Meux*, 1 Coll. 138; *Moore* v. *Morris*, 5 W. R. 383, 4 Drew. 33.

Channell, Q.C., and *Herbert Reed*, for the plaintiff.—As to the arrears of annuity, when property is given to a woman for her separate use, the separate use applies to every coverture, and only ceases to have effect so long as she is discovert. It revives if she remarries without having disposed of the property: *Tullett* v. *Armstrong*, 1 Beav. 1, 4 My. & Cr. 377. As to the £5,000, it is only necessary in order to create a separate estate that there should be an intention to do so, and the court will infer such an intention from the clause restraining anticipation.

Lord ESHER, M.R.—I think the objections which have been taken to the judgment are too strong to be got over, and we must disagree with the learned judge in the court below.

The whole matter depends upon what is the true construction of the separation deed and the will. If the construction of them both is such that the defendant had no separate estate at the time when the charges in favour of the plaintiff were created, the plaintiff's case necessarily fails, by reason of the decision in *Palliser* v. *Gurney*. That case will now have the authority of the Court of Appeal, as well as that of a divisional court consisting of three judges of the Court of Appeal.

With regard, then, to the construction of the separation deed, I think it is admitted that if the deed had said in express terms "the annuity which I give to my wife for our joint lives is to be for her separate use as against me only," there would be no separate use as against any other husband whom the wife might have after the death of the first. But I think that upon any reasonable construction of the deed as a whole, one must be led to the conclusion that the husband was speaking only of a separate use in his wife as against himself. He could not have been thinking of a husband to whom she might be married after he was dead, because the annuity was to cease with the joint lives—that is, the moment he died if he died first. He could not, therefore, have intended to give the annuity to the separate use of his wife as against a husband whom she might marry after his death. With regard to any husband whom she might marry in case of a divorce obtained by himself, the deed provides that, if the cause for the divorce should arise after the date of the deed, the annuity is thenceforth to cease, and, therefore, he could not have thought of that any more than of a husband whom she might marry after he was dead. There was, of course, the possibility of his finding out after the execution of the deed that he had a cause for obtaining a divorce from his wife which existed before the date of the deed. But can anyone who takes a reasonable view of human nature suppose that when he made this deed and settled an annuity of £500 a year on his wife he was contemplating the possibility of her having previously given him a good ground for obtaining a divorce, and intending that, in case he should obtain a divorce on that ground, the annuity should be to her separate use as against any husband whom she might then marry before his own death. The very notion is absurd.

Can it, then, be supposed that he was contemplating the possibility of his wife's obtaining a divorce from him? It is conceivable that he might afterwards give her a good cause for obtaining a divorce; that is in human nature; but that he should sit quietly down and contemplate the possibility of his doing so is not conceivable, because the only cause which he could give her would be adultery, coupled with cruelty, and, therefore, he would be contemplating something very wrong on his own part. The question of desertion could not arise, because the husband and wife were agreeing to live separately. I think, therefore, it is clear that the separate use mentioned in the deed is a separate use of the income as against the first husband alone, and that arrears of the annuity which ought to have been paid before, and which, if they had been paid before, would not have been separate estate, except as against him, were not, after his death, separate estate at all.

Then we come to the will of the husband. The will gives the wife the income of a sum of £5,000 during her life, without any words of separate use: but there is a subsequent declaration that she is not to have "power to alienate, charge, or anticipate the income." Are those words by themselves, there being no other words, sufficient to give her a separate estate as against her husband; are those words enough to authorize the court to draw the inference that the income was intended to be the wife's separate property? On this point there is in *Baggett* v. *Meux* a *dictum* of Knight-Bruce, V.C., which, although it was not necessary for the decision of that particular case, was part of his considered judgment. He says in the most deliberate and explicit terms that words (equivalent to those of the present will) prohibiting alienation of property by a married woman would be of no effect, unless there were also other words giving the property to her for her separate use. And Lord Langdale, in *Tullett* v. *Armstrong*, used language which shows that he took precisely the same view as Knight-Bruce, V.C. Two such authorities as these are, I think, sufficient to determine the present case on authority alone. But on principle the construction insisted upon on behalf of the plaintiff would lead to this, that that which is a mere accessory to the separate use for the purpose of rendering it effectual ought, standing alone, to compel an implication of that separate use to which it is only an accessory. I

think that the two cases to which I have referred govern the construction of this will, and that no separate estate was given to the wife by it.

The defendant had, therefore, no separate property, either by deed or will, as against her second husband, and she had, therefore, no separate estate at the time she entered into the covenant sued upon. It follows that we cannot agree with the learned judge, and we must allow the appeal and enter judgment for the defendant.

BOWEN, L.J.—I am of the same opinion. As regards the restraint on alienation created by the will, nothing is plainer than that such a restraint may be effectual as an accessory to a separate use already existing. If, however, the restraint is imposed in any other way, it is inoperative. I think I need say no more on this point.

Then as regards the separation deed the argument for the defendant comes to this, that the deed shows that the separate use was not intended to continue beyond the existence of the marital relation between the parties. I would rather put it thus, that the deed was intended to create a separate use only during the joint lives of the parties, for I desire to leave open the possibility that in the probably undreamt-of contingency of a divorce, to which the Master of the Rolls has alluded, the separate use would have arisen as against a second husband taken by the wife during the joint lives of herself and her first husband. Whether that view or the one taken by the Master of Rolls is the more correct one is not really material, because the separate use was certainly to come to an end at the death of either party.

FRY, L.J.—I am of the same opinion. With regard to the separation deed, it appears to me difficult to conceive that there could be an intention that the produce of the annuity should be held to the separate use of the wife at a time when the annuity itself had ceased. The annuity was to cease on the death of either husband or wife. It is difficult to imagine that a separate use could be created after the death of the husband, but I think the meaning is reasonably plain as expressed in the instrument itself. In the first place, there is a recital that the husband had agreed to allow the wife an annuity of £500 "as and for her separate maintenance and support during the joint lives" of himself and his wife. Then follows the most material part of the deed, the declaration of trust:—"It is agreed and declared that the trustees, and the survivor of them, shall stand possessed of the annuity during the continuance thereof, upon trust to pay the same to the wife for her separate use without power of anticipation." Therefore, by the express terms of the instrument itself, the trust for the separate use is declared only during the continuance of the annuity. In other words, the deed declares that the separate use is to be until the death of whichever shall first die of the husband or wife, and we are only giving effect to the instrument itself in holding that whether the separate use applies to any other coverture than that which was then existing, it does not apply to any coverture which may exist after the termination of the joint lives.

Now with regard to the will the case stands thus. There is a gift of income to four ladies (one of them being the testator's wife) for their respective lives, and there is a declaration that neither of them "shall have power to alienate, charge, or anticipate the income of the several legacies bequeathed for their benefit." It is admitted that that, as it stands, is an attempt to restrain anticipation by the ladies during their lives, whether they are married or unmarried; but we are asked to cut it down to a restraint on anticipation during coverture only, and thence to infer a gift to their separate use. Now it is to be observed that a restraint on anticipation can never exist except as an accessory to a trust for a separate use, and we are asked to infer the existence of the substance from the existence of the accessory. In my opinion that cannot be done. It must be borne in mind that the courts have always leaned against a restraint on alienation, and for this very obvious reason, that to give property to a person involves giving him a power to alienate it, and an instrument which, while giving property, takes away that incident to it, must always be construed strictly. I believe that in no case has a trust for a separate use been inferred from a restraint on alienation.

Attention has already been drawn to *Baggett* v. *Meux*, in which Knight-Bruce, V.C., expressed a clear and decisive opinion that this could not be done; and I may quote also the language used by Lord Langdale in *Tullett* v. *Armstrong*, where he says:—"I conceive that the validity of a clause in restraint of alienation, when clearly expressed in connection with a clause giving the estate for the separate use of a married woman, also clearly expressed, has not till lately been doubted." That, I think, is the furthest extent to which the doctrine has been carried, and therefore it is impossible for us, from the general restraint on alienation or anticipation, to infer a trust for the separate use of the wife. Consequently the defendant had no property for her separate use at the time when she executed the charge in favour of the plaintiff, and therefore, on the authority of *Palliser* v. *Gurney*, the plaintiff's case fails, and we must give judgment for the defendant.

Appeal allowed.

Solicitors, *Agate & Garnett; J. C. Stogdon.*

High Court of Justice.

Chan. Div.
Stirling, J. } April 21.

In re CUNNINGHAM AND FRAYLING'S CONTRACT. (*a.*)

Trustee—Trust for sale—Power of appointing new trustees—Exercise of power by co-heiresses of last surviving trustee—"Acting" trustee—"Bare" trustee—Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78), *s.* 5—*Land Transfer Act,* 1875 (38 & 39 *Vict. c.* 76), *s.* 48.

A power of appointing new trustees was given by deed in 1836 *to "the acting trustee for the time being" of the indenture. The last acting trustee, T. P., died intestate, leaving his son T. H. P. his heir-at-law, who subsequently died intestate, leaving his son T. H. S. P. his heir-at-law. He died intestate in* 1876, *leaving his three daughters his co-heiresses. The three co-heiresses executed the power of appointing new trustees contained in the deed of* 1836.

Held, that this was a valid execution of the power, the trust estate having devolved on the three daughters as co-heiresses of the last surviving trustee; these having shown themselves "acting" trustees by exercising this power, and the legal estate having descended to them from their father, who, as a trustee with active duties to perform, was more than a "bare trustee" within the Vendor and Purchaser Act, 1874, *and the Land Transfer Act,* 1875.

Christie *v.* Ovington, 24 *W. R.* 204, 1 *Ch. D.* 279, *followed, in preference to* Morgan *v.* Swansea Urban Sanitary Authority, 27 *W. R.* 283, 9 *Ch. D.* 582.

(*a.*) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

This was a summons by vendors under the Vendor and Purchaser Act, 1874, for the purpose of ascertaining whether they could make a good title to certain freehold hereditaments situate in Church-road and Clarence-place, Bristol.

The title commenced with indentures of lease and release, dated the 22nd and 23rd of November, 1836, the release being made between Ann Whittaker, the elder, of the first part, John Walker and Martha his wife, William Perryman and Mary his wife, James Hammonds and Elizabeth his wife, Thomas Horatio Penny and Charlotte his wife, Ann Whittaker, the younger, and Rebecca Whittaker, of the second part, and William Dwevvy and Thomas Penny of the third part. By it the property in question was conveyed unto and to the use of William Dwevvy and Thomas Penny, their heirs and assigns, upon trust that they or their assigns, or the survivors of them, or the heirs and assigns of such survivor, or other the trustees or trustee for the time being, should sell the same as therein mentioned. And it was therein provided that if any of the trustees thereby appointed, or to be appointed as thereinafter was mentioned, should depart this life, or decline to act in the trusts thereby in them reposed, then and in such case it should and might be lawful to and for the said Ann Whittaker, the elder, during her life, and after her death to and for the said John Walker and Martha his wife, William Perryman and Mary his wife, James Hammonds and Elizabeth his wife, Thomas Horatio Penny and Charlotte his wife, Ann Whittaker, the younger, and Rebecca Whittaker, and the survivors and survivor of them, and after the death of such survivor to and for the acting trustees or trustee for the time being, or the executors or administrators of the last acting trustee, to appoint one or more person or persons to be a trustee or trustees in the room of the trustee or trustees so dying or declining to act, and that the property should be vested in the trustee or trustees so appointed.

All the parties of the second part named in the said indenture, died without having exercised their power of appointing new trustees.

William Dwevvy died in 1849, and Thomas Penny died in 1855, intestate as regards trust estates, leaving Thomas Horatio Penny his heir-at-law.

Thomas Horatio Penny died in 1857, intestate as regards trust estates, leaving Thomas Horatio Stephen Penny his heir-at-law.

Thomas Horatio Stephen Penny died intestate in 1876, leaving his three daughters, Charlotte Matilda Penny, Emma Bird, and Clara Ann James, his co-heiresses-at-law.

By an indenture dated the 7th of June, 1890, Charlotte Matilda Penny, Emma Bird, and Clara Ann James, who had never previously acted as trustees, purported to appoint George Cunningham, Alfred James Hammonds, and Edwin Arthur Hammonds, trustees of the deed of the 23rd of November, 1836, and to vest the property in them.

The trustees thus appointed on the 7th of July, 1890, entered into an agreement for the sale of the property to E. S. Frayling.

H. F. Lawes, for the vendors.—The power of appointing new trustees in the deed of 1836 was validly exercised by the deed of 1890. The three co-heiresses were not only seised of the legal estate, but were also "acting trustees" within the deed of 1836.

He referred to *In re Morton and Hallett*, 28 W. R. 895, 15 Ch. D. 143, and the Conveyancing and Law of Property Act, 1881, s. 31, sub-section 6.

Warrington, for the purchaser.—The three ladies never acted in the trusts save to execute the deed of 1890, and they were consequently not "acting trustees." Further, the legal estate never vested in them upon the death of Thomas Horatio Stephen Penny, who was a "bare trustee" within section 5 of the Vendor and Purchaser Act, 1874, and section 48 of the Land Transfer Act, 1875, and upon whose death intestate the property devolved upon his personal representative.

He cited *Morgan* v. *Swansea Urban Sanitary Authority*, 27 W. R. 283, 9 Ch. D. 582, and *Re Docwra, Docwra* v. *Faith*, 33 W. R. 574, 29 Ch. D. 693.

Lawes, in reply, referred to *Christie* v. *Ovington*, 24 W. R. 204, 1 Ch. D. 279. A trusteeship that involves considerable responsibility cannot be described as "bare."

STIRLING, J.—This case raises a question of law between vendor and purchaser which it is not satisfactory to have to decide. That question is whether the deed of the 7th of June, 1890, was a valid exercise of the power of appointment contained in the deed of the 23rd of November, 1836..

It is said that Charlotte Matilda Penny, Emma Bird, and Clara Ann James were not the "acting trustees or trustee for the time being." Now according to the case of *In re Morton and Hallett* it is clear that the heir-at-law of the last surviving trustee who has the legal estate can execute a trust for sale; and here the trust estate has devolved upon Charlotte Matilda Penny, Emma Bird, and Clara Ann James as co-heiresses-at-law of Thomas Stephen Horatio Penny, and if the legal estate in the property also devolved upon them they were in a position to exercise the trust for sale

It is quite plain from the judgment of Jessel, M.R., in *In re Morton and Hallett* that he thought that where, as here, there is a trust to sell and a power of appointing new trustees, the heir-at-law of the last surviving trustee can execute that power. Now here, if the legal estate vested in the three co-heiresses, it seems to me that they, being persons capable of executing the trust, would fall within the designation of "trustees or trustee for the time being" in the power to appoint new trustees in the deed of the 23rd of November, 1836. Then are they "acting" trustees? I am told that they have received no rents from the property; but I find them here exercising the power of appointing new trustees, which is evidence of their acting. Their not having received the rents is not irreconcilable with this, because it merely amounts to this, that down to a certain time they did not act, but did so, when called upon, by executing this power. I think, therefore, they are "acting trustees" within the meaning of the power.

Then the question remains, whether, having regard to the Vendor and Purchaser Act, 1874, and the Land Transfer Act, 1875, the legal estate vested in these ladies? There are conflicting opinions of Jessel, M.R., and Hall, V.C., as to the meaning of a "bare trustee" within these sections. I regret to have to decide between them, but as I have to form my own opinion on the subject, I must state that I prefer the view of Hall, V.C. This was, as I understand it, that a trustee with active duties to perform is not a "bare trustee" within the meaning of these sections. It is obvious that in *Morgan* v. *Swansea Urban Sanitary Authority*, though it was not necessary for his decision, the late Master of the Rolls held a contrary opinion. He says: "I should have thought that a 'bare trustee' or a 'naked trustee' meant a trustee without any beneficial interest." Being of opinion, however, that the view of Hall, V.C., is preferable and more in accordance with the general opinion of the profession, I hold that Thomas Stephen Horatio Penny was more than a bare trustee, and that the legal

estate devolved upon these ladies as his co-heiresses. I have already held that they were acting trustees; they had, therefore, power to appoint new trustees, and the appointment which they made was valid. I therefore hold that the vendors have made out a good title to the property.

Solicitors, *Meredith & Co.*, for *Hunt, Hodson, Bobbett, & Castle*, Bristol; *Torr & Co.*, for *W. H. Atchley*, Bristol.

Chan. Div. Stirling, J. — April 14, 15.

In re PRIDE.
SHACKELL *v.* COLNETT. (*a.*)

Mortgage—Payment off by part owner of property under mistake—Presumption of intention to keep mortgage alive.

A person who, believing himself to be the owner of an estate, pays off a mortgage upon it, when he is in fact only owner of a portion, will be presumed by the court, in the absence of any express declaration by him, to have made the payment for his own benefit, and the mortgage will be deemed to be kept alive as to the portion of the estate not belonging to him.

A testator devised hereditaments, which were subject to mortgage, to his six children, including P. and S. P. acquired three more of the six shares, and in 1859 he purchased the share of S. In 1862 S. commenced a suit to set aside this sale to P., but before the decree P. paid off the mortgage on the five-sixths of the property to which he believed himself to be entitled.

Held, that the mortgage was kept alive as against the share of S. for the benefit of P.

All the necessary facts are stated in the judgment.

Graham Hastings, Q.C., and *F. Thompson*, for the summons.—Under such circumstances equity will always presume that a mortgage is kept alive for the benefit of the person paying it off. It is absurd to suppose that J. Pride paid off the mortgage on the share of a hostile litigant.

They cited *Adams* v. *Angell*, 25 W. R. 139, 5 Ch. D. 634; *Earl of Buckinghamshire* v. *Hobart*, 3 Swans. 186; *Drinkwater* v. *Combe*, 2 Sim. & St. 340; and *Countess of Shrewsbury* v. *Earl of Shrewsbury*, 1 Ves. jun. 227.

Augustine Birrell, for the plaintiffs.—The plaintiffs were ignorant of J. Pride's dealing with the mortgages till after the commencement of the action. Any equity to the mortgage has been barred by lapse of time.

Hastings, Q.C., replied.

STIRLING, J.—In this case a summons has been taken out by the defendants to vary the certificate of the chief clerk made in pursuance of a judgment in an action brought by the trustee of the plaintiff's marriage settlement and the plaintiff against the trustees and executors of one James Pride to recover a share of the residuary estate of one Thomas Pride, with accounts of such share and of the income thereof. This judgment directed (1) an inquiry whether two mortgages affect the one-sixth share of the plaintiff, Susan Spring, in the testator's residuary real and personal estate, and what is due to the defendants in respect thereof, and (2) an account of the rents and income of such one-sixth share received by the defendants.

The question is whether the two mortgages are still subsisting; and the chief clerk has found that they are not.

As regards, first, the mortgage for £2,000, the facts are, shortly stated, as follows:—Thomas Pride was the father of the plaintiff, S. Spring, and had five other children, to whom (by his will) he left his residuary real and personal estate in (practically) equal sixths, James Pride taking one-sixth share and S. Spring another. Part of the property consisted of land and tithes which, with other property not belonging to the testator, were subject to two mortgages, the amounts due upon which, prior to the date of the re-conveyance, to which I shall presently refer, had been reduced to £2,000 and £300. James Pride had from time to time acquired other shares of his brothers and sisters, in his father's estate, and on the 19th of April, 1859, Susan Spring executed a deed conveying her sixth to him; so that, in the result, James Pride became possessed of the whole of his father's residuary estate (with the exception of the share of Anne Jones, one of the daughters) subject to the two mortgages. On the 1st of December, 1867, Susan Spring commenced a suit to set aside the sale of her share to James Pride, and by a decree of Wood, V.C., dated the 17th of February, 1864, it was set aside. In the meanwhile, on the 1st of February, 1864, a deed was executed, to which the first and second mortgagees, a party entitled to a charge on the property, Henry Jones and Anne, his wife, entitled to one-sixth, and James Pride, entitled to the remainder, were parties, and which was in form a reconveyance to James Pride, of the whole residuary estate, subject to a right of redemption as to one-sixth share in favour of Henry Jones and Anne, his wife. There was, therefore, an absolute reconveyance to James Pride of five-sixths of the property, including the share of Susan Spring, free from the mortgages. Did that in equity put an end to the mortgage?

There is a statement of the law on this subject in the case of *Adams* v. *Angell*, where the late Master of the Rolls said: "In a court of equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it has been extinguished. If a charge is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way; but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it."

The question here is under which branch of the rule thus laid down this case falls—whether under that which applies when a tenant for life pays off a charge, or when the owner in fee or a tenant in tail does so. Even in the case of a tenant in tail, if the estate cannot be barred and the tenant thus become absolutely entitled, the rule that the charge is not presumed to be kept alive does not apply, as was decided by Lord Thurlow in *Countess of Shrewsbury* v. *Earl of Shrewsbury*; and so, too, in *Drinkwater* v. *Combe*, in the case of an owner in fee who paid off the

(*a.*) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

charge, where the estate was subject to an executory devise over, which took effect, it was held that the usual rule did not apply. The presumption, therefore, is in either case that the intention is to keep the charge alive, because to keep it alive is for the benefit of the person who pays it off.

Here the owner of five-sixths of the estate paid off the charge pending a suit to set aside the sale to him of one of these sixths. It would be most unreasonable to presume that he paid it off for the benefit of the very person who was bringing that suit against him instead of for his own benefit. I think, therefore, I must follow the cases to which I have just referred, and apply the rule which is applicable where a tenant for life pays off a charge on the inheritance without expressly declaring his intention. I think, therefore, an intention must be presumed to keep alive the mortgage of £2,000.

[His lordship then dealt with the mortgage for £300, and also with the accounts and other evidence which showed that James Pride had, in fact, shown his intention of keeping the mortgages alive, and varied the chief clerk's certificate.]

Solicitors, *Field, Roscoe, & Co.*, for *G. F. Hill*, Cardiff; *A. Hunt*, for *A. H. Oliver*, Newport, Monmouthshire.

Chan. Div. Kekewich, J. } March 17, 21.

In re BULLOCK.
GOOD *v.* LICKORISH. (*a.*)

Will—Gift of income to A.—Cesser on assignment or bankruptcy—Discretionary trust to apply income for the benefit of A. only—Discretion of trustees.

A discretionary trust to apply income for the benefit of a cestui que trust, *arising upon cesser of his life interest by assignment or bankruptcy, may be exercised by the trustees, notwithstanding that the* cestui que trust *is the only object of the discretionary trust.*

A testatrix directed trustees to stand possessed of a fund upon trust to pay the income to T. W. B. during his life, or until he should become a bankrupt or liquidating debtor, or should cease to be entitled to receive such income for his own benefit; and, in case any of those events happened, then "to pay to him or apply for his benefit during the remainder of his life" either the whole or so much only of the said income as the trustees should, in their uncontrolled discretion, think fit, and, "subject to the aforesaid interest," upon trust for other beneficiaries. T. W. B. assigned his interest, and subsequently became bankrupt.

Held, that the trustees might, in the exercise of their discretion, expend the whole or any part of the income for the maintenance of T. W. B., and that any part not so applied by them went to the persons entitled under the gift over.

Semble, *that payment of the debts of T. W. B. might be an application of the income for his maintenance.*

Adjourned summons.

Mary Bullock by her will, dated the 29th of May, 1883, in exercise of a power of appointment given to her by her husband's will, directed that the trustees of the fund subject to such power, should stand possessed of £15,000, part thereof, upon trust to invest the same, and to pay the income of the investments to her son T. W. Bullock during his life, or until he should become a bankrupt or a liquidating debtor or cease to be entitled to receive such income or any part thereof for his own personal use or benefit by any means or for any purpose, and upon any of those events to pay to him or apply for his benefit during the remainder of his life either the whole or so much and so much only of the said income as the testatrix's late husband's trustees or trustee should in their or his uncontrolled discretion think fit, and subject to the aforesaid interest thereinbefore appointed in favour of the said T. W. Bullock, the trustees should hold the said sum and the investments and income upon trust for other objects of the power. Mary Bullock died in 1886.

By a memorandum of charge, dated the 30th of January, 1889, T. W. Bullock assigned to Messrs. Lickorish & Bellord all his interest under Mary Bullock's will to secure a sum of about £500, and notice of this assignment was on the 23rd of August, 1890, given to the trustees.

On the 23rd of October, 1890, a receiving order was made in bankruptcy against T. W. Bullock, and in December he was adjudicated a bankrupt.

This was a summons by the trustees of the fund asking for the opinion of the court as to whether they might during the life of T. W. Bullock apply any part of the income of the fund in providing, as the trustees should think fit, for the past and future lodging, board, clothing, maintenance, and support of T. W. Bullock, and the payment of sundry legal expenses, or how the income ought to be dealt with by them.

Rawlins, for the trustees of the will.

Maidlow, for the assignee of T. W. Bullock.

Warmington, Q.C., and *Marcy*, for persons claiming under the gift over.—There is nothing to prevent the gift over from taking effect. The trustees have no discretion except for the benefit of a person who cannot take because of his bankruptcy. They have a discretion only when it is to be exercised for the benefit of the bankrupt conjointly with other persons *Godden* v. *Crowhurst*, 10 Sim. 642; *Kearsley* v. *Woodcock*, 3 Hare, 185; *Hemming* v. *Neil*, 62 L. T. 649, 38 W. R. Dig. 203; *In re Coleman, Henry* v. *Strong*, 39 Ch. D. 443, 37 W. R. Dig. 204.

H. A. Colmore Dunn, for T. W. Bullock.

Ashton Cross, for other persons entitled under the gift over.—The trustees have an absolute discretion, notwithstanding the bankruptcy: *Chambers* v. *Smith*, 3 App. Cas. 795, 26 W. R. Dig. 248.

March 21.—KEKEWICH, J.—[After holding that the assignee of T. W. Bullock and the trustee in his bankruptcy had no valid claim to any part of the income of the fund, continued:—] The question is raised as between T. W. Bullock and those entitled under the gift over who are claiming adversely to him. The argument on their behalf was that the language of the will only empowers the trustees to pay the income to T. W. Bullock or apply it for his benefit, and that neither of these things can be done. As regards payment reliance was placed on the decision in *In re Coleman* and my own judgment in *Hemming* v. *Neil*, to which, on reflection, I adhere; and it was said that to pay income to T. W. Bullock would be to make a payment in derogation of the overriding title of the trustee in bankruptcy, and therefore a wrongful payment, which would be no discharge to the trustees of the will, and would render them accountable to the trustee in bankruptcy. That argument is, I think, well founded.

As regards applications for the benefit of T. W. Bullock it was argued that where the court has upheld a discretionary trust for applications arising on bank-

(*a.*) Reported by JAMES H. BAKEWELL, Esq., Barrister-at-Law.

ruptcy or its equivalent, the discretion has been exercisable with reference to the wife and children as well as the bankrupt, and the courts have proceeded on the impossibility of determining beforehand what, if anything, the trustees would, in the exercise of their discretion, apply for the benefit of the bankrupt as distinguished from the other objects of the power. The language of the judgments in *Godden* v. *Crowhurst* and *Kearsley* v. *Woodcock* countenances this argument, but the precise point now before me was not before the court in either case. I can see no reason on principle for defeating the obvious intention of the testatrix. It is clear that the trustee in bankruptcy can take no interest in income applied for the benefit of the bankrupt; and it is difficult to see how those entitled under the gift over can successfully claim as coming to them what, if it does not come to them, would not go to the trustee in bankruptcy. In *Chambers* v. *Smith* it was held that trustees possessing a discretionary power might exercise it in favour of beneficiaries, notwithstanding arrestment by judgment creditors. [His lordship referred to the judgments of Lords Hatherley and Blackburn, 3 App. Cas., pp. 804, 807, 817, and continued:—] T. W. Bullock has no control over the fund when the trustees resolve to exercise their discretionary power. He cannot, and no one claiming through him can, make a claim against the trustees for payment. The assignment in this case, which is equivalent to the arrestment in *Chambers* v. *Smith*, called the discretionary power of the trustees into operation; and it would be a contradiction to hold that the power is inoperative just when it was intended to be exercised. What the trustees in the exercise of their discretion do not from time to time think fit to apply for the benefit of T. W. Bullock, goes by the words of the will to those entitled under the gift over, but they take only this overplus, and cannot claim what the trustees determine to apply.

I was asked by the trustees to define the limits within which they may apply the income for T. W. Bullock's benefit. I find it extremely difficult to do this in the abstract, and I am unwilling to fetter the trustees' discretion, which was intended to be, and ought to be construed as a large discretion. I can say no more at present than that they certainly may, in my opinion, spend the whole or any part of the income in maintenance, using that word in its most general and widest sense; and I doubt whether I was right in saying in the course of the argument that they could not properly pay T. W. Bullock's debts. The discretion is vested in them, and they must exercise it, and so long as they exercise it honestly—that is, as men of ordinary business habits and prudence—and with due regard to all the circumstances of the case, the court will not interfere with them.

Solicitors, *Tucker & Lake*, for *R. H. & P. W. Whitcombe*, Bewdley; *H. Fereday*, for *Rowley, Chatwin, & Emerson*, Birmingham; *Lickorish & Bellord*.

Chan. Div.
Romer, J. } Feb. 14, 16—18.

KENRICK v. DANUBE COLLIERIES AND MINERALS CO. (LIMITED). (a.)

Copyright—Publication—Report—Injunction—Damages.

A mining engineer, K., made a report upon a mining property and handed it to a person engaged with a syndicate in bringing out a company. It was agreed between them that the report might be printed and shown to the syndicate, and, if they determined to proceed with the formation of the company and published the report, K. was to be paid £1,000 for it, but if the company was not proceeded with, the report was to be returned to him. Some 100 copies of the report were printed and shown to the syndicate. Copies were given to some of the members of the syndicate and to one or two other persons. The proposed company having been abandoned, the defendant company took up the property, and, having obtained a copy of the report, made use of it in the prospectus issued by them.

Held, that K. was entitled to an injunction against the company to restrain them from publishing the report, which remained his property, and also to an inquiry as to damages.

The plaintiff, William Wynn Kenrick, was a mining engineer of considerable experience in English and foreign coalfields. In 1884 he surveyed the Ubunya Collieries and other coalfields in Hungary, which were about to be sold to certain persons who were contemplating the formation of a limited company, to be called the Danubian Coal and Iron Co. (Limited). The plaintiff prepared a detailed report, dated the 22nd of May, 1884, of the collieries and properties, with plans and an appendix, and handed it to F. W. Dawson, one of the persons interested in the formation of the proposed company. It was agreed between F. W. Dawson and the plaintiff that the former might print the report, plans, and appendix, and show them to the persons who were engaged with him in the formation of the company, and if they published the report, plans, and appendix, or otherwise made use thereof, the plaintiff was to be paid therefor the sum of £1,000; but that, if the formation of the company was not proceeded with, the report, plans, and appendix were to be returned to the plaintiff.

The plaintiff subsequently went to South Africa on professional business, and soon after his departure F. W. Dawson and the syndicate determined to abandon the formation of the company. Dawson had caused 100 copies of the report to be printed, and in addition to copies which were given to some of the members of the syndicate a copy was given to one Argles, who was the owner of the mine, and another to one Clemisha, and others to the plaintiff himself.

Subsequently a new company (the defendant company) was incorporated for the purpose of acquiring and working the said collieries and mineral properties, and the promoters having obtained a copy of the plaintiff's report, plans, and appendix, handed the same to the directors of the company.

On the 18th of November, 1889, a prospectus of the new company was published containing references to the plaintiff's report and appendix, and it was stated that a copy of the plaintiff's report, with others, could be seen at the company's offices.

The plaintiff issued his writ on the 3rd of April, 1890, and claimed an injunction to restrain the defendant company from issuing or publishing any copies of the prospectus or otherwise publishing the report and appendix, and also an inquiry as to damages. The defence denied the agreement above stated, and alleged that the plaintiff's report and appendix were printed and published before they came into their hands, and that the plaintiff was not the registered proprietor of the copyright therein. The defendants also pleaded that if they had infringed the plaintiff's rights they had been led to do so by the plaintiff's own conduct, and had done so in ignorance of his rights, and stated that they had no intention of issuing or publishing further copies of the prospectus.

Henry Terrell, for the plaintiff.—The plaintiff only

(a.) Reported by J. W. GREIG, Esq., Barrister-at-Law.

parted with his report on a condition which was not fulfilled, nor has it been published except in the limited manner specified in the agreement; any further publication was unauthorized. The plaintiff has, therefore, at common law, power to prevent any infringement of his right in a private unpublished document.

Neville, Q.C., and *E. F. Studd*, for the defendants.—The publication of the report is admitted, and was authorized by the agreement; the effect of that agreement was to create a transfer of the plaintiff's right to Mr. Dawson, who is the proper person to sue. The plaintiff, not having registered his copyright, has no claim to an injunction to restrain the publication, if any, of the plaintiff's reports: *Edlesten* v. *Edlesten*, 11 W. R. 328, 1 De G. J. & Sm. 185.

H. Terrell, in reply, on the question of publication, referred to the cases of *Jefferys* v. *Booseys*, 4 H. L. 815, 3 W. R. Dig. 155; *Caird* v. *Sime*, 36 W. R. 199, 12 App. Cas. 326, see p. 343.

ROMER, J.—The evidence in this case is meagre, and it is not easy to ascertain what the real facts of the case are. It is admitted that the plaintiff is the author of the report, the subject of this action, in which term I include the appendix and plans, so that his title is *primâ facie* clear. The defences to the action urged at the bar on behalf of the defendants are in substance two. First, that the plaintiff has sold his right to the report to one F. W. Dawson, and is, therefore, not the proper person to sue. Secondly, that the report was published by the plaintiff, or by his authority, before action brought, and that the plaintiff, not having registered, cannot sue for infringement of copyright. It appears to me important to bear in mind that the *onus* of proving the facts upon which these two defences are based is on defendants. To support their first defence the defendants rely on the agreement which is pleaded in paragraph five of the statement of claim, and urge that the conditions under which the £1,000 became payable to the plaintiff were complied with. But they have not proved to my satisfaction that Mr. Dawson and the persons who were engaged with him in the formation of the intended company, and who have been referred to as the syndicate, "determined to proceed with the formation of the said company." I agree with the argument of the defendants' counsel that this phrase does not necessitate the company being registered and floated, but, on the other hand, some latitude must be allowed to the syndicate, and it would not follow that, because some steps were taken towards the formation of the company, the syndicate had determined to proceed, within the meaning of the phrase in the agreement.

The only witness on the point is Mr. Dawson, who gave evidence for the plaintiff. The plaintiff himself was abroad, and could not be called. An application was made to me before the action to allow a commission to issue to take his evidence and postpone the trial, but this application I refused. Now Mr. Dawson did not say that the syndicate had determined to proceed. It was not for the plaintiff to establish this, but for the defendants, and the question was not asked him. The defendants then ask me to infer such a determination. It appears to me that I cannot safely do so. On the one hand I find from the evidence of Mr. Dawson that the company was not registered, and that no contract concerning the company was ever registered, and that the first directors of the company were never selected, and the idea of forming the company appears to have been abandoned because sufficient capital could not be obtained. Some letters of the plaintiff were referred to as throwing doubt on the evidence of Mr. Dawson, but Mr. Dawson was clear, and I think that the statements in the letters were not accurate. Indeed, it is clear that in some respects they are not accurate, and I see no sufficient reason for discrediting Mr. Dawson, especially as the defendants have not called any witness to speak to any matter beyond the acts of the defendants themselves, and how they became possessed of the plaintiff's reports. As against this it also appears from Mr. Dawson's evidence that a prospectus was prepared, and the memorandum and articles of association of the intended company. But, as I have said, I cannot safely draw from this such an inference as the defendants ask. But beyond this, for the reasons I will presently mention, I have come to the conclusion that there has been no publication of the report (beyond the defendants' unauthorized acts). Nor has, in my judgment, the syndicate been proved to have "otherwise made use thereof" within the meaning of that phrase in the agreement. The only acts which were relied on by the defendants to support such a user, beyond the showing of the report to the syndicate expressly provided for by the agreement, were the sending of a copy of the report to Mr. Argles, and also giving one to Mr. Clemisha. But it does not appear that Mr. Argles, who was one of the owners of the mines, was not also a member of the syndicate, or that Mr. Dawson in sending the copy to him was using the report by authority of the syndicate, and as to Mr. Clemisha, it is improbable that the copy was given to him with such authority, seeing that it was given as late as 1886 or 1887, and Mr. Dawson appears when he gave it to have felt he was acting without authority, having regard to what he says he stated to Clemisha at the time. At any rate, I again say, the *onus* being on the defendants to establish the user within the meaning of the agreement, they have not discharged it to my satisfaction.

The result is that the conditions on which, according to the agreement, the plaintiff was to be paid for the report have not been complied with, and the report remains his, and this view is strongly supported by the fact that the £1,000 has not been paid or sued for, and that the parties to the agreement are only the plaintiff, who is suing as owning the report, and Mr. Dawson, who comes as a witness to support the plaintiff's case.

As to the second point, prior publication is not proved. The only witness on the point is Mr. Dawson. The defendants had no witness to support this part of their case. Mr. Dawson's evidence is substantially to the following effect: That there was no publication of the report (unless what I am about to state is a publication); that the report was printed according to the agreement with the plaintiff, and shown to the members of the syndicate and a copy given to one or two members and to the solicitor of the syndicate, and that some copies were sent to the plaintiff; that a copy was sent to Mr. Argles and also to Mr. Clemisha, and these I will especially refer to; that except as above no copies were parted with, and only 100 copies were printed, and except those parted with, these copies remained in Mr. Dawson's possession, but how many remained he could not say. Now it is admitted that the mere printing of the report for the purpose of showing it or handing copies of it to a few persons engaged in considering the formation of the company would not be a publication. Nor, in my judgment, was the mere sending of one copy to Mr. Argles a publication, even if that gentleman were not one of the syndicate, having regard to his possession as one of the co-owners of the property, and even if Mr. Dawson was authorized to hand the copy to him, which has not been established.

As to the sending of one copy to Mr. Clemisha, I have already dealt with that. It appears to have been sent to enable Clemisha to assist Dawson in finding persons to help in bringing out Dawson's proposed company, and this would not constitute a making public of the report, even if Dawson had been authorized in what he did by the plaintiff, which, from Dawson's words and demeanour, I gathered he was not. Moreover, neither Clemisha nor Argles is forthcoming as a witness for the defendants, though the defendants claim through them. Clemisha cannot be found, and that may be the misfortune of the defendants. But Argles appears to have been in communication with the defendants, and assisting them, but he is not called, nor is any explanation offered of his absence. The defences, therefore, in my judgment, fail.

The defendants appear to have got the copy of the report which they used from either Argles or Clemisha, probably the latter, though the matter is left somewhat in obscurity on the defendants' evidence. Certainly from no point of view was Argles or Clemisha entitled to deal with the copy of the report which he obtained by selling it to the defendant company, or by authorizing the defendant company to use it as that company has done, and no care or inquiry as to the title of Argles or Clemisha to the report appears to have been taken or made by the defendant company or by Captain Inglis, who was the vendor of the company; so that, even if the defendants succeeded in their defences to the present action, they would still be open to an action for damages by the right owner after registration.

It follows that the plaintiff is entitled to an injunction. The defendant company printed the report and used it by showing it to applicants for shares, as admitted by their statement of defence, and by stating the substance of it in their prospectus. The offer, after action brought, in the statement of defence, coupled with a denial of the plaintiff's right, does not entitle the defendants to resist the injunction. I think the plaintiff has suffered damage. It is said that the case is like the innocent user of a trade-mark in ignorance of the true owner's rights, which gives no claim at law in damages to such true owner. I think the cases are not the same. The plaintiff here has a property recognized at law, which has been injured by the defendants' acts. I therefore give him an inquiry as to damages for the part publication by the defendants of his report.

The injunction will be to restrain the defendants, their agents and servants, from further publishing the said report, plans, and appendix, or any of them. The defendants must pay the costs up to and including judgment. The costs of inquiry as to damages will be reserved.

Solicitors for the plaintiff, *Lumley & Lumley.*

Solicitors for the defendants, *Kaye & Guedalla.*

Q. B. Div. (A. L. Smith and Grantham, JJ.) April 7.

LAMB *v.* GREAT NORTHERN RAILWAY CO. (*a.*)

Master and servant—Wages paid to railway porter—Deduction for sick fund—Truck Act, 1831 (1 & 2 *Will.* 4, *c.* 37), *ss.* 1-3, 23—*Truck Act,* 1887 (50 & 51 *Vict. c.* 46).

The plaintiff, a railway porter, sued his employers, a railway company, for deductions made from his wages applied as contributions to a sick fund under the terms of a written agreement signed by him, the amount of such deductions being shown by the defendants to have been in fact expended in medical relief to the plaintiff and his wife.

Held, that a contract for deductions to be applied for medical relief was not in contravention of the Truck Act, 1831, *and the amending Act of* 1887, *but came within the contracts legalized for exceptional purposes under section* 23 *of the Truck Act,* 1831, *and that the permissory provisions of section* 23 *must be read on to the prohibitory provisions of the amending Act of* 1887.

Quære, *whether a railway porter came within the term "a person engaged in manual labour."*

Appeal from the judgment of his Honour Judge Bristow, sitting at the county court of Doncaster, in favour of the defendants.

This was an action by a railway porter against his late employers, the Great Northern Railway Co., for £2 8s. 9d., the amount of certain deductions made from his weekly wages under an agreement as to the terms of his service signed by him at the time of service, and paid into the Great Northern Railway Sick and Funeral Allowance Fund. The following clause was the clause of the agreement signed by the plaintiff, so far as it was material to the present action:—"There will be deducted from the pay of every porter under all circumstances so long as he continues to be a servant of the company the following sums, . . . being contributions to the Great Northern Railway Co.'s Sick and Funeral Fund, established for the benefit of the company's servants, administered under the rules, copies of which are supplied. It is optional for any servant to join this fund if he belongs to some other benefit society entitling him when sick to 10s. a week if a man, or 3s. 6d. a week if a lad." A table of the contributions so deducted was attached to the form of agreement.

The drawback, or deduction, amounted to 8s. a year, and evidence was given by the defendant company that the whole of that amount (and more) had been expended for medical attendance upon the plaintiff or his wife. The plaintiff contended that any such deduction was in contravention of the Truck Acts of 1831 and 1887 (1 & 2 Will. 4, c. 37, and 50 & 51 Vict. c. 46), and that he, being "engaged in manual labour," was entitled to the benefit of those Acts under the provision of section 2 of the amending Act of 1887 extending their scope to manual labourers. The judge held that the deduction came under the exceptional deduction for medical expenses legalized by section 23 of the Truck Act, 1831, and gave judgment for the defendants.

The plaintiff now appealed.

Aspland, Q.C., and *Blake Odgers,* for the appellant.—Such a deduction was not "payment of wages in current coin of the realm" or "payment of the entire amount of wages" as required by sections 1 and 3 of the Truck Act, 1831. The agreement was illegal as being "a contract made directly or indirectly respecting the manner in which the wages should be expended" contrary to section 2 of the said Act. These provisions are re-enacted by sections 3 and 6 of the amending Truck Act, 1887, and the exceptional deductions, including that for medical attendance, allowed by section 23 of the earlier Act are only exempted from the prohibitory provisions of the later Act in regard to section 5 of that Act, which allows an employer to counter-claim in respect of anything excepted under section 23. This deduction was not made solely for medical attendance, but

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

for a general benefit fund, and medical attendance to a wife does not come within the scope of section 23.

Pillar v. *Llynvi Coal and Iron Co.*, 17 W. R. 1123, L. R. 4 C. P. 752; *Cutts* v. *Ward*, 15 W. R. 445, L. R. 2 Q. B. 357; *Ex parte Cooper, In re Morris*, 26 Ch. D. 693, 33 W. R. Dig. 23, were cited.

Montague Lush, for the respondents, was not called upon.

A. L. SMITH, J.—The plaintiff in this action was a servant in the defendant company's employ from August, 1876, up to June, 1890. At first he was a goods guard, and afterwards he became a porter at one of their railway stations. In March, 1880, he signed a document containing the terms on which he was willing to serve the company. This was a written agreement, and the only term to notice as material for the present purpose is one accepting wages at the rate of from 16s. to 18s. a week, from which he covenanted to agree to a small weekly deduction to go to the Great Northern Sick and Funeral Allowance Fund.

Under the terms of this form of agreement it was optional for any employee to subscribe to this fund if he was a member of any other benefit society and entitled to not less than 10s. a week when on sick pay. The plaintiff had paid under this covenant 8s. a year. He now brought an action to recover the amount so deducted from September, 1887, to June, 1890, on the ground that previous to the first date the Truck Act of 1887 had become law, and that under that Act any such deduction from the rate of wages had become illegal, and he sued for £2 8s. 9d. as the amount deducted for the above-mentioned fund during this period. The defendant company, on the other hand, say, first, that there was no contravention of the Act by them in retaining this amount, and, secondly, they produce evidence that the whole of the amount deducted, and more, has been expended by them in payments for medical attendance upon the plaintiff or his wife in each year during this period. It is admitted that the plaintiff, as a railway servant, could not have sued before the recent Truck Act of 1887 came into operation, because the old Truck Act of 1831 (1 & 2 Will. 4, c. 37), did not apply to such a class, but the later Act applies the provisions of the former Act to "persons engaged in manual labour" within the terms of the Employers and Workmen Act, 1875. This point has not been argued before the court, because it has not become necessary. We know that the defendants' counsel was prepared to argue against the plaintiff being entitled to be included under that term. Without expressing any binding opinion, I will only say that, as at present advised, I should be inclined to hold that the plaintiff as a porter was, in fact, a manual workman within the meaning of the Act and in accordance with the principles of interpretation of those words laid down by Day, J., and myself in *Morgan* v. *General Omnibus Co.*, 32 W. R. 416, 12 Q. B. D. 201.

But to come to the point argued before us. Was this deduction by the defendant company from the plaintiff's wages prohibited or not by the two Truck Acts read together as enacted? By sections 2, 3, and 4 of the Truck Act, 1831, drawbacks generally are prohibited, but by section 23 they are permitted in the particular case of drawbacks for medical attendance. Certain drawbacks are legalized by section 23. One of these is the drawback for medical attendance, provided that the agreement to allow it is in writing. The agreement here was in writing; but it is said that it was for something more than medical attendance, in that it was for a general benefit fund including other purposes than medical attendance. However that may be, the company here have proved that the whole amount and more has been actually expended in medical attendance on the plaintiff or his wife. He cannot now turn round and claim for money proved to have been so expended as "wages earned and not actually paid to him by his employer" under the terms of section 4. It is, however, said that such a deduction, if not prohibited by the Truck Act of 1831, comes under the prohibition of section 6 of the amending Act of 1887. That section deals particularly with agreements for deductions or drawbacks made under coercion. Such contracts as come under the first sections of the Act of 1831 are to be illegal and void if proved to have been made under coercion; but does that section apply at all to agreements sanctioned under section 23 of the earlier Act? The two Acts are to be construed together. That being so, the proviso in section 5 of the later Act, expressly excepting agreements under section 23 of the earlier Act, seems to me really surplusage. The provisions of section 23 as to the particular drawbacks legalized must be read in after both sections 5 and 6 of the later Act, and if the agreement, as here, comes under section 23, as one for medical attendance, it is excepted from the prohibitory provisions of the later Act, whether expressly provided to be so excepted or not. I do not think the *dicta* by some of the court in *In re Morris* are applicable. That was a case where there was no written contract, and the *dicta* merely suggest a query as to what might have been the opinion of the court had there been a contract in writing.

I am of opinion that the judgment for the defendants must be affirmed, and this appeal must be dismissed.

GRANTHAM, J.—I agree. The contract must be held to include medical relief afforded to the plaintiff's wife as well as to himself. I think that section 5 of the later Act must have been re-enacted, though nearly in the same form as in the earlier Act, in order to meet the case of a counter-claim by the employer, whereas the earlier Act only dealt with any set-off in these various respects made by an employer. Again, section 2 of the earlier Act applies only to "wages due" to the workman, whereas section 6 of the later Act applies to the place or manner in which the wages "are paid," and against any coercion by the employer as to the method in which such wages are to be afterwards expended by the workman. In any case, section 23 supplements all the provisions of the later Act, and agreements for the purposes legalized by that section are excepted from any prohibitory provisions of the later Act.

Appeal dismissed.

Solicitors for the appellant, *Thomas & Metcalf*, for *Dunn*, Doncaster.

Solicitors for the respondents, *Nelson, Barr, & Nelson.*

Q. B. Div. (Pollock, B., and Charles, J.) Feb. 6.

LANGSTON (SURVEYOR OF TAXES) (*Appellant*) *v.* GLASSON (*Respondent*). (*a.*)

Inland revenue—Income tax—Bursar of college—Salary as bursar—Exemption from income tax in respect of such salary—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 146, *Schedule E.*

The principal bursar of St. John Baptist College,

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

Oxford, claimed to be exempt from income tax on his salary of £450 a year which he received as such bursar, on the ground that, though not actually a member of the corporation of the college, his salary is "by statute" a charge upon the revenues of the corporation, and is therefore equally exempt from direct taxation. The principal bursar is an officer appointed for five years by the president and fellows, who are members of the foundation, and he is, by the statutes of the college, one of the necessary officers of the college.

Held, that, as he was not one of the body who constitute the college, but merely an officer appointed by the president and fellows, he was not entitled to the exemption claimed, but was liable to be assessed for income tax, under Schedule E. of section 146 of 5 & 6 Vict. c. 35, upon the salary which he received as bursar.

Case stated by Income Tax Commissioners under section 59 of 43 & 44 Vict. c. 19.

At a meeting of the Income Tax Commissioners for the University of Oxford on the 21st of December, 1889, Mr. William J. W. Glasson, M.A., of St. John Baptist College, principal bursar of the said college, appealed against an assessment on £450 under Schedule E. of 5 & 6 Vict. c. 35, s. 146, made upon him for the year ending the 5th of April, 1890, being the amount of his stipend as the principal bursar of St. John Baptist College.

The Act 5 & 6 Vict. c. 35, s. 146, enacts that the duties thereby granted contained in the Schedule marked E. should be assessed and charged under the following rules, which rules shall be deemed and construed a part of this Act, and to refer to the said duties, as if the same had been inserted under a special enactment.

Rule 1 provides that the duties should be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in the said Schedule E., or to whom the annuities, pensions, or stipends mentioned in the same schedule shall be payable, for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, or pensions, after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament, where the same have been really and *bonâ fide* paid and borne by the party to be charged.

Rule 3 provides that the said duties shall be paid on all public offices and employments of profit of the description hereinafter mentioned, *videlicet* (amongst others), any office or employment of profit held under any ecclesiastical body, whether aggregate or sole, or under any public corporation, or under any company or society, whether corporate or not corporate; any office or employment of profit under any public institution or on any public foundation of whatever nature or for whatever purpose the same may be established.

The respondent claimed to be exempt from direct assessment on the above sum, which represents his stipend as bursar, on the ground that, though not actually a member of the corporation of the college, his salary is "by statute" a charge on the revenues of the corporation, and is, therefore, equally exempt from direct assessment; he also said that he received the same allowances for buttery, &c., charges as members who are actually on the foundation.

The respondent put in a copy of the statutes made for St. John Baptist College by the University of Oxford Commissioners acting in pursuance of the Universities of Oxford and Cambridge Act, 1877.

Statute 1 provides as follows:—"The college shall consist of a president, fellows, and scholars." Statute 4, section 1, provides:—"The officers of the college shall be the vice-president, two deans of arts, a bursar or bursars, tutors, lecturers, and librarian. If there are more bursars than one, one of them shall be called the principal bursar." Section 2: "The president and fellows may regulate the conditions of the tenure, and the powers, duties, and emoluments, as well of such new offices as of the existing offices." Section 3: "The officers of the college, with the tutors and lecturers, shall be elected by the president and fellows at stated general meetings, and for periods not exceeding five years."

On the 25th of April, 1889, the respondent was duly elected principal bursar for five years, at a yearly salary of £450.

The surveyor, in support of the assessment, contended that the office of bursar in this case, not being held by a fellow or any person on the foundation of the college, was an "office" or employment of profit held under a society corporate, and as such fell within rule 3 of 5 & 6 Vict. c. 35, s. 146; that the college had no power to, and do not, deduct income tax from the bursar's stipend, and there was no enactment to exempt the stipend from direct taxation.

The commissioners found (1) that the respondent was not on the foundation of the college, but that (2) his stipend was charged by the statutes of the college on the corporate revenues of the college, and they held that the stipend was not directly assessable, and allowed the appeal.

The surveyor appealed.

Sir R. E. Webster, A.G., Sir E. Clarke, S.G., and *Danckwertz*, for the appellant.

A. P. Poley, for the respondent.

POLLOCK, B.—This is an appeal on the part of the Crown upon an exemption allowed by the commissioners sitting for Oxford University in favour of the bursar of St. John Baptist College, in the University of Oxford; and they allowed that deduction to be made "because his stipend was charged by the statutes of the college on the corporate revenues of the college"; and they also added that they had regard to the "official interpretation of the law expressed by the Board of Inland Revenue," a matter which ought not to be the ground of decision either by the commissioners or by us. The question is, Is that deduction admissible? I am sorry to say I have come to the conclusion that it is not.

The bursar is a gentleman who comes within statute 4 of the College Statutes which were passed, and to which the common seal of the University of Oxford Commissioners was affixed in the year 1881; and by statute 4, which relates to officers of the college, it is provided by the 1st section that "the officers of the college shall be the vice-president, two deans of arts, a bursar or bursars, tutors, lecturers, and librarian." Then there is a power given to the president and fellows to regulate these offices, and they may from time to time institute new offices, and they may suppress offices, and they may assign to such new offices reasonable stipends as they may think proper; and they may from time to time regulate the condition of the tenure and the powers, duties, and emoluments as well of such new offices as of the existing offices.

It is to be observed that the respondent was appointed in 1889, certainly long since the passing of these statutes; therefore that clause as to existing offices does not apply. Therefore he receives such stipend as the president and fellows at their general meeting consider to be the proper stipend. We were referred to the original statutes of the college with reference to the position and payment of the bursar. The only point that throws any light upon his position is that it is said as to his stipend, "*a collegio recipiat.*" When we look at the collocation of these words, and see that there are several officers who are

to be paid in like manner, they do not at all show that he is one of the body who constitute the college. If he were one of the body who constitute the college in the sense that he was one of those who had the power of dividing among themselves the revenues of the college, then there would be no office, no salary, but he really would be receiving that which fell to his lot as one of that college body. It is clear to me, both from the original statute and from this more recent statute of 1881, that he is an officer in the sense that he is appointed by the president and fellows, and he receives a salary for the discharge of his duties.

Then, that being so, we find, by reference to Schedule E. of the Income Tax Act, by the 3rd subsection, "the duties paid upon all public offices, and employment of profit of the description hereinafter mentioned within Great Britain shall be as follows." Then follow a series of offices belonging to the Houses of Parliament, courts of justice, and so forth, and then comes this: "Any office or employment of profit held under an ecclesiastical body, whether aggregate or sole, or under any public corporation, or under any company or society, whether corporate or not corporate." Therefore this case comes within that strictly, and in substance also it comes within that definition, and as such it seems to me that the respondent must pay this income tax exactly in the same way as if he had received a salary that was paid by some other corporation or by some private individual. With regard to that corporate body, they pay upon the funds which belong to a corporate body, and those who are the constituent members of that corporate body are merely persons going to form the body. The funds of that body belong to the corporate body as a corporate body, and not to the individual members, and are dealt with accordingly by the Income Tax Act. Again, it was said that the bursar gets his pay from the college; true, he does in this sense, that he is employed by the college, and whether an action for his salary should be against the collegiate body or against those individual persons appointing him, who would recoup themselves from the funds of the college, is equally immaterial.

It was said there was a little hardship upon the respondent, and the commissioners obviously thought so, because of the direction given to the officers of the Inland Revenue by the Board of Inland Revenue, and that is in these words, "The members of a capitular or collegiate body are not liable to direct assessment in respect of sums which they are as members of the corporate body legally entitled to receive out of the taxed income of the corporation. Salaries paid out of such income to persons who are not members are, however, chargeable by direct assessment, unless they are a charge by statute or otherwise on the revenue of the corporation." That really raises only the point raised here to-day. If we could find that the respondent was a member of the collegiate body, and was merely taking his share of the collegiate property, then he would not be taxed; but if he comes within the second branch, namely, that he receives a salary paid out of such income, then, though it is said that applies only to persons who are not members, it seems to me that there is no hardship in respect of this direction given. Any one construing the direction with reference to the legal status of the parties would see no difficulty in saying that the respondent came within the second category, and not within the first. However that may be, the objection as to hardship raises no point of law at all. It is only fair, however, to allude to it as part of the commissioners' ground of decision.

It appears to me, therefore, that this allowance cannot be made, and that this assessment is incorrect.

CHARLES, J., concurred.

Appeal allowed.

Solicitor for the appellant, *The Solicitor of Inland Revenue.*

Solicitors for the respondent, *W. & H. J. Sheldrake.*

Q. B. Div. (Pollock, B., and Charles, J.) Feb. 5.

DILLON v. CORPORATION OF HAVERFORDWEST. (a.)

Income tax—Gas works belonging to municipal corporation—Profit on trade with private customers—Deductions—Expenditure incurred in lighting streets—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule D., Cases I. and II.*

The corporation of a borough were empowered by Act of Parliament to erect gasworks and light the streets without contracting for the purchase of gas; and they were further empowered, after sufficiently lighting the streets, to supply gas to any persons who should be willing to pay for it.

Held, that, in estimating the profits of their trade with their private customers, for the purpose of assessment to the income tax, they were not entitled to deduct the amount expended in the public lighting of the streets.

Case stated by Income Tax Commissioners under 43 & 44 Vict. c. 19, s. 59.

At a meeting of the commissioners for the general purposes of the income tax for the division of Haverfordwest, held on the 31st of October, 1888, the Corporation of Haverfordwest appealed against an assessment of £558 10s. made upon them under Schedule D. in respect of the profits of their gas works.

A local Act of Parliament, passed in 1835 (5 & 6 Will. 4, c. lxxiii.), for paving, lighting, and otherwise improving the town of Haverfordwest, after appointing certain persons to be commissioners for carrying the Act into execution, by section 45 empowered the commissioners, or the persons with whom the commissioners might contract for the purpose, to set up lamps in the streets, and light the same with gas, oil, or otherwise. Section 53 empowered the commissioners, if they thought fit to light the streets without contracting for the same, to erect gasometers and all necessary apparatus for the production and supply of gas, and for that purpose to purchase land. Section 56 enacted that, if the commissioners should deem it expedient to erect such gas apparatus and to light the streets without contracting for the same, it should be lawful for them, after sufficiently lighting the streets, to let or demise to any person or persons who should be willing to take the same any lights or burners, and to supply the same with gas upon such terms and conditions, and at such annual rents for the same, and in such manner, as the commissioners should think proper; provided that all money to arise therefrom should be, in the first instance, applied towards defraying the expenses of the said gas apparatus and other things connected therewith, and if there should be any overplus, then the same should be applied generally for the purposes of the Act. Section 96 authorized the commissioners, for the purpose of defraying the expenses of carrying the Act into execution, to levy a rate annually on the occupiers of

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

all dwelling houses and other buildings within the district not exceeding one shilling in the pound.

By an Act (40 & 41 Vict. c. cxxxii.) to confirm certain provisional orders of the Local Government Board, all the jurisdiction and powers of the said commissioners were transferred to the council of the borough of Haverfordwest.

The commissioners, and afterwards the corporation, annually levied a rate of one shilling in the pound under section 96.

The sum of £558 10s., at which the corporation were assessed, represented the profits made by them in their business of supplying gas to private consumers. The corporation contended that they were entitled to deduct from such profits the expenses incurred by them in the manufacture of gas for the public lamps and in lighting the streets. The surveyor of taxes, on the other hand, contended that such expenses could not legally be deducted.

The commissioners of income tax decided in favour of the corporation, and reduced the assessment to £500 17s. 9d.

The surveyor of taxes, being dissatisfied with the decision, required the commissioners to state a case, for the purpose of bringing this appeal.

Danckwerts (*Sir Edward Clarke, S.G.*, with him), for the appellant.—The respondents, in the first place, carry out their statutory duty of lighting the public lamps; and in the second place, over and above that duty, they carry on a trade, manufacture, adventure, or concern in the nature of trade—viz., the manufacture and supply of gas to private consumers. They are liable to be assessed to income tax on the profits arising from that trade. The method of ascertaining those profits is to set on one side the gross receipts and to set on the other side those expenses which the Income Tax Act allows to be deducted therefrom. By section 60, Schedule A, No. III., 3, of the Act of 1842, gas works are to be assessed on the amount of the profits received therefrom; and the expenses allowed to be deducted in ascertaining those profits are those specified in the rules to Schedule D: see 29 & 30 Vict. c. 36, s. 8. The respondents contend that they are entitled to make this deduction under Schedule D, Cases I. and II., rule 1, which allows the deduction of money wholly and exclusively laid out or expended for the purposes of the trade. But this means expenses incurred in the trade, not expenses incurred so as to be able to carry on the trade. The expenditure attributable to lighting the public streets is capital expenditure, it is a sum paid for the privilege of supplying the public with gas; and it ought not to be deducted from the profits of the respondents' trade.

F. C. Gore, for the respondents.—The commissioners were right in allowing this expenditure to be deducted. The respondents' trade with the private consumers of gas ought not to be treated as a separate matter from their business of lighting the public lamps. The gas trade which they carry on is one trade only. The effect of section 56 of their Act is that they cannot make any profit from supplying gas to private customers till they have performed the duty of lighting the public lamps. The thing assessed to income tax is profit. And the profit of a trade is the surplus by which the receipts exceed the expenditure necessary for the purpose of earning those receipts. The expense incurred by the corporation in respect of the public lamps is a sum necessarily laid out and expended by them in earning what they receive from their private customers.

The following cases were cited:—*Corporation of Dublin* v. *McAdam*, 20 L. R. Ir. Ex. D. 497, 36 W. R. Dig. 98; *Glasgow Corporation Water Commissioners* v. *Miller*, 13 Ct. Sess. Cas. (4th series), 489; *Russell* v. *Town and County Bank*, 13 App. Cas. 418, 36 W. R. Dig. 96.

POLLOCK, B.—This corporation, by their private Act of Parliament, acquired the power to supply themselves with gas, they took power to erect gas works and light the streets without contracting for the purchase of gas; they also took additional power to use the same gas works for the purpose of supplying any persons who were willing to buy their gas, and to receive payment for it, always provided that they were not to sell gas to other persons until they had complied with the duty undertaken by them of supplying the public lamps. Now, when the corporation rendered their accounts, on the gas which they manufactured for the public account there would be and could be no profit, but upon the gas which they supplied on the private account to consumers to whom they sold their gas—that account being taken separately—there was a profit; and on that profit they were in the first instance assessed. They appealed, and appealed successfully, to the assessment commissioners, and now again the Crown appeals to this court.

I have come to the conclusion that this appeal must succeed. The respondents are assessed under section 60, Schedule A, No. III., of the Income Tax Act, 1842: "The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited." And by sub-section 3 this rule applies to gas works. It is as owners of gas works that the corporation are assessed. Now with regard to deduction the rules applicable to the present case are those given in Schedule D, Cases I. and II. The first of these rules is: "In estimating the balance of the profits or gains to be charged according to either of the first or second cases, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains, for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade." It is clear to my mind that anything expended upon the public lighting of the town was not expended for the purposes of that trade in respect of which the respondents were assessed. Here is a body which is bound to provide for the lighting of the town. They may buy gas or they may make it. They elect to make it, and of course it must be paid for by a rate. In doing this they are in no sense traders; there are no vendors, and no vendees. To use the expression of Palles, C.B., in *Corporation of Dublin* v. *McAdam*, it is a case of principal and agent, that is to say, the corporation are the agents to supply gas to their principals, the people of the place. So far no trade is carried on. But then they have beyond this an option of doing something more; section 56 enacts that it shall be lawful for them, after sufficiently lighting the streets, to supply gas to any persons who shall be willing to pay for it. They choose to act upon this; they make gas and sell it, and immediately, by virtue of the relation of vendor and vendee coming into existence, a trade arises and profits for the first time arise in that trade.

It seems to me that this case is tolerably clear when we see the real meaning of this section, and consider the *Glasgow case* and the *Dublin case*. In the latter case Palles, C.B., says, "I think the true ground of decision is that the body to pay is a distinct and separate body from the body to receive, that the relation between the two bodies is that of vendor and purchaser of water, as in the case of municipal inhabitants it is that of principals and

agents in respect of that supply." And later on he returns to the same mode of argument, and says that, to his mind, it is clear that no trading arises until a supply is given to those who are beyond the boundary. All that argument applies very strongly to the present case. Upon the other side it has been argued that the whole thing is to be looked at in one light, that we must look on this body as a trading body to which the law has established a sort of clog or drawback, to this effect—you must not supply private inhabitants until you supply the public lamps, and, therefore, when you make up your accounts, if you find you make a profit upon the private supply, you must look back and see whether you have made a loss upon the public supply, and then deduct that loss from it. But I think I have already answered that proposition by showing that no profit arises until the corporation for the first time begin to give a private supply. I am of opinion that this appeal must be allowed, and the assessment must stand as passed.

CHARLES, J.—The trade which the respondents carry on is that of supplying gas to private consumers. Their operations, so far as the public streets are concerned, are not operations carried on by them as a trade at all, but for the purpose of supplying themselves with gas. People cannot trade with themselves, and this corporation cannot be held to carry on a trade so far as the duty of lighting the streets is concerned. They begin to trade as soon as they have customers, and their customers are those who choose to contract with them to take their gas.

But it is said that, nevertheless, this deduction of the expense incurred in lighting the public lamps ought to be allowed. Mr. Gore argued that, though it is an expense incurred in the discharge by the corporation of their public duties, yet it is wholly and exclusively laid out for the purposes of the trade of the corporation, for under section 56 a private customer cannot be supplied unless this expense be incurred, because it is only after they have sufficiently lighted the streets that the corporation may sell gas to private customers. That certainly was a captivating way of putting the case, but upon reflection I am not able to assent to it. I think that this expenditure was not an expenditure for the purposes of the trade, which was a trade of supplying the private customers only, but was for the purpose of enabling the corporation to enter upon that trade, which is a very different matter. The Act does not say that the initial expenditure incurred by a person to enable him to enter a particular trade is to be deducted from the profits which he earns in that trade.

Upon principle, and also on the authorities which have been cited, I am of opinion that our judgment ought to be for the Crown.

Appeal allowed.

Solicitor for the appellant, *Solicitor of Inland Revenue.*

Solicitors for the respondents, *Peacock & Goddard.*

Q. B. Div. (A. L. Smith, J.) Jan. 28.

LEAROYD *v.* BROOK. (*a.*)

Apprentice—Apprenticeship deed—Felony by apprentice—Refusal of master to carry out covenants under the deed.

In an action against a master for a breach of covenant by him, under an apprenticeship deed, in refusing to continue to keep, teach, and maintain an apprentice, the defence went to prove that the apprentice was an habitual thief.

Held, that this was a good defence, on the ground that the master impliedly covenanted to teach the apprentice how to carry on the particular trade honestly, and that the apprentice, by becoming an habitual thief, had rendered the fulfilment of such a covenant impossible by his own default.

Action tried at Leeds Assizes before A. L. Smith, J., without a jury, and judgment delivered in London.

Waugh, for the plaintiffs.

Tindal Atkinson, Q.C., and *H. Manisty*, for the defendant.

A. L. SMITH, J.—This is an action brought by the guardians of Arthur Pickard, a lad of about sixteen years of age, to recover from the defendant damages, or, in the alternative, the whole or part of the sum of £100, being the premium paid by the plaintiffs upon apprenticing Pickard to the defendant, by reason, as it is alleged, of breach of the articles of apprenticeship by the defendant, he having refused to keep, teach, and maintain Pickard after December 31, 1888. By the deed, bearing date December 23, 1887, and made between the plaintiffs of the one part, and the defendant of the other part, Pickard was bound apprentice to the defendant for a term of five years and three months, during which term Pickard was bound, among other things, to order and behave himself as a true and faithful apprentice, and not to waste his master's goods; and in consideration of Pickard having so put and bound himself, and also in consideration of the sum of £100 then paid to the defendant by the plaintiffs, the defendant covenanted to teach the said Pickard the trade of a pawnbroker, to board and lodge him during the said term, and during the last two years thereof to pay him the weekly wage of 30s. The defendant was a pawnbroker and silversmith in a large way of business in Halifax, in conjunction with which he carried on an extensive trade in jewellery. He had two places of business in the town, having at the Charlotte-road premises, the lesser business of the two and where Pickard was located, as much as from £300 to £400 worth of jewellery pledged with him daily, together with other articles of value. If Pickard had continued apprentice he would have graduated up to the larger business, in which jewellery to the amount of £2,000 to £3,000 was constantly dealt in. By uncontradicted evidence it was established that from the time when Pickard entered upon his duties as apprentice in December, 1887, his conduct was bad. Young as he was he frequented singing-rooms and theatres, smoked cigars, and stayed out till late hours of the night, the defendant having repeatedly threatened to lock him out if he would not mend his ways; he, however, persisted in his conduct, in spite of the efforts of the defendant. For some months prior to December, 1888, the defendants' money had been repeatedly missed from the till at Charlotte-road, and upon the afternoon of the 31st of December, 1888, Pickard was detected to have stolen 6d. out of it. On being found out and challenged as to how much more he had taken, he said that he did not know, but that he had been taking it for months, sometimes as much as 5s. at a time. Sums amounting in all to about £5 had during these months been missed from the till. The defendant thereupon had an interview with the plaintiffs and informed them of what had happened. They asked the defendant to take Pickard back, and he said he

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

would take time to consider. This he did, and on the next day informed the plaintiffs that, as he could have no confidence in Pickard, he could not further keep him, and sent him back to the plaintiffs. This action was then brought. That Pickard was an habitual thief—that is, that he had been in the habit of stealing—in my judgment, has been proved. The question now arises, Is a master, under articles of apprenticeship, bound to keep, teach, and maintain at his own risk an habitual thief for the term stipulated for by the articles? I should certainly answer offhand the question in the negative; but it was said that I was bound by authority to hold otherwise. It was said on behalf of the plaintiffs that, inasmuch as the defendant's covenant in the deed of apprenticeship to keep, teach, and maintain the apprentice was independent of the obligations imposed upon the apprentice, that, therefore, the breach of the obligations by the apprentice afforded no answer to a breach of covenant by the master to keep, teach, and maintain for the stipulated time. It has unquestionably been held that, in an ordinary apprenticeship deed, the covenants by the master are independent covenants, the performance of which does not depend upon the performance by the apprentice on his part of the obligations imposed upon him by the deed. The cases of *Winstone* v. *Linn*, 1 B. & C. 460, and *Phillips* v. *Clift*, 7 W. R. 295, 4 H. & N. 168, are direct authorities upon this point. It appears, however, to me that this does not decide what I have to determine in the present case. Where an apprentice by his own wilful act prevents a master from teaching him, the master can set this up as a defence when sued upon his covenant to keep, teach, and maintain the apprentice, irrespective of the question whether the apprentice has performed his obligations under the deed or not. This is settled by the case of *Raymond* v. *Minton*, 14 W. R. 675, L. R. 1 Ex. 244. The *ratio decidendi* of that case is not that the master is absolved because the apprentice has not performed the obligations imposed upon him by the articles, but because the apprentice, by his own acts, has put it out of the power of the master to carry out what he had contracted to do. Apply this reasoning to the present case. The master has contracted to teach the apprentice how to carry on a pawnbroker's trade honestly. That must be the contract by the master. The apprentice, by becoming an habitual thief, has rendered that impossible. Then why does not the principle laid down in *Raymond* v. *Minton* apply? Moreover, the remedy suggested in some of the cases as being the sole one which the master had upon default of the apprentice and loss consequent thereon—namely, to sue for the loss—can hardly exist in a case where the apprentice becomes an habitual thief; he cannot sue at once for his loss, but must prosecute his apprentice and get him convicted and sentenced if he can, then take him back for the residue of the term, and sue for the loss he has sustained—an inapt procedure beyond all question. A very similar point to that now under discussion was attempted to be raised in the case of *Phillips* v. *Clift*. The plea in that case alleged "that the apprentice conducted himself in so dishonest a manner in the defendant's business, and defrauded and robbed the defendant so that it became unsafe for the defendant to continue him in his service, wherefore the defendant dismissed him." The case was argued upon demurrer, and the court held the plea to be bad. The Lord Chief Baron held that the plea did not allege a felonious taking, and he went on to say: "I do not think it necessary to express an opinion as to what would be the effect of an allegation in the plea that the apprentice had been guilty of a felonious stealing, or had been actually convicted and suffered punishment, for the plea alleged neither the one nor the other." Baron Watson said: "I do not know what the plea means. The apprentice may have taken sweetmeats from a jar, or a shilling from the till, for which offences he might be corrected by personal chastisement or kept in confinement; but the master has no right to dissolve the contract." I will add, a very different taking from what has been proved in this case. Baron Channell rested his judgment upon the ground that the covenants were independent. This certainly is not an authority showing that a master cannot justify upon the ground of his appentice having become an habitual thief. Two years later—viz., in 1861—Byles, J., at *Nisi Prius* in the case of *Cox* v. *Mathews*, 2 F. & F. 397, expressly held, in an action by an apprentice against his master for not teaching him, that "if the plaintiff was in the habit of stealing, the defendant would not be bound to have him in his shop to instruct him, as there was gold lying about, and constant opportunities of stealing." This ruling is in point. No authority has been cited, and I am not aware of one either overruling or even doubting this ruling of Byles, J. It is a ruling which commends itself to me, I follow it, and for the reason above I hold that the defendant in this case has successfully justified the breach of covenant alleged against him. This being so the claim for damages fails. But it was further argued that, even if the defendant was justified in acting as he did, yet he must return so much of the premium as was not exhausted for keeping, teaching, and maintaining the apprentice. There has been no total failure of consideration, and there is no action for damages maintainable. Then how can the proportionate part of the premium be recovered? It cannot. Moreover, the case of *Whincup* v. *Hughes*, 19 W. R. 439, L. R. 6 C. P. 78, shows that this is so. I will point out that in this deed the covenants by the master are made, not only in consideration of the payment of the premium, but also in consideration of the apprentice having bound himself to the defendant. This is different from the deeds which I find set out in the cases; for in them the covenants by the master are in consideration only of the payment of the premium. I only allude to the fact to point it out. I do not found my judgment in any way upon it, but I take it for the purposes of this case that the deed is an ordinary apprenticeship deed, with independent covenants, and I give judgment for the defendant, with costs.

Judgment for defendant.

Solicitor for the plaintiff, *Boocock*, Halifax.

Solicitors for the defendant, *Jubb, Booth, & Hellwell*, Halifax.

Court of Appeal.

From Q. B. Div. May 13, 14.

DOBSON *v.* FESTI, RASINI, & CO. (*a.*)

Practice—Writ—Partnership firm—Foreign firm—Service—R. S. C., 1883, *ord.* 9, *r.* 6; *ord.* 11, *rr.* 1 (e), 7; *ord.* 16, *r.* 14.

The Rules of the Supreme Court as to suing partners in the name of their firm, and as to service on persons

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

sued as partners in their firm name, do not apply to a partnership firm all the members of which are foreign subjects domiciled and residing abroad; and, even where the cause of action against such firm is one within the terms of ord. 11, *r.* 1 (e), *and the plaintiff has obtained leave to issue and serve notice of a writ against such firm out of the jurisdiction, and has served it abroad on one of the partners, the court has no jurisdiction, if no appearance has been entered, to allow the plaintiff to sign judgment, in default of appearance, against such firm.*

Russell *v.* Cambefort, 37 *W. R.* 701, 23 *Q. B. D.* 526, *and* Western National Bank of New York *v.* Perez Triana & Co., ante, *p.* 245, [1891] 1 *Q. B.* 304, *followed.*

Appeal from a divisional court of the Queen's Bench Division.

The plaintiffs were machine manufacturers residing in Lancashire, and the defendants were an Italian firm consisting of ten partners, all of whom were foreigners residing and domiciled abroad, and the defendant firm had no place of business and no manager in England, and no property there. Two of the partners—namely, Giovanni Festi and Cesare Rasini were, by the deed creating the defendant partnership, appointed managing partners, with unlimited liability, and each of them was authorized separately to represent and bind the firm. The other eight partners, one of whom was itself the firm of Francesco Turati, and another the Banca Generale of Rome, were in the position of sleeping partners with limited liability, and could in no way represent or bind the defendant firm.

The plaintiffs had supplied the defendant firm with machinery, and the defendant firm had failed to pay an instalment amounting to £3,151, being part of the price payable for the machinery delivered to them.

The plaintiffs in consequence brought this action against the defendants, who were sued in their firm name, to recover the £3,151 for goods sold and delivered, and the plaintiffs obtained leave from A. L. Smith, J., under ord. 2, r. 4, to issue notice of the writ of summons out of the jurisdiction, and to serve such notice on the defendant firm in Italy, the defendant firm being required to enter an appearance within sixteen days after service thereof. Nothing was said in this order as to how the service was to be effected. The plaintiffs served the notice of the writ in Italy on Cesari Rasini, one of the managing partners in the defendant firm. No appearance of any kind having been entered, the plaintiffs, on the expiration of the sixteen days after service, applied *ex parte* to the master at the Central Office to enter judgment in default of appearance. The master refused to do so, and an application by the plaintiffs that the master might be directed to enter judgment was refused by Denman, J., and subsequently by a divisional court (Cave and Grantham, JJ.).

The plaintiffs appealed.

Loehnis, for the appellants.—The plaintiffs contracted to deliver machinery in Italy to the defendant firm, who contracted to pay £3,151 on delivery. The defendants' contract to pay ought to have been executed in England, and accordingly the plaintiffs' action is founded on breach of a contract which ought to be performed within the jurisdiction. The case therefore comes within ord. 11, r. 1 (*e*): *Robey* v. *Snaefell*, 36 W. R. 224, 20 Q. B. D. 152; and the plaintiffs have obtained leave to issue notice of the writ of summons out of the jurisdiction. Then ord. 16, r. 14, provides that any two or more persons, being liable as co-partners, may be sued in the name of the firm of which they are co-partners. The words of that rule are perfectly general, and therefore it applies to a partnership firm the members of which are foreigners; and in *Dubout* v. *Macpherson*, 38 W. R. 62, 23 Q. B. D. 340, it was held that a third-party notice under ord. 16, r. 48, might be served on a foreigner out of the jurisdiction, and the same had been previously held in *Swansea Shipping Co.* v. *Duncan*, 1 Q. B. D. 644, 24 W. R. Dig. 205. These cases show that the whole of order 16 is applicable to foreigners, whether they are plaintiffs or defendants. The cases of *Russell* v. *Cambefort*, 37 W. R. 701, 23 Q. B. D. 526, and *Western National Bank of New York* v. *Perez Triana & Co.*, *ante*, p. 245, [1891] 1 Q. B. 304, are distinguishable from the present case, because in each of those cases the cause of action was not one to which order 11 was applicable, and leave to serve notice of the writ out of the jurisdiction was not, and could not have been, obtained; but it was attempted in those cases to use ord. 9, r. 6, for the purpose of creating jurisdiction, so as to circumvent order 11. The cause of action in the present case is within order 11, and leave has been obtained to serve notice of the writ out of the jurisdiction. Then ord. 11, r. 7, provides that notice of the writ shall be given in the manner in which writs of summons are served: and that, therefore, makes ord. 9, r. 6, applicable, which provides that, "where persons are sued as partners in the name of their firm the writ shall be served upon any one or more of the partners . . . and . . . such service shall be deemed good service upon the firm." Ord. 9, r. 6, is simply procedure. As was pointed out by Fry, L.J., in *Russell* v. *Cambefort*, it provides that service on one partner is service on them all, in those cases in which they could all have been personally served. That could have been done here. This view is supported by the judgment of Lindley, L.J., in *Western National Bank of New York* v. *Perez Triana & Co.* Ord. 9, r. 8, deals with service of a writ of summons on a corporation, and in *Scott* v. *Royal Wax Candle Co.*, 24 W. R. 668, 1 Q. B. D. 404, it was held that where the cause of action came within order 11 the court had jurisdiction to allow service out of the jurisdiction upon a foreign corporation as defendants; and the plaintiff in that case having issued the writ and served notice thereof by leave of the court out of the jurisdiction upon the foreign corporation, was held to be entitled to sign judgment in default of appearance. I submit that the same procedure is applicable in the case of a foreign firm. [KAY, L.J.—But according to the judgment of the majority of the Court of Appeal in *Western National Bank of New York* v. *Perez Triana & Co.* your writ, being against the defendants in their firm name, is wrong, and although you have obtained leave to issue and serve a wrong writ, how does that help you?] The fact that in the present case the cause of action comes within order 11 gives the court jurisdiction, and ord. 9, r. 6, is therefore applicable. The plaintiffs have obtained the evidence of an Italian advocate which shows that, under the Italian law, service on one partner, if a managing partner, is good service on the firm. It would be practically impossible to serve each of the partners in the defendant firm here personally; one of the partners, Francesco Turati, is itself a partnership firm: to serve that partner, if each partner must be served, the plaintiffs will have to ascertain who are the partners in that firm, and serve each one of them.

Cur. adv. vult.

May 14.—LINDLEY, L.J.—This is an appeal from the refusal of a divisional court to give directions to the proper officer to allow the plaintiffs to sign judgment against the defendants upon default of appearance. The action, which was brought against the defendants in the name of the defendant firm, was for breach of a personal contract for goods sold and

delivered. The members of the defendant firm are all Italian subjects resident abroad, and the defendant firm has no property, no place of business, and no manager in England. Nevertheless, leave was given to serve notice of the writ upon the defendant firm abroad. I do not say that that was irregular, as the defendants might have appeared, and I do not say if they had appeared that judgment might not have been signed against them. I think, however, that ord. 9, r. 6, has no application unless the foreign firm choose to appear. That was the interpretation put on that rule by this court in *Russell* v. *Cambefort* and by the majority of the Court of Appeal in *Western National Bank of New York* v. *Perez*. It has been ably and skilfully contended by Mr. Loehnis that the present case is different from those cases, because, in the present case, leave has been obtained under order 11 to serve notice of the writ abroad. That is very true, but it does not assist the plaintiffs unless the defendant firm chose to appear.

Before the Judicature Acts there was no jurisdiction to allow a foreign firm to be sued in the firm name. Have the Rules of the Supreme Court enlarged or extended the jurisdiction in that respect? In my opinion they have done nothing of the kind. What the jurisdiction of the English court was with respect to the service of its process abroad, and the very circumscribed limit of that jurisdiction when permitted, is shown by the cases of *Cookney* v. *Anderson*, 11 W. R. 628, 1 De G. J. & S. 395, and *Foley* v. *Maillardet*, 12 W. R. 355, 1 De G. J. & S. 389, before Lord Westbury, and the case of *Drummond* v. *Drummond*, 15 W. R. 267, L. R. 2 Ch. App. 32.

Bearing in mind that the jurisdiction now contended for did not exist before the Judicature Acts, if we were to allow this appeal we should be putting a construction on the rules which, though verbally admissible, would be contrary to the general principles of international law. I think that was the *ratio decidendi* in *Russell* v. *Cambefort*, and in my opinion the reasoning there was correct, and was based on general principles of law. I think it would be a monstrous thing to allow a plaintiff in this country to obtain judgment in default of appearance against a foreign firm having no manager, no place of business, and no property in this country, by serving one of the partners of the foreign firm the other members of which might perhaps be in another part of the world altogether. It is nothing to the purpose to say that, according to Italian law, the process of the Italian courts could be so served.

Mr. Loehnis has, no doubt, the advantage of the wording of the rules in his favour, but one cannot on that account disregard the general principles of international law.

In my opinion there is no jurisdiction to allow judgment to be signed in this case, and the appeal must be dismissed.

LOPES, L.J.—In my opinion ord. 9, r. 6, does not apply to a foreign firm none of the members of which are domiciled or resident here, unless the firm chooses to appear.

In the present case the defendant firm is not domiciled or resident here, has no property here, and has not appeared. I am clearly of opinion that ord. 9, r. 6, does not apply to this case, and that view is in accordance with the cases of *Russell* v. *Cambefort* and *Western National Bank of New York* v. *Perez*.

Mr. Loehnis argued that the present case was distinguishable from those cases, because in the present case leave had been obtained to issue and serve notice of the writ abroad. But that does not assist the plaintiffs unless the defendant firm has appeared.

I have only one further observation to make. Before the Judicature Acts it is clear there was no jurisdiction in a case like this, and jurisdiction cannot be said to be increased by the rules made under the Judicature Acts. These rules do not, and cannot, give the jurisdiction contended for.

KAY, L.J.—I agree. How far the *lex fori* applies to foreigners is an important question. No doubt if a foreigner sues in this country he must conform, and be taken to submit, to the *lex fori*. But the matter is altogether different when he is sued. Before the Judicature Acts, if a foreigner was sued as to certain kinds of property here, or land here, no doubt then, if he appeared, no difficulty would arise in proceeding against him. But there should have been personal service upon him, and he should have appeared.

Here what has been attempted is this. A firm consisting entirely of foreign subjects, having no place of business, no manager, and no property here, have committed a breach of contract here, on account of which it is said they are brought within ord. 11, r. 1 (*e*). Then it is said, there being jurisdiction (which is assumed), ord. 11, r. 7, provides that notice in lieu of service shall be given in the manner in which writs of summons are served, and that you must, therefore, look back to the earlier rules and orders as to that. So far, on the face of the rules, there is a great deal apparently in favour of the plaintiffs' contention. The foreign firm, however, is sued in their firm name—not as individuals—and leave has been obtained to issue and serve notice of the writ abroad on the foreign firm. One of the partners of the foreign firm has been found abroad, and notice of the writ has been served on him there. Ord. 9, r. 6, has been relied upon as authorizing this. The whole question is whether that rule applies to the case of an altogether foreign firm. In *Russell* v. *Cambefort* the defendants were a foreign firm which had a place of business here and a manager here. There had, however, been no breach of a contract to be performed within the jurisdiction, and, therefore, there was no jurisdiction under order 11 by reason of the actual cause of action. But an action was nevertheless brought, and the writ was served on the manager of the defendants' place of business here. The Court of Appeal had, therefore, to consider ord. 9, r. 6, and Cotton, L.J., held that it did not apply to a foreign firm at all. The Lord Justice said (37 W. R., at p. 701, 23 Q. B. D., at p. 528): "No doubt the rule in question is made under the authority of an Act of Parliament, and that has been relied on as giving it as great an effect as an Act of Parliament; but although an Act of Parliament can give jurisdiction to the court against British subjects, as to foreigners Parliament has not, and does not assume to have, jurisdiction against those who are residing abroad and have not submitted to the jurisdiction of the English courts. Therefore, in construing the rule we must have regard to what Parliament has the power to do, and in my opinion we should be wrong in construing it as giving jurisdiction against those who are in no way subject to the English Parliament; and although the rule does authorize service on one member of a partnership in general terms, yet it ought to be construed only as applying to partnerships the members of which, either by their nationality or residence, have become subject to English law and to the power of Parliament. Looking at it in that view I do not think the rule applies to firms consisting of foreigners who have in no way become subject to the English Parliament." If those words have any meaning at all they must mean that the thing there was wrongly done, not because the actual cause of action did not give jurisdiction, but because ord. 9, r. 6, does not apply at all to a firm consisting of foreigners, even although having a place of busi-

ness and a manager here. In *Western National Bank of New York* v. *Perez Triana & Co.* Bowen, L.J., referring to *Russell* v. *Cambefort*, said: "The judgment of the Court of Appeal was, however, based expressly on the view that ord. 9, r. 6, was not intended to govern writs directed against foreign firms none of whose partners were resident or domiciled in England"; in other words, he adopts what I think is the exact meaning of what was said by Cotton, L.J., in *Russell* v. *Cambefort*. Unless, therefore, we are to overrule both those cases we must hold that ord. 9, r. 6, does not apply at all to the present case, and if that be so, then order 11 cannot give ord. 9, r. 6, a different effect. I agree with Lindley, L.J., that it would be a strong thing that this rule as to service on partnership firms should apply to a foreign firm all of whose members are domiciled and resident abroad, and enable a plaintiff to sign judgment in default, after serving one of the partners of the foreign firm. I should be most reluctant to give such a meaning to that rule, and in my opinion the matter is really decided by *Russell* v. *Cambefort* and *Western National Bank of New York* v. *Perez Triana & Co.*

Appeal dismissed.

Solicitors for the appellants, *Rowcliffes & Co.*, for *Fullagar & Co.*, Bolton.

From Chan. Div. April 9, 18.

In re MAINWARING.
CRAWFORD *v.* FORSHAW. (*a.*)

Executor — Renunciation of probate by one executor — Power of selection of beneficiaries.

A testator by his will appointed three executors, and gave the residue of his estate to certain named charitable institutions, "or such others or additional as my executors herein named may select to be divided in such proportions as they may approve of." One of the executors renounced probate.

Held (reversing the decision of Kekewich, J., 38 *W. R.* 412, 43 *Ch. D.* 643), *that the executor who had renounced probate was not entitled to exercise the power, but that the power belonged to the two executors who had proved the will, in their official capacity, and was exercisable by them.*

Keates *v.* Burton, 14 *Ves.* 434, *approved.*

Appeal from Kekewich, J.

This was an appeal by Messrs. J. D. Crawford and William Jones, the proving executors of the will of J. K. Mainwaring, deceased, from a decision of Kekewich, J. (reported 38 W. R. 412, 43 Ch. D. 643).

The will contained the following bequests, amongst others:—"To Annie Kyffin Hughes . . . the sum of one hundred pounds, to be paid to her on attaining the age of sixteen years, in the event of her decease prior to which time, the amount to remain at the disposal of my executors, for distribution to such charities or charitable institutions as they approve of." "To my executors herein named the sum of fifty pounds each for the trouble they may have in the execution of this my will, and also to mark my friendship and regard for them." The will then proceeded:—"I hereby appoint J. D. Drawford, J. Forshaw, and William Jones executors of this my will"; and later on, after giving various charitable legacies, contained the following gift:—"The residue of my estate I bequeath to the above-named charitable institutions, or such others or additional as my executors herein named may select, to be divided in such proportions as they may approve of."

J. Forshaw renounced probate but claimed, nevertheless, to take part in the selection of the charitable institutions to share in the gift of residue; and Kekewich, J., held that he was entitled to do so.

The two proving executors appealed.

The case was argued before the Court of Appeal in November last, when the court was of opinion that the Attorney-General should be served with notice to argue on behalf of the Crown.

Crawford (*Neville, Q.C.*, with him), for the appellants.—The simple question is, does the trust fail if the renouncing executor cannot take part in the distribution? The words "executors herein named" mean executors simply, and those who have proved can exercise the power. This is not merely a bare authority, but an authority coupled with an interest and survives to the other two executors: *Attorney-General* v. *Gleg*, 1 Atk. 356. Kekewich, J., thought the point was not decided in *Keates* v. *Burton*, 14 Ves. 436, but it really was so; there the power was given to the executors, but they had not exercised it, and could not exercise it because they had renounced the only capacity in which they could exercise it. [LINDLEY, L.J.—Was not Kekewich, J.'s difficulty the words "the executors *herein named*"? If he excluded them, how could Forshaw join?] It simply means executors, and this is not a naked power, but a power coupled with an interest.

He also cited *Attorney-General* v. *Fletcher*, 5 L. J. N. S. Ch. 75, and *Hibbard* v. *Lambe*, Ambl. 309; and relied on 20 & 21 Vict. c. 77, s. 79.

Ingle Joyce, for the Attorney-General.—I agree that the executor having renounced cannot take part in the distribution. This is a power coupled with an office, and in order to exercise the power it must be exercised by the three persons named, and they must also accept the executorship. "Executors herein named" means the three executors named; if it were not so the testator would not speak of them elsewhere in his will simply as "my executors." The testator wished all these three gentlemen to exercise this wide power of selection. This is an arbitrary power quite distinct from the trust, and not an integral part of it, and being a bare authority and so different from that which is coupled with an interest, cannot survive: *Peyton* v. *Bury*, 2 P. Wms. 626. It is not every power given to an executor which must necessarily survive. This power must be exercised by all three executors, and cannot now be exercised by the one who has renounced probate jointly with the others: *Cole* v. *Wade*, 16 Ves. 42.

The respondent did not appear on the appeal.

Crawford replied.

LINDLEY, L.J.—This appeal from the decision of Kekewich, J., raises the question whether two out of three executors appointed by the will of J. K. Mainwaring have or have not the power of saying amongst what charities the residue of his estate shall be distributed. One executor renounced probate, hence arises the difficulty. When the case first came before the court we thought it right not to decide it in the absence of the Attorney-General, and it therefore stood over in order that he might be served. The will, which is a short one, contained the following clause, which is material: "To Annie Kyffin Hughes . . . my god-daughter, the sum of one hundred pounds, to be paid to her on attaining the age of sixteen years, in the event of her decease prior to which time, the amount to remain at the disposal of my

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

executors, for distribution to such charities or charitable institutions as they approve of." The executors are not named before that clause, but they are afterwards; and the persons to exercise that power are those who proved the will and not otherwise. [His lordship then read the clause in the will on which the main question arises, and continued:—] Kekewich, J., construed the power as a naked power not coupled with an interest, and when we read his judgment we find his attention was not called to the clause dealing with Annie Hughes' bequest. The case seems to be exactly the same as *Keates* v. *Burton*, and *Attorney-General* v. *Fletcher*, which was not referred to in the court below. The distinction between the latter case and this I cannot see. The proper construction is to give the power to these gentlemen in their official capacity; and Mr. Forshaw is not now at liberty to exercise the power, but the others can. Mr. Joyce argued that the power is not now exercisable by any: the answer is that they do it in their official capacity. The result is that the appeal must be allowed, and we propose to vary the order by declaring that Mr. Forshaw, having renounced, is not entitled to exercise this power, but it can be exercised by the other executors.

BOWEN, L.J.—This case is one of construction, where one may be guided by the reasoning in similar cases, and is not concluded by authority. It was argued on behalf of the Crown that the power was given to the three persons, and the other side contend that the power was given in an official capacity, so that the power survives to the survivors. The only ground for Mr. Joyce's ingenious argument was the occurrence of the words "*herein named*," and it would be giving too much force to those words to imply that by virtue of them all the executors must act or none: that is not a reasonable view. It is more reasonable to suppose that the testator would have used language much more clear and precise if he had that in view.

KAY, L.J.—The point here is one of construction. [His lordship then read the will, and continued:—] The question is whether the words "*herein named*" do limit and control that power given to the executors. The addition of those words seems to me to add not really any serious difficulty. The power is one attached to the office of executors.

Appeal allowed.

Solicitors for the appellants, *Miller & Williamson*, Liverpool.

Solicitors for the Attorney-General, *Hare & Co.*

From Q. B. Div. May 4.

HEINEMANN & CO. *v.* HALE & CO. (*a.*)

Practice—Writ—Service of writ—Action against foreign firm in firm name—R. S. C., 1883, *ord.* 9, *r.* 6.

A writ was issued against the defendants in the name of their firm. The firm was a foreign firm, carrying on business at Buenos Ayres, and consisted of three partners, all of them foreign subjects. Two of the partners were resident and domiciled abroad, and one was residing in England at the date of the issue of the writ. The partner in England used a room in London for the purposes of the business of the firm. The writ having been served on the partner in England, he moved to set aside the writ and the service.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Held, following the decision in Western National Bank of New York *v.* Perez Triana & Co., ante, *p.* 245, [1891] 1 *Q. B.* 304, *that ord.* 9, *r.* 6, *did not apply to the case of a foreign firm, the only mode of suing a foreign firm being to issue the writ against the partners individually, and obtain leave to serve them under order* 11; *and that the writ and the service must be set aside.*

Appeal from the Queen's Bench Division (Cave and Charles, JJ.) refusing to set aside the writ and service of the writ.

The writ was issued by a firm in London against the defendants, a foreign firm carrying on business in Buenos Ayres. The defendants were sued in the firm name, the firm consisting of three partners, who were all foreigners. Two of them were domiciled and resident at Buenos Ayres, and the third, Sanford, who formerly resided at Buenos Ayres, about eighteen months before the service of the writ came to reside in London. The writ was served upon Sanford in London. The claim indorsed upon the writ was for moneys paid by the plaintiffs for the defendants at their request, the money being paid in London upon bills of exchange drawn by the defendants in Buenos Ayres upon the plaintiffs, accepted payable in London for the accommodation of the defendants.

It appeared that Sanford used two rooms in the City of London for the purposes of the firm's business, but neither his name nor that of the firm was written up there. Sanford having moved under ord. 12, r. 30, to set aside the writ and the service, the Divisional Court dismissed the motion. Sanford appealed.

Finlay, Q.C., and *Danckwerts*, for Sanford.—This is the case of a foreign firm consisting of foreign subjects, two of whom are residing out of the jurisdiction; and ord. 9, r. 6, which allows service of a writ, issued against a firm, upon a partner, does not apply to such a case. The plaintiffs ought to have issued the writ against the individual partners, and to have obtained leave under order 11 to serve notice of the writ on the two partners in Buenos Ayres, and served the writ itself upon Sanford in this country. The plaintiffs seek to avoid the necessity of obtaining the leave of the court to serve the foreign partners. The plaintiffs cannot, by proceeding under ord. 9, r. 6., get rid of the necessity of obtaining the leave of the court. Ord. 2, r. 4, and order 11 form a complete code as to service on foreigners out of the jurisdiction, and ord. 9, r. 6, must be read subject to those orders.

They referred to *Russell* v. *Cambefort*, 37 W. R. 701, 23 Q. B. D. 526; *Western National Bank of New York* v. *Perez Triana & Co.*, *ante*, p. 245, [1891] 1 Q. B. 304; *In re Busfield*, 34 W. R. 372, 32 Ch. D. 123; *In re Maugham*, 22 W. R. 748; ord 16, r. 14; ord. 42, r. 10.

Tindal Atkinson, for the plaintiffs.—The defendants' firm are carrying on business in England as well as in Buenos Ayres, having an office here. The contracts sued upon were made here, and were to be performed here. In *Western National Bank of New York* v. *Perez Triana & Co.* the contracts were foreign contracts, to be performed abroad, and the firm was a foreign firm with no one residing in this country capable of being served. That case is therefore distinguishable.

Lord ESHER, M.R.—This case seems to me to be settled by authority. The judgment of the majority of this court in *Western National Bank of New York* v. *Perez Triana & Co.* decides that in the case of an action against a foreign firm, ord. 9, r. 6, cannot be made use of; in other words, that the plaintiff cannot

issue the writ against the foreign firm in the firm's name. That proposition seems to me to be as plainly stated as possible. Bowen, L.J., said:—"The judgment of the Court of Appeal (in *Russell* v. *Cambefort*) was, however, based expressly on the view that ord. 9, r. 6, was not intended to govern writs directed against foreign firms, none of whose partners were resident or domiciled in England, and I do not think we should be carrying out the real view of the law so laid down if we were to seek to distinguish the case of service effected on a partner under one portion of the rule from that of service effected on a manager under the other portion of it. . . . It must not be supposed that our decision implies that no remedy can be had against foreign firms, or such of their members as happen to come within the jurisdiction. The law as to suing and serving them will remain what it always has hitherto been, though the writ cannot under ord. 9, r. 6, be addressed against them in the foreign firm's name. The old course will still be pursued—viz., to insert in the writ the names of the partners whom it is desired to sue, and such writ so framed may be served on any of the partners who are found within the jurisdiction. For service out of the jurisdiction recourse must be had to order 11 if the case is one which can be brought within the rules of that order." The meaning of that seems to me to be that the plaintiff cannot issue a writ against a foreign firm in the firm's name. It decides that the foreign partners cannot be served by service on one of the foreign partners in England. The foreign partners can only be served by obtaining leave under order 11 to serve notice of the writ upon them abroad. The court in that case ordered the writ to be amended, as the partner who was served had appeared, and had thus waived the irregularity. In the present case the defendant Sanford has not appeared. The writ, therefore, was wrongly issued and wrongly served, and the writ and service must both be set aside. I cannot see how we can decide this case in the plaintiffs' favour without going contrary to the decision in *Western National Bank of New York* v. *Perez Triana & Co.*

FRY, L.J.—I am of the same opinion. In my view order 11 forms a code which determines the mode of service of writs and notices of writs out of the jurisdiction. Ord. 9, r. 6, was never intended to be applied so as to remove the necessity of obtaining the leave of the court to serve the writ or notice of the writ out of the jurisdiction. In no way could a plaintiff avail himself of ord. 9, r. 6, to escape from the exercise of the judicial discretion of the court under ord. 2, r. 4, and ord. 11, before he can issue a writ and serve the writ or notice of the writ out of the jurisdiction. The effect of suing a firm in the firm's name is, as pointed out by Lindley, L.J., in *Western National Bank of New York* v. *Perez Triana & Co.*, that "it is only a convenient method for denoting those persons who compose the firm at the time when that name is used, and a plaintiff who sues partners in the name of their firm in truth sues them individually, just as much as if he had set out all their names." Supposing that the plaintiffs in the present case had sued the three partners individually, it is obvious that before they could take any step which would give them a right to judgment and execution against the partners in Buenos Ayres, they must have applied for leave to issue and serve notice of the writ, and the judicial discretion of the judge must have been exercised before leave could be given. It was said that by writing the names short as the name of the firm, the plaintiffs could proceed under ord. 9, r. 6, and obtain judgment and execution against the partners in Buenos Ayres. The result would be to allow the form in which the action was brought to determine the matter, for if the defendants were sued in the firm's name ord. 9, r. 6, would be applicable, whereas if the defendants were sued in their individual names order 11 would be applicable. The whole scheme of the rules shows that it was not intended to allow the mere form in which the writ was issued to alter the rights of the parties. The truth is, as pointed out by the majority of the court in the case cited, that the name of the firm is only the names of the partners writ short. The writ and service, therefore, in the present case are of no avail against the two partners in Buenos Ayres, because the leave of the court to issue and serve the writ has not been obtained, and they are of no avail against the defendant Sanford, because the writ has been issued in such a form that judgment could only be obtained upon it against the firm. The writ and service must, therefore, be set aside. In arriving at this conclusion I am fortified by the decisions in *Russell* v. *Cambefort* and *Western National Bank of New York* v. *Perez Triana & Co.*

Appeal allowed.

Solicitors for the plaintiffs, *Lyne & Holman.*

Solicitors for the defendants, *Norton, Rose, Norton & Co.*

High Court of Justice.

Chan. Div. Chitty, J. — April 11.

In re DICIDO PIER CO. (*a.*)

Company—Reduction of capital—Sinking fund—Contract in memorandum—Payment off of preference shares—Companies Act, 1877 (40 & 41 *Vict. c.* 26), *s.* 4—*General Orders, March,* 1868, *rr.* 2—20.

The memorandum and articles of a company contained a contract binding the ordinary shareholders to set apart, and the preference shareholders to accept, a sinking fund for the payment off of their preference shares. The fund having been set apart, and a petition presented for reduction of capital, according to the contract,

Held, that the reduction of capital so to be effected did not involve "the payment to any shareholder of any paid-up capital" within section 4 *of the Companies Act,* 1877, *and, consequently, that creditors (if any) were not entitled to object; and*

Order made without the usual inquiries as to creditors.

Petition.

This was a petition for reduction of capital.

The company was registered under the Companies Acts in 1884 with a nominal capital of £30,000, divided into 460 ordinary and 140 preference shares, all of £50 each, which, according to the memorandum of association, were to "have the rights specified in the articles of association." The material articles were, in effect, as follows:—

Art. 15 provided for reduction of capital by special resolution.

Art. 142 provided that the board might from time to time set apart out of the moneys of the company such sums as in their judgment were necessary or expedient to be, at the discretion of the board, applied or used, among other purposes, "as a sinking fund to pay off the preference shares."

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

Art. 146 provided that the net profits of the company should be applied as follows:—

1. In providing a cumulative preferential dividend of 8 per cent. on the preference shares.

2. In setting apart during five years after commencement of business a sum equal to 20 per cent. of the amount of the preference shares issued by the company for the formation of a fund for paying off such shares at the expiration of five years.

3. Subject to such 8 per cent. and 20 per cent. payments, the profits to belong to the ordinary shareholders.

All the preference shares and 160 of the ordinary shares had been issued and fully paid up.

The company commenced business in April, 1886, and since then had regularly paid the 8 per cent. on the preference shares and set aside the 20 per cent. as a sinking fund, besides paying a large dividend on the ordinary shares.

It was now proposed to pay off and cancel all the preference shares, but as this involved a reduction of capital this petition was presented.

The chief clerk had directed that advertisements should be issued as *In re Tambracherry Estates Co.*, 29 Ch. D. 683, 33 W. R. Dig. 39.

It appeared that there were creditors, though not to any large amount.

The petition was unopposed.

Ingpen, for the company.

CHITTY, J.—Whatever difficulty there is in this case arises from the extraordinary prosperity of the company. The memorandum expressly refers to the articles and incorporates into its own provisions the provisions as to the rights of both classes of shareholders contained in the articles. The material articles defining the rights of shareholders are articles 142 and 146, and they contain the contract which is embodied in the memorandum, and, in my opinion, both sets of shareholders have rights with respect to the enforcement of this contract. In other words, the preference shareholders could claim the fund if they desired to insist on their rights, and, conversely, the ordinary shareholders could insist on the fund set apart being applied in payment off of the preference shares. Hence there is a contract, referred to in the memorandum, under which the preference shares are to be extinguished, not out of capital, but out of a fund arising from accumulated surplus profits. This is a contract which it is competent for the company to enter into.

The company has passed a formal resolution to apply the fund in hand to the purpose for which it was established. It follows that the resolution involves a cancellation of capital, but a cancellation according to a contract, and by means of moneys which are not capital moneys of the company, though they are moneys which any creditor of the company could have reached in an action at law or other proceedings. I think, therefore, that it is competent to the court to sanction this reduction of capital by cancellation according to the contract.

But there is still a question remaining to be decided —viz., whether the case falls within section 4 of the Companies Act, 1877. Before making the order I must see that the case does fall within the section, or I shall have to send the case to chambers for the usual inquiry as to creditors. I may mention that there appear to be some creditors, though not to any great amount. I cannot, however, act on the suggestion made at the bar with reference to the probability of all the creditors assenting, or as to the smallness of the amount due to them, but I must determine judicially whether this case falls within section 4.

The proviso of the section directs, in effect, that creditors may not object where the reduction of the capital does not involve either, 1, the diminution of any liability in respect of unpaid capital; or, 2, the payment to any shareholder of any paid-up capital. It is clear that the payment in this case does not involve the former alternative. Does it involve the latter? Both classes of shareholders are entitled to enforce a contract that is valid in law, and this fund might have been paid direct to the preference shareholders. The reduction of capital is in pursuance of a contract that the profits were to be applied in the redemption or extinction of shares, and the contract involves such redemption or extinction on payment off. Hence the contract does not involve "the payment to any shareholder of any paid-up capital," because it is the right of both classes of shareholders that on this payment the rights of the preference shareholders, as shareholders, shall cease. The case is a very peculiar one, and not likely to occur again. I therefore make the order.

Order made.

Solicitors, *Pitman & Sons.*

Chan. Div. North, J. — May 8.

ALLIANCE PURE WHITE LEAD SYNDICATE v. MACIVOR'S PATENTS AND OTHERS. (*a.*)

Practice—Patent action—Interrogatories—Further particulars—Patent Law Amendment Act, 1852 (15 & 16 *Vict. c.* 83), *s.* 41—*Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 29.

Where a defendant in a patent action alleges, in his particulars of objections, general user of the plaintiff's alleged invention previous to the date of the letters patent, he may be compelled to answer interrogatories asking for the names and addresses of persons so using it as alleged.

Motion.

In July, 1890, the plaintiffs commenced an action against the defendants for an injunction to restrain them from infringing a patent dated the 11th of November, 1887, taken out by the plaintiffs for improvements in making white lead. The statement of claim asked also for an account of the gain and profits made by the defendants by the user of the plaintiffs' process, or by the manufacture of white lead in accordance therewith, or in accordance with any process only colourably differing therefrom, and that the defendants might be ordered to pay the amount of such gains and profits to the plaintiffs, and for damages.

The defendants set up the defence of want of novelty in the plaintiffs' patent, and in their particulars of objections delivered with their statement of defence relied upon the following objection (among others) to the validity of the letters patent:—(paragraph 7) "that the said alleged invention was previous to the date of the said letters patent published within this realm by the manufacture and sale by white lead manufacturers generally in London and the vicinity thereof continously from the year 1836 up to the date of the said letters patent of white lead made according to the said alleged invention, or substantially in accordance with the same."

The plaintiffs on the 15th of January, 1891, delivered interrogatories to the defendants in which they asked for the names and addresses of the white lead manufacturers in London and the vicinity thereof

(*a.*) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

by whom, as alleged in the 7th paragraph of the defendants' particulars of objections, white lead had been manufactured according to the plaintiffs' invention or substantially in accordance therewith, and sold between the year 1836 and the date of the plaintiffs' letters patent.

The defendants having in their answers, filed the 10th of March, submitted that they could not be required to set forth the names and addresses as asked for by the plaintiffs, the plaintiffs applied for an order for further and better answers to be given by the defendants, and, the order having been made accordingly, the defendants now moved to have it discharged.

Cozens-Hardy, Q.C., and *G. Henderson*, for the defendants.—The matter is concluded by *Palmer* v. *Wagstaffe*, 1 W. R. 438, 8 Ex. 840. Where a defendant relies on a general user he cannot be required to give names.

Moulton, Q.C., and *A. à B. Terrell*, for the plaintiffs.—The old Exchequer reports are useless to guide the court on a question of interrogatories of the present day. The case is concluded by *Birch* v. *Mather*, 31 W. R. 362, 22 Ch. D. 629. The Patent Law Amendment Act, 1852, did not exclude the right to administer interrogatories: *Flower* v. *Lloyd*, 20 SOLICITORS' JOURNAL, 860, is also an authority in favour of the plaintiffs.

Cozens-Hardy, Q.C., in reply.—[NORTH, J.—Mr. Moulton does not object to your giving a good reason for not answering; he only says you have given no good reason. What is the materiality of your objection? If a defendant alleges user by A. and B. and C. and several others, and proves user by one only, he succeeds; why not, if he alleges a general user and proves user by one?] The contrary seems to be the effect of *Palmer* v. *Wagstaffe*.

NORTH, J.—It is quite clear the interrogatories must be answered. It is true the case cited from the Exchequer reports of 1853 says that the present answer of the defendants is sufficient. But what could be more vague than that answer? And there are other decisions of more modern date which go to show that the answers asked for must be given, and I am of opinion that they must.

The plaintiffs to have their costs in any event.

Motion refused.

Solicitors for the plaintiffs, *Lowless & Co.*

Solicitors for the defendants, *Newman, Hays, & Co.*

Chan. Div.
Kekewich, J.

April 11.

In re COLMAN'S TRADE-MARKS. (*a.*)

Trade-mark — Alteration of registered trade-mark — Essential particulars—Terms—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 64, *sub-section* (c); *s.* 74, *sub-section* 2; *s.* 92—*Patents, Designs, and Trade-Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *ss.* 10, 16.

On motion for leave to alter the registration of certain trade-marks registered under the Act of 1883, *by striking out of each of them as registered the words "trade-mark,"*

Held, that this ought only to be allowed on the terms that the applicants should undertake to indorse on their application and enter on the register a statement of the essential particulars of their marks, and a disclaimer of the exclusive right to the added matter (if any) to the satisfaction of the comptroller.

Motion.

The question was on what terms permission should be granted to alter Messrs. Colman's trade-marks by striking out the words "trade-mark."

There were several trade-marks of various dates. Those in dispute were all registered under the Act of 1883 before the Act of 1888 came into force. They consisted of labels of various colours, with different devices on them. One label which was taken as an illustration bore on it a bull's head, with the word "trade" printed in close proximity to it on one side, and the word "mark" on the other.

Messrs. Colman were afraid that the validity of their trade-marks might be effected by the remarks of Fry, L.J., in delivering the judgment of the Court of Appeal (Lindley, Bowen, and Fry, L.JJ.) in *In re The Apollinaris Co.'s Trade-Mark*, 35 Sol. J. 153, 8 Rep. Pat. Cas., at p. 164, to the effect that where a whole label was registered as a trade-mark, and yet contained an assertion that the most conspicuous part of the label was "trade-mark," that was an assertion that it, and it alone, was the trade-mark, and, therefore, that the label as a whole was not; and so the registered owner might lose protection for the mark as a whole. They therefore moved for leave to alter their trade-marks by striking out of each of them as registered the words "trade-mark" wherever the same appeared therein (except where the said words appeared in the "cautions" in some of the trade-marks), and by striking out of one trade-mark the words "Marque de Fabrique," or that the register might be otherwise altered as to the court should seem just.

Cozens-Hardy, Q.C., and *Sebastian*, for the motion.—Leave should be granted without any conditions, or, at any rate, without requiring more than a disclaimer under section 74, sub-section 2, of the Act of 1883. The Act of 1888 does not apply to these trade-marks, which are distinctive labels under section 64, sub-section (c), of the Act of 1883.

Sir R. E. Webster, A.G., and *M. I. Joyce*, for the Comptroller-General. — We do not object to the alteration, but leave should only be given on condition that the applicants state what particulars of their label are essential and what are not. They have misled the public by the use of the word "trade-mark," and their label is deceptive. They now come for an act of grace, and in return for that they should inform the public what parts of the label may be taken and what may not.

Cozens-Hardy, Q.C., in reply, referred to *In re Hudson's Trade-Marks*, 3 Rep. Pat. Cas. 164.

KEKEWICH, J.—It is not for me to determine whether the applicants are well advised in making the application which they do to the court, nor to consider whether the remarks of Fry, L.J., govern the trade-marks in question here or not. That is entirely a question for the applicants to consider before they make their application. They have considered it, and, of course, without in the least degree admitting that they are affected by the Lord Justice's remarks, they entertained a doubt whether they would be able to sustain these labels if hereafter attacked, by reason of those remarks, and therefore they make their application. They come, therefore, under an Act which enables the court to do what is just towards them, but at the same to do it upon such terms as the court thinks fit, and, subject, of course, to the right of appeal, they cannot complain of any terms which the

(*a.*) Reported by H. C. ROPER, Esq., Barrister-at-Law.

court thinks fit to impose. Argument, of course, there may be as to the reasonableness of any particular terms; but they come for an act of grace. I confess that if this had been severely contested on the part of the comptroller I should have been indisposed to allow any alteration at all, and for this reason. Quite apart from what the Lord Justice says, it seems to me clear that the applicants have in their registered trade-mark signified that the bull's head is, as the Attorney-General said, one of the essential parts of the trade-mark, and I think they have done more. I think they have said, putting into English what we are familiar with as schoolmen Latin, that the bull's head is that without which the trade-mark is not; not only that it is one of the essential parts, but that the other essential parts by themselves would not be sufficient protection; and therefore it seems to me that, at any rate, they are justified in entertaining the doubt, and they have placed the comptroller and the court in a difficulty, because they seek to alter that which, up to this time, they represented in the way which I have stated. Now when that word "trade-mark" is expunged—that is to say, when the application has been granted, what will remain as the essential parts? Who can tell? We know now, at any rate, that there is one essential part. We really know no more, except, of course, that, as the Attorney-General has pointed out, there is the get up of the whole label. Whether with a representation of the blue boy, or other devices, there is that open to be protected against imitation. But when the trade-mark is gone, when we cease to be told that the bull's head is the essential part of the trade-mark, then who is to know what is the essential part? It seems to me that some such considerations must have been present to the mind of the draftsman of this section 92, which is in the Act of 1883 and remains in the Act of 1888, because what the application may be directed to is the addition or alteration of a mark in any particular, not being an essential particular within the meaning of the Act, and the preservation of the essential particulars is a necessary incident to the application.

Therefore I think the offer made by Mr. Cozens-Hardy does not go far enough, and I think that the suggestion of the Attorney-General is required in order to meet the justice of the case—that is to say, in order to protect the public. It is quite true that when that has been done the public will not be informed, as I understand, not even in the *Trade-Marks Journal*, not certainly in the certificate, the label will go forth to the world as a whole, and as being as a whole the trade-mark; but there will be this important result, that if Messrs. Colman thereafter come to protect themselves against the infringement, then they will not be entitled to say this or that is an essential part. They will be bound down by the declaration which it is suggested they should make now, and what they now declare to be essential will be essential, and what they do not declare to be essential will not be essential, and all difficulty about that will be removed.

Then Mr. Cozens-Hardy relies upon the fact that he registered under the Act of 1883, and he says no greater term should be imposed on him than could have been imposed under the Act under which he registered. Now I must go back and consider the application as made at the date of the registration. I think it is a sufficient answer to that to say that he, coming now for an act of grace, must take it on the proper terms according to the law of the present day. I need not discuss the question of the old marks before 1875, because the Attorney-General admits that no alteration beyond that which the applicant himself wishes is required as regards those. But as regards the others I think that he ought to state now, as a condition of expunging the words "trade-mark," what are and what are not the essential particulars of the label, and with that I think the matter had better go back to the comptroller.

I quite recognize that the task of going into and discussing the details now would be, as the Attorney-General said, ridiculous, and ridiculous certainly in this sense, that it would be impossible; and I also recognize the extreme desirability of my making nothing more than general remarks, because these points may be raised again in many other cases, and I do not think I ought to do more than express an opinion of a general character.

Order granted; the applicants undertaking to indorse on their application and enter on the register a statement of the essential particulars of the mark, and a disclaimer of the exclusive right to the added matter, if any, to the satisfaction of the comptroller, with liberty to apply to the court in case of difference. The applicants to pay the costs of the motion.

Solicitors, *E. Flux & Leadbitter*, for *W. H. Tillett & Co.*, Norwich; *Solicitor to the Board of Trade.*

Chan. Div.
Romer, J. } Feb. 9—13.

In re FUENTE'S TRADE-MARKS. (*a*.)

Trade-mark — Registration — New mark — Previous fraudulent user — Omission of misleading words— Refusal of registration—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 74 (11).

In 1887, *F. applied to register as a new mark certain labels to be applied as trade-marks to cigars. Previous to* 1887 *he had used the marks on cigar boxes in combination with the word "Habana," though the cigars contained in the boxes were in fact of Mexican growth and manufacture. There were words in the labels used by F. previously to* 1887, *implying that he was the successor in business of a certain firm of M. & Co., which he was not. The marks for the registration of which as new marks application was made in* 1887 *omitted the word "Habana," and stated the true place of the applicant's manufactory, and gave the applicant's own name, without any false addition as to previous businesses.*

Held, that the former fraudulent user of the marks disentitled the applicant to have them registered as new marks, even though the dishonest portions were omitted, since to permit registration would in effect be allowing the applicant to benefit by his former fraudulent conduct.

Summons.

This was a summons under the Patents, &c., Act, 1883, originally taken out by one José Fuente, and carried on by his representatives after his death pending the proceedings, that the Comptroller-General might be directed to proceed with the application of José Fuente notwithstanding the opposition of L. and H. Pinto. An application had been made on the 10th of September, 1887, by José Fuente to register two trade-marks hereinafter called respectively "La Republica Francesa de la Union" trade-mark, and the "Plantacion de la Union" trade-mark in respect of tobacco whether manufactured or unmanufactured.

There was also an application to register another mark called "La Union" as an old trade-mark, but this part of the case does not call for a report.

(*a*.) Reported by J. W. GREIG, Esq., Barrister-at-Law.

The "La Republica Francesa de la Union" mark, No. 67,419 (*Trade-Marks Journal*, Feb. 22, 1888, p. 234) consisted of three labels. The first label had two seated female figures lightly clad holding between them a medallion containing a laureated head. Over the label were the words "La Republica Francesa" in one line in large type, and below, the words "De la Union" in smaller type, and then, in another line, "Fabrica de Tabaccos Superiores" in still smaller type. Below the medallion were the words "De J. Fuente, Vera Cruz." The second label was an oval, and contained the words "Vera Cruz," with J. Fuente's name written across them. The third label was similar to the first, but of smaller size. The applicant described himself in the application to register as successor to Madraz y Ca., Vera Cruz, Mexico, and the description of goods to which he proposed to apply the trade-mark was "Tobacco, whether manufactured or unmanufactured."

The "Plantacion de la Union" trade-mark, which was numbered 67,418 in the *Trade-Marks Journal* of June 13, 1888, also consisted of three labels. The first represented a plantation, over which were the words "Plantacion de la Union," "Fabrica de Tabaccos Superiores," and below, the words "De J. Fuente, Vera Cruz." The second label was a smaller representation of the one just described, while the third one was an oval with the words "Vera Cruz" and J. Fuente's name written across them. The applicant described himself in the same way as in the other application, and the trade-mark was to be applied to the same description of goods.

The evidence showed that for some years previous to 1887 the same marks had been used by the applicant, except that instead of his own name appearing on them the labels contained the name of his predecessors, Madraz y Ca., with the address "Habana" as part of the label. The applicant or his predecessors had never had any factory or place of business at Havana, and the cigars sold by him were made at Vera Cruz, in Mexico. Shortly before, or immediately after, the passing of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), the applicant discontinued the use of the name of Madraz y Ca. and the address of "Habana," and substituted his own name, De J. Fuente, and his true address, Vera Cruz. The grounds of opposition to both the applications contained, amongst others, the following objections:—"That the applicant has used the word 'Habana' in conjunction with the said trade-mark in such a way as to amount to or convey a misrepresentation." "That the applicant has used in conjunction with the said trade-mark a statement conveying or intending to convey to the public the impression that he is the successor in business of the firm of Madraz y Ca., whereas, in fact, he is not such successor." The grounds of opposition to the Plantacion de la Union trade-mark also contained the following objection:—"The applicant has never used the said trade-mark in the way in which he proposes to register the same. The words 'Vera Cruz' on the trade-mark has been substituted for the word 'Habana,' which has been used on a trade-mark so as to amount to or convey a misrepresentation."

Neville, Q.C., and *F. B. Muir*, for the applicant.—The word "Habana" has not been used since 1884, and its use, correct or otherwise, ought not now to be allowed to stand in the way of an honest application to register. The case of *Newman* v. *Pinto*, W. N., 1887, p. 119, is a decision that where the whole circumstances show fraud the court will not assist, but there is nothing of that sort here, as the cigars were well known to be of Mexican origin, and there is nothing in our present mark which cannot be registered—there is nothing in it common (*i.e.*, open) to the trade as defined in *Burland* v. *Broxbourn Oil Co.*, 38 W. R. 89, 42 Ch. D. 274, where common to the trade is shown to mean anything the trade can legitimately use.

Aston, Q.C., *J. Cutler*, and *McColl*, for the opponents.—There has previously been a fraudulent user of the same mark with a slight difference. The applicant cannot now be allowed, by omitting the fraudulent part, to benefit by the former user. The case is *primæ impressionis*, but is an instance where the rule should be applied that he who comes to this court must come with clean hands.

Neville, Q.C., in reply.—It is solely a question whether the personal disability created by the former fraudulent user is to be allowed to prevent an honest applicant from getting his mark registered after that user has been discontinued. It would be unjust to say that once tainted this mark is always tainted.

ROMER, J.—There are three applications before me. [His lordship dealt first with the application to register "La Union" as an old trade-mark, which he dismissed on the ground that the mark was not an old mark. He then continued:—] But that leaves the court to consider the application so far as concerns two new marks, No. 67,419 and No. 67,418. Those two marks may be dealt with together, for substantially the points arising with regard to them are the same, and in my judgment I will confine my observations to the trade-mark 67,418, which has been referred to as the Plantacion trade-mark.

It is contended on behalf of the respondents that the application to register that trade-mark should be refused because of the facts that I am about to refer to: That mark, though new in the sense of not having been used prior to 1875, has, in fact, been used several years prior to this application, and attention is called to the way in which that mark has been used, though not quite in the form set forth in the *Trade-Marks Journal*. As used, instead of having the words at the bottom, being the name of De J. Fuente, the applicant, and the address, Vera Cruz, which is now the place of residence or factory of the applicant, the mark as used contained the name of Madraz y Ca. as the predecessors in title of Fuente, with the address "Habana," and stamped upon the boxes which contained the cigars coming from this factory occur the words "Plantacion de la Union," and underneath, but as part of the stamp, the word "Habana"—between the two words appearing the initials of the applicant's predecessors, Madraz y Ca. The box also contains a smaller label with the word "Habana" printed on it, and the initials "Madraz y Ca." written across it. It appears that in the form which I have mentioned, and not otherwise, the mark which it is now sought to have registered has been used for several years and in no other form.

But it appears as the result of the evidence before me that at or about the year 1887, on the passing of the Merchandise Marks Act of 1887, the applicant discontinued using the mark the word "Habana," in any shape or form, and used instead his own name with the address of Vera Cruz, in Mexico. It further appears that there was an application made by Fuente to register the trade-mark as used in the form which gave the name of his predecessors in title as the owners of the mark, with the address of "Habana" as the place of residence. That application was not proceeded with, and in lieu of it the application now before me was made, and made as far back as the 10th of September, 1887.

With regard to the contention on the part of the

applicant that since the time I have mentioned, or even since 1885, he has not used the label with the word "Habana" upon it at all, I find there is no evidence that any box of his cigars with any label of his which does not contain the word "Habana" upon it has ever been seen in this country; and though Mr. Fuente in his affidavit made a general statement as to his not having used the label in its old form since the time I have mentioned, owing to his death the respondents have had no opportunity of cross-examining him upon that. But so far as I can gather from the evidence, whatever may have been the intention of Mr. Fuente, or even his practice in Vera Cruz, it does not appear that he has sent any cigar boxes to this country having upon them a label in the form in which it is now sought to have them registered.

Under these circumstances the respondents say that the application should be refused, because of the alleged fraudulent user by the applicant and his predecessors of substantially this very mark. The first question which arises is this, Was the mark as used fraudulent? I have come to the conclusion that it was. Inside the box, and looking at the label as used, as appears from the exhibit before the court, it is clear to me that the representation is there made that Madraz y Ca., who were the predecessors of Fuente, had their place of business at "Habana." But it does not rest there. The mark on the box itself, which is burnt, and to which I before referred, also supports the view that the representation is being made that the words "Plantacion de la Union" were being used with reference to cigars coming from Habana. And that is also further supported by the small label to which I have referred, having the word "Habana" upon it, and the name of Fuente's predecessors in title written across it.

I come to the conclusion, therefore, that the trade-mark which it is now sought to register as in fact used with certain words put there in the place of the word Fuente of Vera Cruz was used fraudulently for several years, and used up to the time when the application was made for registration of this mark.

Under these circumstances I have to consider whether the applicant is entitled to get this mark registered as a new mark. On the whole, I think he is not so entitled. It is clear, and, indeed, was admitted, and rightly admitted, by one of the applicant's counsel in the course of his argument, that the object of the applicant in this case in applying for registration of this mark as a new mark is, in effect, to enable him to get the benefit of the old user—that is to say, the old user which I have come to the conclusion was a fraudulent user. That, it appears to me, ought not to be allowed. I think if this mark was registered it would give the applicant, in effect, the benefit (a benefit to which he is not entitled) of the old user. Further, I think that the effect of the registration in this case might well be calculated to deceive. I think that any person who had been accustomed to deal with the cigars under the old form of the label, and who had been led to believe that the cigars came from Habana, might still be led, by cigars under the new form of the label, into believing that they also were Habana cigars, for he would not unnaturally remember the old label which he would find substantially the same as the new one, and either might not notice or might not appreciate the difference between the two arising from the substitution of the words Fuente of Vera Cruz for the words "Madraz y Ca., Successores, Habana."

And as it occurs to me the point might be put in another way. Suppose the case had come before the court as follows:—Application by Mr. Fuente to register the mark as a new one, saying nothing whatever about prior user. Answer put in on behalf of the opponents. This is not a new mark, it is substantially an old mark as used, which shows on the face of it that that is so. That would be an answer to the claim but for the reply which the applicant in this case asks the court to allow him to establish to this effect: I used the label and the trade-mark referred to, and I used it, not for Habana cigars, but for Mexicans, and I ask the court to allow me to show for my own benefit on this application, and in support of it, that my old user was fraudulent and, therefore, ought to be removed from my path. In my judgment he ought not to be allowed to rely on that before the court in order to assist him in getting this mark registered. As I said at first, the substance of the application is that the applicant, by registering this as a new mark, may, in substance, get the benefit of his old fraudulent user. The point is a new one, and I will not be the first judge to assist the applicant in a case of this kind. Having regard to this decision it is unnecessary for me to consider, and therefore I do not decide, the other points which have arisen in this case, and in my judgment all three applications fail, but with regard to costs I feel bound now, having had the whole of the evidence before me, to express my strong disapprobation of the evidence given by Mr. Pinto and of his conduct in reference to these marks, and, having regard to what he has said on oath, his cross-examination, and his conduct, in dismissing these applications, to mark my sense of Mr. Pinto's conduct, I dismiss them without costs.

Solicitor for the applicant, *S. Chapman.*

Solicitor for the respondents, *J. Curtice.*

Q. B. Div. (A. L. Smith and Grantham, JJ.) April 14, 23.

HOARE *v.* NIBLETT. (*a.*)

Married woman—Joint contract—Separate liability— Res judicata.

The rule in Kendall *v.* Hamilton, 28 *W. R.* 97, 4 *App. Cas.* 504, *that a judgment (although unsatisfied) against one of two joint contractors for breach of the contract is a bar to a subsequent action for the same breach against the other joint contractor, applies where that other is a married woman, and therefore bound only as to her separate estate.*

This was an appeal from a decision of the judge of the Clerkenwell County Court directing that a nonsuit should be entered.

The facts and arguments sufficiently appear from the judgments of the court.

W. Willis, Q.C., and *E. T. Blackwell,* for the plaintiff.

Gerard Laing, for the defendant.

Cur. adv. vult.

April 23.—The following written judgments were delivered:—

A. L. SMITH, J.—The question in this case is, whether the learned judge of the county court at Clerkenwell was right in nonsuiting the plaintiff.

The circumstances are as follows:—By agreement in writing dated the 19th of September, 1888, Charles Niblett, the husband of the present defendant, by his agent, Vincent, contracted to let to the

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

plaintiff, a married woman, No. 42, Upper Bedford-place, Russell-square, together with the furniture and effects therein for the term of one year, and thereby contracted to give to the plaintiff the option of purchasing such furniture and effects. This contract Charles Niblett broke, and thereupon the plaintiff sued him for not letting the house to her and for not giving her the option to purchase, and ultimately recovered judgment against him for £30 damages and costs.

Charles Niblett only in part satisfied this judgment and then became bankrupt. The plaintiff thereupon commenced another action against the present defendant, the wife of Charles Niblett, upon the same contract and for the same breaches for which she had sued Charles Niblett.

Objection was taken that this second action was not maintainable by reason of the well-established rule of law that a joint contractor cannot be sued in a second action upon the same contract, though not a party to the first action in which judgment had been recovered, the reason, as I understand it, being that there can only be one judgment upon one entire contract: *Kendall* v. *Hamilton; Hammond* v. *Schofield*, [1891] 1 Q. B. 453 (per Vaughan Williams, J., at p. 457).

The learned judge held the objection well founded, and nonsuited the plaintiff.

The way the plaintiff sought to make out a case against the defendant was by showing that Vincent in reality contracted with her not only on behalf of Charles Niblett, as stated in the contract, but also on behalf of his wife, the present defendant, and it must be taken that legal evidence can be produced in that behalf.

This case may therefore be discussed upon the hypothesis that both the husband and the wife had signed the contract of the 19th of September, 1888. Mr. Willis, for the plaintiff, asserts that even if this were so the husband and wife are not joint contractors upon one entire contract, because by the contract the wife could only contract in respect of her separate estate, whereas the husband contracted personally, and he says that consequently there were two contracts, and not one. It must, however, be pointed out that they both contracted by one contract in writing to do the same identical thing, they both committed the same breaches, and both became liable for the same amount of damages. Why, then, is this not one entire contract jointly entered into by both?

The argument of Mr. Willis goes the length of asserting that a married woman cannot, by possibility, enter into a joint contract, for if she enters into a contract conjointly with another she must always contract in respect of something in respect of which the other does not contract, and that this is so even if she jointly contracts with another married woman. This proposition I have never heard before, and I do not agree with it. Fry, L.J., in the case of *Whittaker* v. *Kershaw*, *ante*, p. 25, 45 Ch. D., at p. 329, says: "The effect of section 1, sub-section 2, of the Married Women's Property Act, 1882, as it appears to me, is to allow a married woman to be sued in respect of anything in respect of which a man could be sued; subject to this, that her power to contract is limited, and that the remedy is confined to her separate estate. The right of action is the same as against a man, but the relief is different." It seems to me that she can contract in the same way as a man; subject to this, that she must have separate estate at the date of contract, which the man of course need not. It appears to me that Mr. Willis is in this difficulty—if the defendant had separate estate when she contracted, she can contract as a *feme sole*, and consequently can enter into a joint contract and if she has not, she cannot contract at all. So, whichever way it is taken, the plaintiff cannot succeed, for if the defendant had separate estate then the rule of law about joint contractors applies, and if not then she cannot be sued. Whichever way you take it the plaintiff must be nonsuited. For these reasons it appears to me that the learned county court judge was right in nonsuiting the plaintiff. It is unnecessary to decide any further point taken by the defendant, and in my judgment this appeal must be dismissed, with costs.

GRANTHAM, J.—In my judgment this nonsuit was right. The plaintiff contended that the goods, the subject of this action, being claimed by Mrs. Niblett in her husband's bankruptcy as her goods and not Mr. Charles Niblett's at the time the contract was made by him with the plaintiff, the plaintiff can now sue Mrs. Niblett and recover against her separate estate the damage for a breach of so much of the contract made between the plaintiff and Mr. Niblett as relates to these goods. Assuming there had been no proceedings taken under this contract which ended in judgment being obtained by the plaintiff against Charles Niblett, I think the plaintiff could have maintained such an action, but as in this case the plaintiff first sued Charles Niblett, not as agent at all, but as principal, and got judgment against him, she cannot now sue the wife.

The action could only be maintained on one of two grounds—either that she was an undisclosed principal, or else that she was a *feme sole* dealing with her separate estate. If the former the plaintiff, is precluded from maintaining it because the only written contract is one by Vincent, as agent for the husband, and if the husband is treated as agent for the wife, then there is a judgment outstanding against the agent, and until that is set aside you cannot maintain another action against the principal. And if you treat it as an action against the wife, contracting in reference to her separate estate, she must have entered into a joint contract with her husband, because, the transaction being one, the contract being one, the subject-matter of the contract being the same, it is exactly the same cause of action on which the plaintiff first sued—viz., a contract to put her in possession of these goods, and she having obtained a judgment on that cause of action, it must be treated as a judgment obtained against one of two joint contractors, and no authority has been suggested that takes the case out of the ordinary law above referred to.

Appeal dismissed.

Solicitors for the plaintiff, *Law & Sons.*

Solicitor for the defendant, *E. W. Essell.*

Q. B. Div. (Pollock, B., and Charles, J.) Feb. 10; April 22.

REG. v. JUDGE OF THE HALIFAX COUNTY COURT AND BAIRSTOWE. (*a.*)

County court—Jurisdiction—Validity of patent—"Title to any franchise"—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 56.

The privileges granted to an inventor by letters patent are a "franchise" within the meaning of section 56 of the County Courts Act, 1888. *A county court has, therefore, no jurisdiction to entertain an action in which the title to letters patent is in question.*

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

In this case a rule *nisi* had been obtained calling upon the judge of the Halifax County Court to show cause why a *mandamus* should not issue directing him to hear and determine an action for the infringement of a patent which had been commenced in his court.

The plaintiff alleged that the defendant had infringed his patent, and the action was brought to recover thirteen guineas damages for the infringement. The defendant disputed the validity of the patent. The county court judge held that he had no jurisdiction to try the action, and nonsuited the plaintiff. The plaintiff then obtained the rule *nisi*, which now came on for argument.

T. Terrell showed cause against the rule.—Such an action as the present is not within the ordinary jurisdiction of the county court as defined by section 56 of the County Courts Act, 1888. Actions relating to patents are regulated by the Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 Vict. c. 57). Sections 28-32 of that Act deal with legal proceedings, and "the court" therein referred to is defined by section 117 to mean "her Majesty's High Court of Justice in England"; the procedure under the Act generally, and in particular the provisions of section 29, as to delivery with the statement of claim in an action for infringement of particulars of the breaches complained of could not be followed in the county court. Moreover, patent cases are excepted from the jurisdiction of the county courts by section 56 of the County Courts Act, 1888, for the word "franchise" in that section includes patent rights: Blackst. Comm., vol. 2, p. 37, *sub voc.* Franchise; Termes de la Ley, *sub voc.* Franchise. [CHARLES, J. referred to Finch's Law, c. 14, pp. 164-167, where instances of franchises are given, and there is no mention of letters patent.]

R. A. Dale, in support of the rule.—A patent is not a franchise; that expression relates to rights affecting real property, such as a right to hold markets and take tolls: Rastall's Entries, p. 382; Com. Dig., *sub voc.* Franchise; Chitty's Prerogative, p. 119, where a list of fourteen franchises is given, and letters patent are not included. In section 56 the word immediately follows, and is to be taken as *ejusdem generis* with, the words "toll, fair, market." The Patents Act, 1883, only regulates the practice in patent actions; that practice could be adopted in the county courts; provision now exists for delivery of particulars where the claim exceeds 40s. This is a personal action, and the Patents Act has not taken away the jurisdiction of the county court: *In re Stuart* v. *Jones*, 1 W. R. 20, 1 E. & B. 22.

Terrell, in reply.—It was not intended that the county courts should have jurisdiction in matters of such difficulty as the investigation of titles to hereditaments or to letters patent, and there is no recorded instance of the validity of a patent having been tried in a county court.

Cur. adv. vult.

April 22.—POLLOCK, B., delivered the judgment of the COURT.—This action was commenced in the county court of Yorkshire, holden at Halifax, for the infringement of a patent. The defendant denied the validity of the patent, and upon the case coming on for hearing the judge declined to hear it, upon the ground that the court had no jurisdiction. The plaintiff then applied to this court for an order directing the judge to proceed with the case. The question, therefore, for our determination is whether or no the county court has jurisdiction to try such an action where the plaintiff's title to the patent is in issue. No instance of such an action having been tried in a county court was brought to our attention, and there are good reasons why in practice such actions should be brought in the superior courts. The right of the Crown to grant letters patent to a person for the sole use of any art first invented by him is a part of the ancient royal prerogative; this right has been limited by the Statute of Monopolies, but the grant is founded on the common law right of the sovereign. In modern times, although the right conveyed to a subject by a patent is the same as in the time of James I., and an action is now, as then, maintainable by the grantee of a patent against anyone who causes him damage by an infringement, the procedure, which is necessarily peculiar in its requirements as to particulars, inspection, and other matters, has been dealt with first by rules of court and later by statutes. The existing Act (by which the earlier provisions have been repealed) is 46 & 47 Vict. c. 57. Sections 28 to 32 provide in detail for the procedure of "the court" in a patent action, and by section 117 "the court" is defined as meaning "her Majesty's High Court of Justice in England." Hence either party, plaintiff or defendant, who is desirous of availing himself of such procedure can do so only where the action is in that court. It was argued before us that this alone would denote such an intention on the part of the Legislature that all proceedings in patent actions should take place in the High Court as to deprive the county courts of jurisdiction. We think, however, that this proposition does not exhaust the question, and that, although it is not without some weight, it is by no means conclusive. We must, therefore, next look to see what is the jurisdiction of the county courts.

The jurisdiction of the county court is given by the original County Court Act of 1846 (9 & 10 Vict. c. 95), s. 58, and the same language, with a variation as to pecuniary limit, occurs in the Act of 1888, s. 56. By this section "all personal actions where the debt, demand, or damage claimed is not more than £50" may be commenced in county courts. The words "personal actions" clearly include an action for the infringement of a patent, but in both of these Acts the following proviso occurs:—"The court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise shall be in question, or for any libel or slander, or for seduction, or for breach of promise of marriage," and it was contended on behalf of the defendant that "franchise" includes the right or privilege which is granted by a patent for a new invention.

The primary meaning of the word "franchise," as its origin denotes, is a freedom, but it has been used in the language of the law in a wider sense, as including a liberty or privilege. In Termes de la Ley the only meaning given to it is "an immunity or exemption from ordinary jurisdiction." The various rights, however, which it aptly describes are dwelt upon at great length in Viner and Comyn and in Bacon's Abridgment and in Blackstone's Commentaries, vol. 2, p. 37, it is said "franchise and liberty are used as synonymous terms, and their definition is a royal privilege or branch of the king's prerogative subsisting in the hands of a subject. Being, therefore, derived from the Crown they must arise from the king's grant, or in some cases may be held by prescription, which, as has been frequently said, pre-supposes a grant. The kinds of them are various and almost infinite." In Chitty's Prerogative of the Crown, p. 119a, franchise is defined to be "a royal privilege or branch of the royal prerogative subsisting in the hands of a subject by a grant from the king," and for this he refers to Finch's Law, 164.

In Comyn's Digest (Prerogative D., 30) it is said, "The king may grant to another to have any franchise or liberty"; so as to "privileges of trade," and under the head of "Trade" (B.) instances are given of grants by the king's patent for the sole printing of certain books. In *Darcy* v. *Allein*, 11 Rep. 84b (vol. 6, p. 159), the court said in dealing with the first question—viz., whether the said grant to the plaintiff of the sole making of cards within the realm was good or not—"Also such charter of a monopoly against the freedom of trade and traffic is against divers Acts of Parliament, as 9 Ed. 3, c. 1 and 2, which for the advancement of trade and traffic extends to all things vendible, notwithstanding any charter of franchise granted to the contrary, or usage or custom or judgment given upon such charters, which charters are adjudged by the same parliament to be of no force or effect." These words are inapplicable to the "first question" unless the court intended to assume that the grant of the sole making of cards within the realm was a "charter of franchise," and although the charter of franchise mentioned in the statute cited apparently referred to charters which had been granted to corporations or towns, it seems to be a fair inference that the court considered such charter of a monopoly as a charter of franchise, and that this would be none the less true when the monopoly answered to the description which the court declared to be lawful—*i.e.*, "when any man by his own charge and industry, or by his own wit or invention, doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that never was used before, and that for the good of the realm."

The result of these authorities is, in our opinion, that "franchise" does include such a right as was put in issue by the proceedings in the county court. The plaintiff, however, further contended that, even assuming this to be so with reference to the general meaning of the word "franchise," the language of the exemption is such as requires that a more limited meaning should be given to it. The sentence in which it is found commences by exempting from the county court jurisdiction "any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market," shall be in question, and it is said that as these words apply to claims in respect of realty, or *quasi*-realty, the word "franchise" which follows ought to be limited in its meaning to franchises of such a character as involve the right to incorporeal hereditaments or rights of a similar kind. This rule of construction does not seem to us to apply. It is not the case of a general word following one or more less general terms *ejusdem generis*, in which it may properly be said that the meaning of the subsequent general word is cut down or governed by the more particular word which precedes it. Here the category of exceptions begins by very general words, and then, after the word "or," adds specific causes of action, and finally closes with "or for any libel or slander, or for seduction or breach of promise of marriage," so that to give proper effect to the language used the legal meaning of each word must be assigned to it. Upon careful consideration of all these grounds of argument we have arrived at the conclusion that the view acted upon by the county court judge was correct, and that this rule must be discharged, with costs.

Solicitors for the plaintiff, *Ford & Ford*, for *O. T. Rhodes*, Halifax.

Solicitors for the defendant and the county court judge, *J. H. Bridgford* for *W. H. Boocock*, Halifax.

Q. B. Div. (Cave and Vaughan Williams, JJ.) Jan. 29; April 14.

In re AGRICULTURAL HOLDINGS (ENGLAND) ACT, 1883. GOUGH AND OTHERS *v.* GOUGH AND OTHERS. (*a.*)

Landlord and tenant—Compensation to tenant—Tenant for life—Executors of—Executors of landlord paying compensation—Right of executors to a charge on the lands—Agricultural Holdings (England) Act, 1883 (46 & 47 *Vict. c.* 61), *s.* 29.

In a petition by the executors of a deceased landlord, a tenant for life, to obtain a charge upon lands under section 29 of the Agricultural Holdings Act, 1883, *in respect of a sum paid by them as compensation to an outgoing tenant, such compensation having been fixed by valuation before the death of the landlord, but not paid by him, the county court judge held that the executors were not entitled to have this charge, as the word "landlord" in the section did not include the executors of the landlord.*

Held, by Cave, J. (*affirming the decision of the county court judge*), *that the word "landlord" in section 29 of the Act does not include the executors of the landlord, and that, therefore, the executors were not entitled to the charge.*

Held, by Vaughan Williams, J., *that "landlord" does include executors of the landlord, and that the executors were entitled to the charge.*

Appeal from the county court of Somerset, holden at Wells.

A petition was presented in the Wells County Court by the executors of John Gough, deceased, asking for an order charging a sum of £35 upon a certain holding under section 29 of the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61).

The late John Gough was tenant for life of a certain farm, and in the year 1886 he let the same to John W. Huggett as tenant from year to year. In March, 1889, Huggett, the tenant, gave his landlord, Gough, notice of his intention to quit the farm at Lady Day, 1890, and in January, 1890, he served on the landlord a notice of claim for £130 for unexhausted improvements on the farm under the provisions of the Agricultural Holdings (England) Act, 1883, and on the 2nd of April the landlord served on the tenant notice of a counter-claim for £80 for dilapidations. On the 5th of April two valuers were appointed, and under the provisions of sections 8 and 42 of the Act they agreed that £90 was the sum due to the tenant, and £55 the sum due to the landlord, leaving a balance due to the tenant of £35, which was to be paid within a fortnight.

On the 8th of April Gough died, having up to that time been in receipt of the lands in question as owner for life. The ownership then passed to the remainderman. On the 24th of April Gough's executors paid the £35 to the tenant, and they claimed a charge upon the holding for that amount. The only question raised was whether, under section 29 of the Act, the petitioners were entitled to ask for an order.

For the petitioners it was contended before the county court judge that the word "landlord" in section 29 meant the "landlord or his executors," and the interpretation clause, section 61, and section 30 were cited in support of that contention. For the remainderman it was contended that "landlord" did not include the executors, inasmuch as "landlord" in the interpretation clause was not defined as including executors, whereas in the same clause "tenant" is expressly said to include executors.

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

The learned judge held that the order could not be made, as section 29 speaks of the landlord applying for the order, and by the definition clause "landlord" is to mean "any person for the time being entitled to receive the rents and profits of any holding," whereas the "tenant" is defined to be the "tenant or his executors," and section 29 says the "landlord, on paying to the tenant the amount due," &c., that the money was paid on the 24th of April, when John Gough was dead, and when he had, therefore, ceased to be entitled to receive the rents and profits, as he was only the tenant for life, and his right, therefore, ceased with his death; that the executors never were entitled to receive the rents and profits, and that they are not now entitled to charge the £35 paid to the tenant, upon the lands under the 29th section.

The learned judge therefore dismissed the petition.

The petitioners appealed.

Section 29 provides: "A landlord, on paying to the tenant the amount due to him in respect of compensation under this Act, . . . shall be entitled to obtain from the county court a charge on the holding, or any part thereof, to the amount of the sum so paid or expended.

"The court shall, on proof of the payment or expenditure, . . . make an order charging the holding, or any part thereof, with repayment of the amount paid or expended, with such interest, and by such instalments, and with such directions for giving effect to the charge as the court thinks fit."

H. F. Lawes, for the appellants.

Garland, for the respondents.

Cur. adv. vult.

April 14.—VAUGHAN WILLIAMS, J., read the following judgment:—

The question in this case is whether the word "landlord" in section 29 of the Agricultural Holdings (England) Act, 1883, includes the executors of the landlord, so as to enable them to obtain from the county court a charge on the holding. I think that the word "landlord" in that section does include the executors of the landlord. The argument against this construction is based entirely on the fact that the definition section—section 61—defines "landlord" as "any person for the time being entitled to receive the rents and profits of any holding," and makes no mention of the personal representatives of the landlord, whereas the definition of a "tenant" expressly includes the executors, administrators, and assigns of, and any person deriving title under, the tenant. This definition clause does certainly *primâ facie* give rise to the presumption that in this Act "landlord" does not include the executors of the landlord, but it seems to me that if the Act is looked at as a whole, the presumption arising from the words of the definition section is negatived. The right of the tenant to compensation is dealt with in section 1 of the Act, which gives the tenant on quitting his holding at the determination of his tenancy the right to obtain from the landlord as compensation the value of improvements; now it seems impossible to suppose that the word "landlord" in this section does not include the personal representatives of the landlord, or to suppose that if the landlord were tenant for life and died suddenly, a tenant, who had not already given notice of claim under section 7, would lose his statutory right to compensation.

Then take section 6 of the Act, which requires that in the ascertainment of the amount of compensation under this Act payable to the tenant, there shall be taken into account in reduction thereof any sums due to the landlord in respect of rent. It seems clear that in this section "landlord" must include the personal representatives of the landlord; moreover, it seems clear that a tenant—or, at all events, a tenant who has made a claim under section 7—has a right to enforce his claim against the executors of the landlord, for the final clause of section 61 provides that "the designations of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings taken under or in pursuance of this Act in respect of compensation for improvements."

Now, in my opinion, one ought not, unless the words compel one to do so, to construe the Act, which imposes on landlords this liability, so as not also to extend to them, or those that they represent, the correlative right of charging this compulsory expenditure on the land, and thus on those who have the benefit of the expenditure. It is said that the apparent injustice of so construing the Act, not to give the executors this power, disappears in face of the consideration that the Legislature may not have intended to charge the land unless the landlord, by application to the county court, declared his option so to charge it, because it is said that it might well be that the landlord preferred his heirs-at-law to his next of kin. It seems to me that this improbable event weighs as nothing against the injustice which will be done in the necessarily frequent cases where the landlord either has not the opportunity, or from carelessness neglects the opportunity, of charging the land. *Primâ facie* it must be supposed that the Legislature intended that those who get the benefit of the expenditure should bear the burden. There is another point of view which seems to me to lead to the same conclusion. The definition of "landlord" is "any person for the time being entitled to receive the rents and profits of any holding." Now it may be that this definition may be so read as to include as persons for the time being entitled to receive the rents and profits of any holding those who are entitled to receive rents and profits in arrear or unpaid at and after the determination of the term. Indeed, the whole scope of the Act goes to show that the final account is not to be taken till after the determination of the term, for there are items of charge and deduction in section 6 which can hardly be arrived at until after the determination of the term. Moreover, it can hardly be that the Legislature intended that a tenant who had suffered the term to expire without making a claim under section 7 should lose the benefit of that section, or, indeed, of any part of the Act; and it is to be observed that, if the term "landlord" is only to apply so long as the term subsists, the determination of the term, as well by the death of the tenant for life or *cestui que vie*, as by effluxion of time, will oust the jurisdiction of the statute.

I have only to add that in the Agricultural Holdings Act, 1883 (Scotland), which, except that it substitutes "sheriff" for "county court judge," and Scotch law terms for English law terms, seems generally couched in the very words of the English Act, "landlord" is made by the definition clause to include executor and administrator. In my opinion this is done not to differentiate the Scotch Act from the English Act, which was passed in Parliament on the same day, but to clear up a possible doubt which might arise on the wording of the English Act. I think this because it is difficult to conceive any reason why it should be just in Scotland that the executors should have this power of charging the land with money which they are compelled to spend out of their testator's estate for the benefit of the land, and not just in England that they should have the same power.

CAVE, J., read the following judgment:—This is an appeal from an order of a county court judge, refusing to give the appellant a charge under section 29 of the Agricultural Holdings (England) Act, 1883.

At the commencement of 1890 a Mr. Gough was tenant for life of the property in question, which was then in the possession of a tenant whose tenancy was about to expire at Lady Day of that year. The tenant had duly given notice to Mr. Gough, his landlord, of his intention to make a claim for compensation under the Act, and on the 5th of April, 1890, by a valuation made by consent, the amount of the compensation was assessed at £35. On the 8th of April the landlord died, leaving the £35 unpaid. On the 24th of April his executors paid the amount, and then applied to the county court for a charge on the holding, which the county court refused to give, on the ground that the executors could not bring themselves within the Act. Section 29 of the Act, omitting immaterial parts, provides that "a landlord on paying to the tenant the amount due to him in respect of compensation under this Act . . . shall be entitled to obtain from the county court a charge on the holding to the amount of the sum so paid." Now, in this case the applicants were not the "landlord," but his executors, and it is necessary, therefore, to turn to the interpretation clause to see if that throws any light on the question. Section 61 enacts, that "landlord" in relation to a holding means "any person for the time being entitled to receive the rents and profits of any holding." Now the applicants never were entitled to receive the rents and profits of this holding, for on the death of Mr. Gough on the 8th of April the person for the time being entitled to receive the rents of this holding was his granddaughter, who became tenant in fee on his death. At the end of section 61 it is provided that the designations of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings taken under or in pursuance of this Act in respect of compensation for improvemonts. In my judgment this part of the interpretation clause made Gough the landlord, and his tenant the tenant after the 25th of March, notwithstanding that the tenancy determined on that day.

I do not see how it can possibly apply to the executors, and it seems to me to afford an argument against them, as tending to show that Mr. Gough himself might have ceased to be within the definition of the word "landlord" given in the earlier part of the section if this clause had not been inserted. If but for this clause Mr. Gough would not after the 25th of March have been within the definition of landlord merely because he still remained entitled to receive the rent which accrued due on that day, then *à fortiori* his executors would not come within that definition. If this is the natural meaning of the language of the statute, is there anything so repugnant to natural justice in the result as to force us to the conclusion that this could not have been the intention of the Legislature? Before the passing of the Act of 1883 the executors of a tenant for life who had been compelled to pay compensation to the tenant according to the terms of the lease or the custom of the country, under such circumstances as existed here, could not have recovered any part of that sum from the remainderman, but the whole must have come out of the personal estate of the tenant for life. It is true that the Act gives the tenant more ample compensation than he could have obtained before, and makes that compensation payable by the landlord who may be only a tenant for life, but in return it gives the landlord power to obtain a charge, if in his discretion he thinks fit to do so, not only for that compensation which he is compelled by the Act to pay, but also for that which he would, even before the Act, have had to pay under the terms of the lease or the custom of the country.

Is there anything unreasonable or contrary to natural justice in confining the option to take a charge to the landlord himself, and in not extending it to his executors, who would be bound, or might naturally be expected to decide in favour of taking a charge, while the landlord himself might be quite as likely to decide in favour of the heir or remainderman as not? I do not say it would be unreasonable to extend the option to the executors; it is enough for my purpose that it is not so repugnant to natural justice to confine it to the landlord personally as to compel us to put a non-natural interpretation on the words of the statute. Whether the one view should be adopted or the other might very well depend on the prior history of the nation, and of its dealings with landed property, and also on the economical views generally prevalent in the nation. It is remarkable that in another Act passed on the same day, but confined to Scotland, the opposite view of extending the option to the executors of the landlord did prevail; and the very fact that the Legislature, when it was minded so to extend the option, knew how to express that meaning, is a strong argument against giving to quite different language in the English Act the same interpretation as would be given to the language of the Scotch Act. Nor can it be said that the matter was passed over *per incuriam*, for when, in section 61, the Legislature comes to define the word "tenant," it expressly includes the executors, and to show that this right to compensation extends to the tenant's executors, and to preclude the contention that the general inclusion of executors would not extend to such a right, it expressly provides that the right to receive compensation in respect of any improvement made by a tenant shall enure to the benefit of such executors, administrators, assigns, and other persons as aforesaid.

It may be said that this construction prevents the landlord from exercising his option if he should die just after the determination of the tenancy, and before he has time to apply to the county court for a charge; but I should wish to guard against any such construction being inferred from my judgment. It is not necessary to decide the point here, but I should like it to be understood that I am not at present prepared to hold that the executors could not succeed in obtaining a charge, if they could show that their testator in his lifetime had unequivocally declared his intention of applying for one—as, for instance, by giving the remainderman notice of the tenant's claim, with the view to the remainderman's being represented on the arbitration provided by the Act, and protecting his interests against the claim of the tenant. Nothing of the kind is suggested to have taken place here, and, for the reasons above set forth, I am of opinion that the learned county court judge was right, and that this appeal should be dismissed.

Appeal dismissed, without costs. Leave to appeal.

Solicitors for the appellants, *Pilgrim & Phillips*, for *H. F. Poynton*, Bristol.

Solicitors for the respondents, *Moon & Gilks*, for *J. W. B. Leach*, Martock.

Court of Appeal.

From Chan. Div. April 22.

In re CHEESMAN (A SOLICITOR). (*a*.)

Costs—Taxation after payment—Solicitor—Special circumstances—Pressure—Payment "under protest"—Client abroad—Discretion of judge—Attorneys and Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *ss.* 37, 38, 41.

In October, 1890, *house property which was subject to a mortgage was sold by the mortgagor, the 8th of November being, as the mortgagee's solicitor was aware, the date fixed for completion. On the 24th of November, when the purchaser was pressing for completion of the contract, and threatening an action for specific performance, the mortgagee's solicitor delivered a bill of costs for £45, and three weeks afterwards a small supplementary bill for £3 16s. The mortgagor himself was in Australia, but on the 23rd of December his solicitor, acting as his agent, in order to get the purchase completed, paid "under protest" the sum of £42, which the mortgagee's solicitor had offered to accept in full discharge of the bills, and a receipt was given which stated that the amount was "paid under protest."*

The mortgagor's solicitor having taken out a summons for taxation after payment, alleging as "special circumstances" within sections 38 *and* 41 *of* 6 *&* 7 *Vict. c.* 73 —(1) *the mortgagor's absence*, (2) *the payment having been made "under protest," and* (3) *the "pressure" arising from the necessity under which he lay of obtaining the mortgagee's concurrence in order to complete the contract for sale*, Kekewich, J., *acceded to the application.*

Held, on appeal, that, though there might be some doubt whether the grounds alleged were sufficient to constitute a clear case of "special circumstances" within the meaning of the Act, yet, as some grounds for holding such special circumstances had been shown, and the judge had exercised his discretion, his decision ought not, under the circumstances of this case, to be interfered with, and that appeals in cases of this kind ought not to be encouraged where the amount in question was so trifling.

Decision of Kekewich, J., *affirmed.*

Appeal from Kekewich, J.

This was an appeal by a solicitor, from an order made by Kekewich, J., at chambers, directing taxation of certain bills of costs, after payment, on the ground of "special circumstances."

Walter Liberty Vernon, who was now residing at Sydney, New South Wales, had mortgaged some houses at St. Leonard's-on-Sea in 1880 for £3,000, and Mr. Cheesman, the appellant, who had then acted for both parties, was now solicitor to the mortgagee.

On the 6th of October, 1890, the property was put up for sale by order of the mortgagor, and was sold, the 8th of November then next being fixed by the conditions of sale as the date for the completion of the contract, a fact of which the mortgagee's solicitor was admitted to be aware.

Sixteen days after the date so fixed for completion —that is to say, on the 24th of November—the mortgagee's solicitor delivered three bills of costs, amounting together to £42, to the mortgagor's solicitors, and three or four weeks later, on the 18th of December, a supplementary bill for a further sum of £3 16s. 2d. The purchaser was then pressing for the completion of the contract, and had actually threatened to bring an action to enforce specific performance of it.

On the 23rd of December a meeting for the purpose of completing the purchase took place between the mortgagor's solicitor (as agent for the mortgagor, who was still in Australia), the mortgagee's solicitor, and the purchaser's solicitor; and the mortgagee's solicitor offering to accept £42 in discharge of the bills (to the amount of which the mortgagor's solicitor had objected), the latter paid that sum "under protest" in order to procure the completion of the purchase. The receipt expressly stated that the amount was "paid under protest."

In the following month the solicitor to the mortgagor took out a summons on his behalf for taxation of the bills of costs, notwithstanding payment.

On the 16th of February, 1891, Kekewich, J., sitting at chambers, held that a sufficient case of "special circumstances" had been made out, and accordingly referred the bills for taxation.

The judge having certified that he did not require to hear further argument, the mortgagee's solicitor, Mr. W. Cheesman, appealed direct to the Court of Appeal.

Everitt, Q.C., and *Gaselee*, for the appellant.—There were no "special circumstances" here sufficient to justify taxation after payment. There was no pressure by the mortgagee or his solicitor. The only pressure was by the mortgagor's own vendee. As to the payment having been made "under protest," that amounts to nothing. The only other circumstance alleged was the absence of the mortgagor in Australia, but that made no real difference. There was no overcharge. The mortgagor simply objected to every item in the bill without any reason. We exercised no pressure. [KAY, L.J.—Is it not pressure if you take advantage of the exigencies of a client's position?] The circumstances here were not sufficient to authorize taxation after payment; there were no apparent overcharges: *In re Wells*, 8 Beav. 416, at p. 418; *In re Harrison*, 10 Beav. 57. In *In re Norman*, 34 W. R. 313, 16 Q. B. D. 673, there were very gross overcharges. If this taxation is allowed, it will open the door to a great many taxations. [LINDLEY, L.J.—Would that be a great evil?] We submit that it would.

They also referred to *In re Browne*, 1 De G. M. & G. 322.

McSwinney, for the respondent.—All the old cases are immaterial in face of the decisions in *In re Boycott*, 34 W. R. 26, 29 Ch. D. 571, and *In re Norman*, which really throw us back on the Act of Parliament itself. What constitute "special circumstances" within the Act is a matter for the discretion of the judge in each case, and no fixed rule should be laid down: *In re Norman*. Here the judge has exercised his discretion, and his decision ought not to be interfered with. The special circumstances here were three. First, the mortgagor was at the time the bill was paid, and for many months before, residing in Australia. Secondly, the bills were paid "under protest," and those words actually formed part of the transaction of payment, which shows that neither party considered the transaction finally concluded. Thirdly, there was pressure because the mortgagee's solicitor took advantage of the exigencies of the mortgagor's position arising from the fact that the purchaser was pressing for completion. In *In re Browne*, 1 De G. M. & G., at p. 331, Knight-Bruce, L.J., said:—"If the question is simply whether the payment is made of the client's free will, does not collateral pressure bear upon it as much as direct pressure?" Lastly, the judge has exercised his discretion, and it cannot be said he has exercised it unfairly. Moreover, what has the solicitor to fear if his charges are fair, as he says?

(*a*.) Reported by R. H. DEANE, Esq., Barrister-at-Law.

Gaselee, in reply.—The words "under protest" are "nugatory." A solicitor does not like his bill taxed. Even a solicitor has some legal rights.

LINDLEY, L.J.—This is an appeal from Kekewich, J., ordering taxation of a solicitor's bill of costs after payment, partly on the ground that the payment had been made "under protest." The bill of costs was that of the solicitor of the mortgagee, and the payment was made by, or on behalf of, the mortgagor. Section 38 of the Attorneys and Solicitors Act, 1843, therefore applies, and under that section there must be sufficient special circumstances to justify an order for taxation of a bill after payment at the instance of a third party, just in the same way as there must in the case of an application made under section 37 at the instance of the client himself. That was decided in *In re Dickson*, 5 W. R. 108, 8 De G. M. & G. 655, at p. 660. We must, therefore, see if there were present in this case circumstances such as could justly be called "special." This court has recently considered the principles upon which taxation ought to be ordered after payment in the case of *In re Norman*, and has succeeded in getting out of the narrow groove into which the Court of Chancery had fallen. In that case it was laid down that each case must depend on its own circumstances, and that it would not be right to substitute any other standard for that fixed by the Legislature. With that view I entirely agree. The special circumstances referred to here are, that the property was in mortgage, the mortgagees had called in their money, the mortgagor had agreed to sell the property, and the time fixed for completion was the 8th of November, 1890. The mortgagee's solicitor knew of the sale and the time fixed for completion. The purchasers were pressing for completion. The bills (there were three of them) were delivered after the time for completion had passed, and when the purchasers were still pressing. The last bill, which was a small one, was not delivered till the 18th of December. The total aggregate amounted to somewhere about £50. They were paid on the 23rd of December, 1890. Mr. Douglas, a solicitor acting for the mortgagor, ran his eye through the bills, and struck off six or eight pounds, and a receipt was given in this form:—"Received this 23rd day of December, 1890, of W. L. Vernon, Esq., the sum of £42, being in discharge of the annexed bills of costs. Paid under protest." That was in the actual handwriting of Bailey, Mr. Cheesman's clerk. Now I am not prepared to say that those words "under protest" mean nothing at all, but I think they only rebut the inference of contentment or satisfaction on the part of the person who paid the bill, and that they amount to saying "if we can tax, we will." They do not amount to reserving the right to tax, but the meaning was to reserve the right (if there was any) so far as it could be reserved. The learned judge below thought that this was a case of "special circumstances." I do not know whether I should have come to the same conclusion, but I am not prepared to differ from him. What weighs with me much is—the entire amount of the bills being so small—the insignificance of the amount involved in this appeal, and I think, therefore, it would be a very bad example to encourage appeals in cases like this, where the amount in question is so trivial.

BOWEN, L.J.—I am of the same opinion. I doubt if I should myself have ordered taxation in this case, but it does not follow that it would be right to overrule the judge in the exercise of the discretion given him by the Act. I concur in the view that it would be a bad thing to encourage appeals like this in small cases. Section 41 says that payment of the bill of costs is not to preclude the judge from ordering taxation "if the special circumstances of the case shall," not "require," but "shall, in the opinion of such court or judge, appear to require the same." If there were no special circumstances which could reasonably appear to require taxation there would be no jurisdiction to order taxation. But it would be difficult to say that in the present case there were no special circumstances which might not reasonably appear to Kekewich, J., to require taxation. I think, therefore, that, in a case like this, we ought not lightly to interfere with the way in which the judge of first instance has exercised his discretion.

KAY, L.J.—I quite agree, and I feel very strongly the impolicy of encouraging appeals in small matters of this kind. Where there is a certain amount of doubt whether the special circumstances alleged are strong enough to justify an order for taxation, it would be bad policy for this court to interfere with the order made by the judge below in the exercise of his discretion under the Act unless a very strong case were made out for doing so.

LINDLEY, L.J.—It is not worth an appeal, that is what it comes to.

Appeal dismissed.

Solicitors for the appellant, *Kingsford, Dorman, & Co.*, for *Phillips & Cheesman*, Hastings.

Solicitors for the respondent, *Langhams*, for *Langham, Son, & Douglas*, Hastings.

From Chan. Div. April 13, 14, 18.

ANGUS v. CLIFFORD. (*a*.)

Misrepresentation—Action of deceit—Fraud—Company—Directors—Prospectus.

An action of deceit will not lie in respect of a negligent, as distinguished from a fraudulent, misrepresentation.

Derry v. Peek, 38 *W. R.* 33, 14 *App. Cas.* 337, *followed.*

The directors of a gold mining company issued a prospectus containing a statement that "full reports of the property have been prepared for the directors by eminent engineers" (naming four). None of the reports in question had in fact been prepared on the instructions of the directors or on their behalf, and, although one of the reports was addressed to the directors, it had been in fact prepared, before the formation of the company, on behalf of a vendor of the property.

At the trial of an action for damages for misrepresentation, brought against the directors by a person who had taken shares in the belief, induced by the prospectus, that the reports had been prepared on behalf of the directors, the judge, in effect, found, (1) *that the above statement was untrue in any fair sense of the words used,* (2) *that none of the defendants gave any satisfactory explanation of the meaning they attributed to the statement, and* (3) *that they were not justified in allowing the statement to be inserted in the prospectus. There was, however, no finding that the defendants, or any of them, had been guilty of fraud.*

Held, by the Court of Appeal, *on these findings, and on investigation of the evidence with respect to each defendant separately (which the court held to be necessary in an action of deceit), that fraudulent, as distinguished from negligent, misrepresentation had not been proved, and consequently that the action could not be supported, against any of the defendants.*

(*a*.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

Decision of Romer, J. (ante, *p.* 252), *reversed.*

Quære, *whether the misstatement in the prospectus could be held material in the absence of proof that the reports themselves were in fact untrue.*

Appeal from the decision of Romer, J., reported *ante*, p. 252.

The action was brought against Sir Charles Clifford, and Messrs. Meates, Nelson, and Lloyd, the directors of the Valley Gold Co., for damages for fraudulent misrepresentation by reason of a statement contained in a prospectus, issued admittedly by the defendants, on the faith of which the plaintiff had admittedly applied for and taken shares in the company.

The company was registered on October 25, 1886, and the prospectus was issued two days afterwards. The statement chiefly complained of in the prospectus was as follows: "Full reports of the property had been prepared for the directors by the following eminent engineers, Mr. Jackson, Mr. Pearson, Mr. Rodda, and Mr. Del Mar." The reports of the engineers had, in fact, been made before the defendants became directors, and had not been prepared on the instructions of the directors or on their behalf. One of the reports (Del Mar's) had in fact been prepared on the instructions of the agent of the vendors to the company, but it was addressed to the directors.

Each of the four defendants were examined and cross-examined at the trial of the action, and none of them was able to give a satisfactory explanation as to what meaning, in fact, he attributed to the words "prepared for the directors," but they all swore they attached no importance to those words. There was no evidence to show that the reports themselves were, in fact, untrue, beyond the fact that the shares in the company had greatly decreased in value, which fact, however, might be attributable to a want by the company of sufficient capital to work the mines.

Romer, J., at the trial of the action found that the statement in the prospectus that the reports were "prepared for the directors" was untrue in the ordinary fair construction attributable to those words, that the directors gave no satisfactory explanation as to what meaning they attributed to them, and that they were not justified in allowing the words to be inserted in the prospectus; and although he did not find as a fact that the directors or any of them were guilty of fraud or dishonesty in allowing the words to be so inserted, he nevertheless held that the defendants were liable in damages for the misrepresentation.

The defendants appealed.

Rigby, Q.C., *Asquith, Q.C.*, and *Grosvenor Woods*, for the appellants.—The real question is whether the defendants were guilty of fraud in allowing this statement to appear in the prospectus: *Smith* v. *Chadwick*, 32 W. R. 687, 9 App. Cas. 187; *Derry* v. *Peek*, 38 W. R. 33, 14 App. Cas. 337; *Glazier* v. *Rills*, 38 W. R. 113, 42 Ch. D. 436. There is no proof of fraud on the part of the directors. The expression "for the directors" would cover a great many things; it might mean merely "addressed to the directors," and Del Mar's report was in fact addressed to the directors.

Sir Horace Davey, Q.C., and *T. R. Hughes*, for the plaintiff, the respondent.—*Derry* v. *Peek* only overruled the doctrine that directors issuing a prospectus had a duty towards the public to take reasonable care to see that the statements contained in the prospectus were correct, and that, if they did not do so, they would be liable, even although the statements were not made fraudulently; but it does not overrule the doctrine (laid down in many previous cases) that a person making a statement with a view to induce another to act on it must be taken to represent that he has formed a belief on the subject-matter of the statement, and if he has in fact formed no belief, that he is liable in an action for deceit just as much as if knew the statement to be false, for he is in fact thereby committing a fraud; see the remarks of Lord Selborne, L.C., at the beginning of his judgment in *Smith* v. *Chadwick*, of Lord Bramwell in *Derry* v. *Peek*, 38 W. R., at p. 35, 14 App. Cas., at p. 350, and of Lord Herschell in the same case, 38 W. R., at pp. 38, 42, 14 App. Cas., at pp. 361, 374. The evidence here shows that the directors adopted this statement in the prospectus as to the reports, recklessly without caring whether it was true or false. [LINDLEY, L.J.—The directors may not have had present to their minds the meaning attributable to the words "for the directors."] It is just possible the statement might be ambiguous as to Del Mar's report, but the statement applies to all the reports and no meaning other than the natural meaning of the words used, can be suggested with respect to the other three reports. Even in the case of a director there must be some limit to his simplicity. The person who drafted the prospectus was not called to give evidence by the defendants. The absence of any reasonable ground for belief is evidence of the absence of any belief. Then as to the materiality of the statement; it put the plaintiff off inquiry as to the nature of the property; the shares are now practically unsaleable. If the directors had formed no belief on the subject-matter of the statement, then there is a material misstatement.

Arnison v. *Smith*, 37 W. R. 739, 41 Ch. D. 348, and *Bishop* v. *Balkis Consolidated Co.*, *ante*, p. 99, 25 Q. B. D. 512, were also referred to.

Rigby, Q.C., in reply.—Although for purposes of contract a person must be held to intend the natural consequences of the language he has used, yet that doctrine is not applicable when it is sought to make him liable, not on contract, but for deceit. The remarks of Lord Selborne in *Smith* v. *Chadwick*, that "actual fraud . . . is to be judged of by the nature of the representations made considered with reference to the object for which they were made . . . and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts," cannot, since the decision in *Derry* v. *Peek*, be held applicable to an action for deceit.

Cur. adv. vult.

April 18.—LINDLEY, L.J.—No question arises on this appeal as to several matters which are very often in controversy in cases of this description. For example, it is conceded that the plaintiff applied to the company for his shares and got them direct from the company; again, it is conceded that the four directors named are responsible for the issue of the prospectus; neither is there any controversy that the plaintiff applied for, and took, his shares on the faith of the prospectus.

The Valley Gold Co. was registered on the 25th of October, 1886, and the prospectus was issued on the 27th of October, two days after the registration of the company. Certain reports are referred to in the prospectus, and the evidence shows that these reports were made at various dates. Pearson's report was made as early as 1884, and was made for, and addressed to, the vendors of this gold mine, and not to the Valley Gold Co., or to its directors. Jackson's and Rodda's reports were made respectively on the 4th and 16th of January, 1886. The two most important reports, however, were made by Del Mar, and were dated respectively the 14th and 25th of

August, 1886, and these two were addressed to the directors.

The statement, contained in the prospectus, which is relied upon as entitling the plaintiff to relief is as follows: "Valley Gold Co. This company has been formed to purchase and develop a gold property situated in San Barnardino, County California"; it then describes the nature of the property, and proceeds as follows: "Full reports of the property have been prepared for the directors by the following eminent engineers, Mr. Jackson, Mr. Pearson, Mr. Rodda, and Mr. Del Mar. These gentlemen have personally inspected the property, and Mr. Del Mar has advised the board as to the means to be adopted for working and developing the same to the best advantage. These reports have convinced the directors that the estate is a rich one, and they have no hesitation in recommending the shares to the public as a genuine investment."

Now the plaintiff says that he was induced to buy shares in this company upon the faith of the statement (amongst others) that, "full reports of the property have been prepared for the directors"; that that statement was untrue; and that he is entitled to relief upon the ground that these directors issued this prospectus containing that untrue statement, and which they knew to be untrue. The plaintiff therefore puts it that he is entitled to relief on the ground of fraud on the part of those gentlemen.

Now Romer, J., in his judgment, curiously enough, does not find, as a fact, that these directors, or any of them, were guilty of fraud. His judgment proceeds upon the following footing:—First of all, he comes to the conclusion that the words "prepared for the directors," upon the true construction of the clause, mean prepared for the directors in the sense that they were the persons employing the engineers to make the reports, and that in that sense the statement is untrue. Then he comes to the conclusion that that statement, being untrue, was material; and then he rather appears to have inferred from that, and to have proceeded upon the theory, that that alone would be enough to make these directors liable, without addressing his mind to the further question whether these gentlemen would be liable supposing that they did make this untrue statement, but made it carelessly as distinguished from fraudulently. His judgment, when carefully read, shows upon the face of it, I think, that his mind was not addressed to that particular point, which was the point mainly argued before us. His judgment seems to me quite consistent with his having proceeded upon the view that the case of *Derry* v. *Peek*, as it was decided in the Court of Appeal, was law; whereas, as we all know, the decision of the Court of Appeal was reversed by the House of Lords. I have spoken to the learned judge about it, and the inference which I draw from his judgment is, I think, warranted by the fact that he says that his attention was drawn to the other points of the case rather than to this. That explains why there is no distinct finding of fraud on the part of these directors. But it is important to bear in mind that the judge, who saw these directors as witnesses and heard their evidence, has not found them, in terms, guilty of fraud. That raises a question of very considerable importance. Before *Derry* v. *Peek* was reversed in the House of Lords I should have thought there would have been no doubt, and could have been no doubt, that this action might have been supported, and would have been supported, upon the evidence adduced in the course of these proceedings. But the decision of the Court of Appeal in *Derry* v. *Peek* having been reversed by the House of Lords, it becomes important to see what the final decision in *Derry* v. *Peek* is.

Speaking of *Derry* v. *Peek* broadly, I take it that it has finally settled the controversy (which was well known to have given rise to very considerable difference of opinion) as to whether an action for damages for negligent misrepresentation, as distinguished from fraudulent misrepresentation, could be maintained. There was considerable authority to the effect that it could, and there was considerable authority to the effect that it could not; and as I understand *Derry* v. *Peek*, it settles the question in this way—viz., that an action of deceit for a negligent, as distinguished from a fraudulent, misrepresentation cannot be supported. I think it is perfectly impossible to read the judgments which were delivered by the lords in that case—especially Lord Herschell's, to which I will allude presently—without seeing that that is the broad proposition of law which *Derry* v. *Peek* has finally settled.

That being the case, it becomes necessary, of course, to examine the evidence and see whether this misstatement (for misstatement it obviously was) is to be regarded as fraudulent, or is to be regarded as only negligent. If the conclusion is that this was a case of negligence, as distinguished from fraud, the action will not lie. If the evidence is that there was a fraudulent, as distinguished from a negligent, misrepresentation the action will lie.

Now the case put forward on behalf of the plaintiff is based upon a passage in the judgment of Lord Herschell in *Derry* v. *Peek*; and I will, therefore, read those parts of that judgment which appear to me to contain the pith of the decision. Lord Herschell says, 38 W. R., at p. 42, 14 App. Cas., at p. 374:—"I think the authorities establish the following propositions:—First, in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second; for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth, and this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

The plaintiff's counsel naturally relied upon that passage, and particularly upon that part of it which says that fraud is proved—not merely that there is evidence of it, but that it is proved—when it is shown that a false representation has been made knowingly, or without belief in its truth. The plaintiff says that the defendants in this case made this false statement knowingly; that they knew what the facts were; and that they made it without any belief in its truth. If the above passage were the whole of the judgment of Lord Herschell I do not think it would be easy to answer that argument. But one must look a little further and see what Lord Herschell says in other parts of his judgment. The following passage (38 W. R., at p. 42, 14 App. Cas., at p. 375), to my mind, qualifies in a most material manner the former statement:—"In my opinion, making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed, though on insufficient grounds." Therefore, as I understand it, a false statement may be made, but made without the

matter being present to the mind of the person making it, and made carelessly; and if that be the fact, that is not fraud, but carelessness, for which an action of deceit will not lie. Then, again, the learned lord, pursuing the same line of thought, says, 38 W. R., at p. 43, 14 App. Cas., at p. 376: "I think there is much to be said for the view that this moral duty" (that is, to be vigilant in preparing these prospectuses, and in stating no more than is believed to be true) "ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements made under such circumstances are true, should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done the Legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think, be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot justly be so designated."

Now my observation upon these latter passages of the judgment is, that what was said, in the passage which I first read, about proof of fraud, must be taken as subject to this, that the matter to be inquired into is fraud or carelessness. If it is fraud, it is actionable; if it be not fraud, but merely carelessness, it is not actionable. The remarks about knowledge—knowingly making a statement and making a statement without believing its truth—are based upon the supposition that the matter was really before the mind of the person making the statement; and if the evidence really is that the person making the statement never really intended to mislead, that he did not see or dream that the effect of what he was saying could mislead, and that the particular part complained of, of what he was saying was not present to his mind at all, then that, in my opinion, is proof of carelessness rather than of fraud.

These directors read this prospectus, that is plain enough. I do not gather that any point is made with reference to that part of the prospectus which states that "these reports have convinced the directors that the estate is a rich one." There is no evidence to show that the reports of these engineers are false in fact. The evidence, I think, is simply this, that the gold mine has not been worked, and that the shares are now worth very much less than the plaintiff gave for them—not an uncommon result. When we look at the balance-sheet that was handed up, I think we can see the reason of that. So much was paid by way of purchase-money, that capital enough to work the mine could not be got, and in fact the mine has not yet been worked. Whether it ever will, I do not know; but in the meantime the shares have gone down. I merely mention this as showing that I do not think any reliance was really placed on that part of the prospectus which says that the reports convinced the directors of the goodness of this speculation. They were convinced of it.

One must look at the evidence, therefore, to see whether the statement that these reports had been "prepared for the directors" was made by them fraudulently or carelessly. In order to investigate that question, the four directors cannot be all lumped together. We must take each of them separately, and see what each of them said in his evidence about it. Without reading the evidence at any length, it appears to me that as Romer, J., who saw each of them as witnesses, has not found them guilty of fraud, it would not be right for us to find them guilty of fraud. The conclusion at which I have arrived, and the inference I have drawn from their evidence, is this, that they really did not put that statement into the prospectus with the idea that it was likely to mislead; that it was a blundering statement; that their attention never was called to it—I mean specifically called to it. It was not that they shut their eyes and did not care whether it was true or false, but they did not see the effect of what they were saying, or the construction which would be put upon it, when those words "for the directors" were passed by them. If those words had been out, I doubt very much whether it would have made any difference. I can easily understand that a man might read this prospectus and not observe the importance of those words. The careless reader would be just as likely to overlook them, as to see the force of them and give his mind to them. If that is the result, if they passed them over without seeing that they were of any importance at all, that appears to me to be carelessness, and not fraud within the legal definition of fraud.

As regards the evidence, one must, as I have said, take the case of each of them separately. As to Mr. Nelson, he says, in his evidence, that he attached no importance to it. I believe him. I believe it because, as I have said before, a man might very well read this prospectus, and be convinced by the reports if he trusted the men who made the reports, and not see the importance of the words "for the directors," on which the plaintiff has fastened in order to throw the responsibility on the directors. As regards Mr. Meates, some part of his evidence is unsatisfactory, and in fact the learned judge said so. But Meates also says that he did not consider the meaning of the passage very materially; and my impression is that, notwithstanding the unsatisfactory answers given by him to some of the questions put to him, he never gave his attention to the passage. I do not think it is right to say he wilfully shut his eyes; I do not think he observed it any more than Nelson did. Mr. Lloyd says, as I understand his evidence, that he read "prepared for" as equivalent to "adopted by," that that was the view he took of it. He did not attach any importance to the particular phrase "prepared for." The real truth was that the reports were laid before the directors; there is some evidence that one of them gave some directions, and that Del Mar's report might have been said to have been prepared for the directors, but it is utterly impossible to say that, of Pearson's, Jackson's, or Rhodda's, therefore I pass that by. But Lloyd did not see that that expression could mislead, and never dreamed that it might mislead. Then there was the defendant Sir Charles Clifford. His evidence, I should think, would show that he was not particularly clear headed. I do not know whether he is an old or a young man, or what age he is; I have not had the advantage of seeing him. But he also says that he attached no importance to these words. His evidence convinces me that there was not the slightest intention on his part to deceive, he never dreamt of such a thing.

The conclusion at which I have arrived is that none of these directors saw the importance of that phrase at all; their attention was never directed to it. It is not that they adopted the prospectus, saying, "I do not care what you put in it; put in what you like"; that would be recklessness. There was no moral obliquity in what they did; it was pure blundering, pure carelessness; and, that being the case, it appears to me that, after *Derry* v. *Peek*, this action cannot be sustained. It is a case of negligent, as distinguished from fraudulent, conduct.

That entitles the defendants to our judgment. But as regards costs the matter is rather different. I am bound to say I think that this was grossly careless, and I think it was such a statement as to invite an action, and therefore I think that the defendants

a considerable amount of importance will be attached, is that, by the special Act of Parliament obtained, the company has the right to use steam or mechanical motive power instead of horses"; in fact, however, the consent of the Board of Trade had not then been obtained, but Lord Bramwell says, 38 W. R., at p. 35, 14 App. Cas., at p. 349, that the learned judge in the court of first instance in that case "held as I do," that the directors or the persons who issued that prospectus "thought that the company had the right, as put in the prospectus, to use steam." And again, in another of the speeches delivered in that case it was stated that the learned judge in the court of first instance had found that the statement had been honestly made, believing it to be true, and that the Court of Appeal, though not differing from that conclusion, had held that nevertheless it must be treated as fraudulent because the directors had no reasonable ground for that belief. The question of whether a statement honestly made, and believed to be true, could nevertheless be treated as fraudulent because those who made it had no reasonable ground for the belief which they said they had, was the main question discussed by the noble lords in the House of Lords. I will not read again those passages which have been read by Lindley, L.J., but I wish also to observe this. That case of *Derry* v. *Peek* was argued in the House of Lords some time before the judgment of the Court of Appeal in *Arnison* v. *Smith* was delivered, and the Lord Chancellor, who was one of the noble lords before whom *Derry* v. *Peek* was argued, was also one of the judges in the case of *Arnison* v. *Smith*, and he, after having heard the arguments in *Derry* v. *Peek*, made this observation in *Arnison* v. *Smith*, 41 Ch. D., at p. 368: "A deliberate statement was made, and the defendants cannot be heard to say that they did not know the popular meaning of the words they used; if they had said 'We do not know what was in the prospectus and hastily put our names to it without reading it,' the case would be open to different considerations." Therefore, it was quite present to his lordship's mind, and he seems to have quite concurred with Lord Herschell's speech upon the general doctrine, that making a false statement by mere carelessness does not necessarily amount to fraud. The carelessness must come up to that which was described in Lord Herschell's speech, and in many other judgments before, as recklessness, that is, according to the definition given in this speech, an indifference in the mind of the man who makes the statement whether the statement was true or false, without knowing whether it was true or false, and without caring. Lord Halsbury also, in his speech in the House of Lords in *Derry* v. *Peek*, 38 W. R., at p. 34, 14 App. Cas., at p. 343, says the same: "I think such a statement, if wilfully made with a consciousness of its inaccuracy, would give rise to an action for deceit provided that damage had been sustained if a person had acted upon a belief induced by such a prospectus."

Now the real question in this case is one which has involved the Court of Appeal—at least, speaking for myself, has involved me—in very considerable difficulty indeed. The learned judge before whom this case was tried in the court below does not seem to have had the speeches of the learned lords in *Derry* v. *Peek* brought to his attention very carefully, if, indeed, at all, when this question was argued. The distinction between a statement which was not true made carelessly and a statement which was not true made fraudulently does not seem to have been pressed upon him. I have read his judgment more than once with attention, and I do not find that that distinction was present to the mind of the learned judge when he gave the judgment in the present case. There is no finding, as has been pointed out, that this statement, if untrue, was made fraudulently. There is no distinct finding of that kind. There is no finding that in making the statement the directors acted dishonestly. There is no finding, as it is termed in Lord Halsbury's speech in the House of Lords, of the existence of the *mens rea* in all or some of these defendants. Therefore the findings of the learned judge certainly do not amount to such a decision as would justify the maintenance of the judgment against them for deceit according to the doctrine laid down in *Derry* v. *Peek*.

Then, of course, that puts this court in this very great difficulty. The learned judge has not in so many words found fraud, but he has found they were liable, and that may or may not have involved a finding that they had acted fraudulently. Then, again, that depends on what, in the judgment of the learned judge, amounted to fraud in such a case; and if he adopted, what is now overruled, the decision of the Court of Appeal in *Peek* v. *Derry*, he might consider it to be laid down that the making of a statement of this kind, believing it to be true, although there was no reasonable ground for such belief, would amount to fraud; whereas that was a doctrine which was unhesitatingly overruled in the House of Lords' decision in that very case. Accordingly we are driven, not having the witnesses before us, to go through the evidence and try to make out if we can whether this statement was or was not dishonestly made by the defendants. I cannot help saying that it impressed my mind very much that the statement, taken in the sense in which it would be read by a person who read the prospectus with care for the purpose of determining whether he should take shares in the company or not, would or might to that person have the meaning that the directors of this company had intended these reports to be made for their own information, they being in the position of the purchasers of the property in question, which was a mine. I think that is quite possible and probable. I think most likely that any careful intending shareholder reading this prospectus would attribute that meaning to these words, and if that were so, no doubt that is a very different thing from what was actually the fact—namely, that the reports had been made before any directors were consulted at all, and had been made on the instruction not of any director, but of the agents in England of the vendors of the mine—in short, that the reports had been made for or on behalf of the vendors rather than for or on behalf of the purchasers. That is, unquestionably, a serious thing, and I agree that that should, or probably would, be the *primâ facie* meaning of those words if read by a careful man who was considering whether he should take shares in the company or not.

But then I should think it quite possible, and I cannot find anything in this evidence which convinces me to the contrary, that the persons who made this statement either did not attribute that meaning to the words or did not clearly see that an intending shareholder who read that prospectus would attribute that meaning to them. I quite believe, and I think it is the fair result of the evidence, that the importance of the words was not present to the mind of any one of these directors. You may say that it is the grossest possible carelessness that that should be so. I quite agree; I think it is. I think they ought to have examined the words very carefully indeed, and that they were guilty of very gross negligence in allowing such words to go forth to the public when the fact was not literally as described by those words. But I am not convinced that we ought to say upon such evidence as was given in this case that any one of these directors in issuing that pro-

spectus to the public had a dishonest purpose—that his mind was in the attitude or condition of what is described as *mens rea*, in short, that he was guilty of fraud; and although it should, or ought to be, involved in the finding of the learned judge in the court below that these defendants were guilty of fraud, we are not aware of the mode at which he arrived at that, and, looking at the evidence after canvassing it with considerable care, I am not satisfied that this evidence does prove such a condition of mental dishonesty on the part of the defendants as would be necessary to support an action of deceit against them according to the decision in *Derry* v. *Peek*.

On this, the main point of the case, I have very imperfectly expressed my own view, as I say, rather out of respect to the learned judge than because I have anything material to add to what the other members of the Court of Appeal have said in this case. But I am also struck, and more forcibly I think than the other members of the Court of Appeal, with the question of materiality. There is no proof whatever that the reports mentioned in this prospectus are, or that any one of them is untrue, or exaggerated or inaccurate in any respect. The statement of claim alleges that the estimates formed by one of the persons who made the reports, Del Mar, were grossly exaggerated, and I think that is the only statement made in the statement of claim as to the untruth of these reports. But, assuming it to be sufficiently raised by the statement of claim, there is no proof, and no attempt at proof, that the reports were in fact untrue. It seems to me that it is impossible for any court to assume anything to assist a plaintiff to make out his case of fraud. Every step, every material step in the evidence which makes out a case of fraud, it is incumbent on the plaintiff who alleges fraud to prove by sufficient evidence. If it is a necessary part of his case to make out that the reports were untrue, then all I can say is, there is not only no proof of that, but there is no evidence of it. It was said, "Oh, yes, but there is some evidence of it, because if the reports had been true, if the mine had been such a rich one, the probability is the shares would not have gone down." But, as Lindley, L.J., has said, we have had the balance-sheet handed up to us, and it was quite plain from the balance-sheet that there was another and very sufficient reason why the shares had depreciated without assuming the reports to be untrue, for it appears quite clearly from that balance-sheet that, after paying out of the capital which was raised the price which had to be paid for the mine, and after paying other incidental expenses, there was not left—and there is evidence to assist this part of the case—sufficient capital properly to develop and work the mine; and that would by itself be, and probably was, a sufficient reason, and for anything I know, and as far as appears from the evidence, was the only reason, why the mine was not properly developed and the shares considerably depreciated.

Now, I should like to put, in order to illustrate my own view of this case, what seems to me a parallel case. Supposing a person was selling a real estate, and he represented that he had been assured by A. B. (I assume A. B. to be a well-known mining engineer, a man whose assurance would carry very great weight) that there existed beneath that estate a particular seam of coal, which was known in the neighbourhood, and was of great value; and it turned out afterwards that he had not had any such assurance from that individual at all, but that the mine was there. Could an action of deceit be maintained in that case? Could the plaintiff come into court and say, "I admit the mine is there; I admit the estate is quite as valuable as it was represented to be, but I was told that it was said by A. B. that the mine was there, and I relied very much on that, and A. B. did not say it." Well, I will not give any definite opinion on the subject, but it seems to my mind that the fact that the mine did exist would be a thing that ought to be very carefully considered in determining whether the statement that A. B. had given that assurance was material or not for the purpose of an action of deceit. You may easily put many cases of the same kind. I will content myself with that as an illustration of what I mean. Now, if the falsehood or exaggeration of these reports is not made out at all, as it certainly is not made out here, I cannot see that this statement would necessarily be an extremely material one. To treat this case in the way I have just treated the case I put by way of illustration—suppose the plaintiff had come here and said, "I admit that all these reports are perfectly true, that they are not in any degree exaggerated; there is nothing in them of which I could at all complain, but I say they were not made for the directors; they were made for somebody else." Could he succeed in an action of deceit? I doubt it very much, and, therefore, I am not satisfied that in this case the statement is proved to be sufficiently material. Again, that goes to another point on which I do not profess to give any decided opinion. It is well established, as Lord Halsbury says in *Derry* v. *Peek*, that in dealing with actions of this character fraud without damage, or damage without fraud, does not give rise to such an action, and certainly the considerations I last alluded to must have some weight in determining whether this misstatement has caused damage. I can quite conceive it might, by way of argument, be made a part of the case. It might be said, "True, I do not prove these reports to be false—I cannot ask that it should be assumed in my favour that they are false; but I took my shares in this company on the faith of this statement that they were made for the directors; damage has resulted to me, perhaps not from the falsehood of the reports, but I should not have taken the shares at all if it had not been for this statement, and, having taken the shares, now those shares have gone down in value, and damage has resulted to me, and, therefore, I have a right to maintain an action of deceit."

I am not quite convinced in my own mind at present, and I will not give any decided opinion upon it, that this is a damage which results directly from the false statement. If the reports were true, and the only falsehood, or the only inaccuracy of the statement, was that they were made for the directors instead of being made for the promoters, for whom they were actually made, I am not quite sure that that damage would result sufficiently from the false statement to enable the plaintiff to maintain his action of deceit. However, as I say, I merely express this as a doubt existing in my mind, I do not wish to give any decided opinion upon it.

For the reasons I have given, I agree entirely with the other Lords Justices, and I also entirely agree on the question of costs. It seems to me that although fraud is not made out to our satisfaction, there was an amount of carelessness so gross as almost to invite an action of this kind, and although the defendants have escaped, they have escaped in such a way that we ought not to say they are entitled to have any of their costs of this action.

Appeal allowed.

Solicitors, *Kerly, Son, & Verden; Burton, Yeates, Hart, & Burton*, for *Kenion, Tyrer, & Simpson*, Liverpool.

From Chan. Div. April 22.

SALOMONS v. KNIGHT. (a.)

Libel—Interlocutory injunction to restrain publication—Annoyance—Proof of immediate injury.

An interlocutory injunction will not be granted to restrain the publication of statements not shown to be likely to cause immediate injury to the person or property of the party seeking the injunction, notwithstanding that such statements are calculated to cause him extreme annoyance; that they appear primâ facie *to be wholly unjustifiable; that, unless justified, they are grossly libellous; and that the plaintiff had previously obtained a verdict for £1,000 damages (which had not been paid) for the publication by the defendant of similar, or practically identical, statements.*

Appeal from North, J.

It appeared that Mr. Salomons, the plaintiff, had in June, 1883, contracted to purchase the interest of Mr. Knight, the defendant, in some property in the City for £4,000. Some difficulty arose as to the defendant's title, and subsequently there was a dispute as to the amount of the balance due to the defendant, and the matters in difference were referred to arbitration. The award found that a small balance of £368 15s. was due to the defendant (who had claimed a very much larger sum), and that on payment thereof the contract should be completed. That was done, and the property was conveyed to the plaintiff. The defendant, as it was alleged, then commenced to threaten, abuse, and annoy the plaintiff, and accused him of perjury and fraudulent conduct in regard to the arbitration. In the result there was a further arbitration, and the umpire found in favour of the plaintiff, and that no damages ought to be paid to the defendant, who had claimed a very large sum as such. The defendant, however, continued to circulate statements about the plaintiff, referring to his alleged "criminal acts," "villainy," "fraud," and so forth. In one circular the defendant used the expression "I repeat the charges of fraud." In another, headed "A Public Challenge," he charged the plaintiff with "deliberate and determined fraud." Another spoke of "your plausible and persistent false swearing."

Several manifestoes, notices, or circulars containing statements of this kind having been sent or addressed to the plaintiff, he brought an action for libel against the defendant, and obtained a verdict and judgment for £1,000 damages (which it was stated had never been paid), a counter-claim by the defendant being at the same time dismissed with costs. The defendant subsequently sent a letter containing a *résumé* of his statements to the chairman of a company of which the plaintiff was a deputy chairman, and expressing his intention to circulate his "manifesto" "unless my just rights are satisfied, and my just demands complied with."

In consequence of that expression of intention by the defendant the plaintiff applied for an interlocutory injunction to restrain the publication of the statements.

North, J., refused to grant an interlocutory injunction, on the ground that the statements were of such a character that no one would pay any attention to them, and that there was no probability of injury accruing to the plaintiff from their circulation.

The plaintiff appealed.

Cozens-Hardy, Q.C., and *Frank Watson*, for the appellant.—The statements are grossly libellous, and can admit of no justification under the circumstances. They reflect injuriously on the plaintiff's character, and ought to be restrained by interlocutory injunction. [BOWEN, L.J.—What immediate injury do you allege? KAY, L.J.—How can you get an interlocutory injunction in such a case after the decision in *Bonnard* v. *Perryman*, *ante*, p. 435? LINDLEY, L.J.—No sensible man who read this stuff would pay the slightest attention to it.] There is no difficulty in exercising the jurisdiction here, as there is no reasonable probability that any plea of justification can be put forward, especially in view of the fact that the appellant has already obtained a verdict for £1,000 in respect of the circulation of substantially the same statements.

John Black, for the defendant, was not called upon.

LINDLEY, L.J.—The judgment of North, J., in this case is very short, and I will read it. He says:—"In this case I see no reason to interfere by way of interlocutory injunction. I have not heard the defendant, and therefore I do not form any opinion about his case, and I will not say more than this, that, after reading the documents that have been published by the defendant, they seem to be, so far as I can form an opinion without hearing him, unjustifiable to a degree; but then, on the other hand, I do not find anything which shows the slightest suggestion by any person, the plaintiff or any other person, that anyone who saw these documents would pay the slightest attention to them, or attach the slightest weight to them. Under those circumstances it is open to the plaintiff, if the charges are such as he says, and he says he cannot recover pecuniary damages from the defendant, to take proceedings by indictment against the defendant; but I do not see any such immediate and pressing injury to person or to property threatened by the defendant's proceedings as to make it desirable or right that I, sitting in the Chancery Division, should interfere to stop by interlocutory injunction the steps the defendant has thought proper to take."

Now I agree with those observations. So far as I can judge the conduct of the defendant is entirely without justification and without excuse, and if he does not take care he will find himself in gaol, I have no doubt. But I agree with North, J., and I think our decision is perfectly consistent with what we said yesterday (in *Bonnard* v. *Perryman*)—there is no reason whatever to suppose that there is any injury being done to the plaintiff, either in person or in property. For these reasons I think an interlocutory injunction ought not to be granted, not because we have the slightest sympathy with the defendant, or think his conduct justifiable, but because of the reasons we have given.

BOWEN, and KAY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellant, *Watson, Sons, & Room.*

Solicitor for the respondent, *John Westcott.*

(a.) Reported by R. H. DEANE, Esq., Barrister-at-Law.

From Q. B. Div. } Feb. 10; April 7;
[and Q. B. Div.] } May 15.

In re AN ARBITRATION BETWEEN KNIGHT AND THE TABERNACLE PERMANENT BUILDING SOCIETY. (*a.*)

Building society—Arbitration—Power to direct arbitrators to state a case—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *s.* 36—*Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49), *ss.* 19, 24.

By section 36 *of the Building Societies Act,* 1874, *the decision of arbitrators appointed under the Act is to be final, but power is given to them, at the request of either party, to state a special case for the opinion of the court on any question of law.*

By section 19 *of the Arbitration Act,* 1889, *power is given to the court to direct arbitrators to state a case on any question of law arising in the course of the reference; and, by section* 24, *the provisions of the Act are made applicable to all arbitrations under any Act passed before the Act, "except in so far as this Act is inconsistent with the Act regulating the arbitration."*

Held (*reversing the decision of the* Queen's Bench Division), *that the two Acts are not inconsistent, and that there is, therefore, power under section* 19 *of the Arbitration Act,* 1889, *to order arbitrators appointed under the Building Societies Act,* 1874, *to state a special case for the opinion of the court on a question of law.*

Appeal from a decision of A. L. Smith, J., in chambers, affirming the order of a master which directed arbitrators appointed under the Building Societies Act, 1874, for the determination of a dispute, to state a case for the opinion of the court.

A dispute having arisen between Knight and the appellant society (a building society subject to the Act of 1874), of which he was a member, a reference was made to arbitration, pursuant to rule 26 of the society, which was as follows:—"In case of disputes arising between the society and any members thereof, or the legal representatives of any member, or other persons claiming through or under the rules, reference shall be made to arbitration pursuant to 37 & 38 Vict. c. 42." The rule went on to provide for the method of appointing the arbitrators, and directed that their decision should be "final and binding on all parties."

During the progress of the arbitration Knight applied to the arbitrators to state a special case for the opinion of the court upon a question of law. The arbitrators declined, and at the close of the reference made their award. Knight then obtained the order from which the society now appealed.

The Building Societies Act, 1874, provides, by section 34, for the election of arbitrators in the manner the rules of the society provide, or, if there be no such provision, then in the manner provided by that section, "and whatever award shall be made by the arbitrators, or the major part of them, according to the true purport and meaning of the rules of the society, shall determine the dispute."

Section 36 enacts that "every determination by arbitrators, or by the court, or by the registrar under this Act of a dispute, shall be binding and conclusive on all parties, and shall be final to all intents and purposes, and shall not be subject to appeal, and shall not be removed or removable into any court of law, or restrained or restrainable by the injunction of any court of equity; provided always, that the arbitrators, or the registrar, or the court, as the case may be, may, at the request of either party, state a case for the opinion of the Supreme Court of Judicature on any question of law."

(*a.*) Reported by T. R. COLQUHOUN DILL and A. P. PERCEVAL KEEP, Esqs., Barristers-at-Law.

The Arbitration Act, 1889, enacts as follows:—Section 19.—"Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the court or a judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference."

Section 24.—"This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorized or recognized by that Act."

It was assumed for the purposes of this case that a point of law had arisen in the course of the reference. The main question argued was whether the provision of section 19 of the Arbitration Act was inconsistent with section 36 of the Building Societies Act, "the Act regulating the arbitration," and therefore, by virtue of section 24 of the Arbitration Act, not applicable to arbitrations under the Building Societies Act.

Macoun, for the appellant society.

Fillan, for the respondent Knight.

WILLS, J.—This case raises a question of some importance, but I think that when it is thoroughly argued it is free from doubt. I have little doubt that if the case could have had the full argument in chambers which it has had here the learned judge would have come to the same conclusion as we have arrived at. The powers of arbitrators under the Building Societies Act, 1874, are dealt with in section 36 of that Act; they are to have complete jurisdiction over the subject-matter of the reference beyond the control of any court unless they choose to state a special case. I am quite aware that there is no verbal inconsistency between the Arbitration Act and that section, but it is clear to anyone who knows what these societies and their arbitrations, are that the intention of the Legislature was to provide an inexpensive tribunal for the settlement of disputes, with the decision of which the parties were to be satisfied; the tribunal is the arbitrators and their decision is to be final—the only exceptions being cases in which they themselves wish to have the opinion of the court. Then, if we turn to the Act of 1889, it appears that section 19 is sufficient to enable the court to interfere in the way desired in this case. But then there is section 24. [His lordship read the section.] Now, in my opinion, the substance of section 36 of the Act of 1874 being that the only case in which this court is to have jurisdiction is where its interference is invoked by the arbitrators themselves, to say that they "shall" state a case is inconsistent with that section. I am therefore of opinion that the Act of 1889 does not apply to these arbitrations, and that the appeal must be allowed.

VAUGHAN WILLIAMS, J.—I am of the same opinion. I will only add a few words. It was argued by Mr. Fillan that section 19 of the Act of 1889 is not inconsistent with the provisions as to arbitration contained in sections 34-36 of the Act of 1874. I think it is entirely inconsistent. In the cases of *Hack* v. *London Provident Society*, 31 W. R. 392, 23 Ch. D. 103, and *Municipal Building Society* v. *Kent*, 32 W. R. 681, 9 App. Cas. 260, the question was raised whether this Act gave to the statutory tribunal created by it a jurisdiction which excluded the jurisdiction of the ordinary courts, and it was held that that was so. It was argued in those cases, as it was here, that it was unlikely that the Legislature intended to give to such tribunals power to finally

1 Ph. 342; *In re Parsons*, 38 W. R. 712, 45 Ch. D., p. 58. The husband's covenant does not bind the property, for by section 2 of the Married Women's Property Act, 1882, the wife alone is entitled to it, and this is not modified by section 19; *In re Queade's Trusts*, 33 W. R. 816; *In re Armstrong*, 36 W. R. 772, 21 Q. B. D. 264; *In re Whitaker*, 35 W. R. 217, 34 Ch. D. 227; and *Hancock* v. *Hancock*, 36 W. R. 417, 38 Ch. D. 78, turn on section 5 of the Married Women's Property Act.

Holland King, for the children.—The wife's covenant is binding: *Flower* v. *Buller*, 28 W. R. 948, 15 Ch. D. 665; *In re Clarke*, 36 W. R. 293, 36 Ch. D. 348. The Act of 1855 deals with the infant, not the property of the infant: *Seaton* v. *Seaton*, 36 W. R. 865, 13 App. Cas. 61; *Tailby* v. *Official Receiver*, 37 W. R. 513, 13 App. Cas. 523.

NORTH, J.—In my opinion this property is bound by the wife's covenant, and is within the words of the Infants' Settlement Act, an Act passed in order to enable infants to make settlements as valid as those of adults, and in which it is clearly usual to bind all after-acquired property. In general, if a person has property which it is not desired to settle, that property is expressly mentioned.

Now the words of the Act, "it shall be lawful for any infant upon or in contemplation of his or her marriage with the sanction of the Court of Chancery to make a valid and binding settlement or contract for a settlement of all or any part of his or her property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy," sweep in all after-acquired property, and these words are large.

It is said that the property in question is missed, being property to which, at the time of the settlement, the infant had no title, and which she could only have a mere hope of obtaining, so that it could not be held to be her property at all at the time of the settlement within the meaning of the Act. This is not accurate, for the Act is not addressed to property only, but covers anything over which the infant has a power of appointment, and, therefore, expressly includes what is not the infant's property. Again, it is said it does not come within the terms of the Act. I do not agree with this, as I consider the reference to "property in expectancy" quite sufficient. The effect given to "expectancy" in the judgment of Kay, J., in *In re Parsons* confirms this. My decision is in accordance with the usual custom of settlements, and I decline to say that the property is not within the covenant. With regard to the second point, whether the property is bound by the husband's covenant, while I think section 19 of the Married Women's Property Act, 1882, does apply to settlements made after the passing of that Act, it is not now necessary to express an opinion.

Solicitors, *Fooks, Chadwick, Arnold, & Chadwick.*

Q. B. Div. (Day and Lawrance, JJ.) April 14, 15.

JONES v. FOLEY. (a.)

Landlord and tenant—Ejectment order by magistrates—Entry by landlord at the expiration of tenancy—Trespass—1 & 2 Vict. c. 72.

A landlord's common law right of entry is not affected by an ejectment order obtained from justices; so that, in the absence of force, a landlord who enters and pulls down a house at the end of a term, after an ejectment order has been obtained, but before it comes into operation, is not guilty of trespass.

This was an appeal from a county court by the defendant in an action for trespass.

The plaintiff was tenant to the defendant, and the action was brought to recover damage for trespass and injury to the plaintiff's furniture. The plaintiff had refused to leave the premises which he was occupying after the term of his tenancy had expired, and the defendant had obtained an ejectment order from justices under 1 & 2 Vict. c. 72. Before the ejectment order came into force the defendant, who had made a contract for that purpose, permitted his builder to enter upon the premises and pull down the house. In doing so the builder had injured some of the plaintiff's furniture, which had not been removed. The plaintiff thereupon brought his action in the county court, and obtained a verdict.

The defendant appealed.

Amphlett, for the appellant.—There was no evidence of forcible entry, and the defendant had a perfect right at the end of the tenancy to re-enter and take possession of the premises. The magistrate's order was intended to serve the same purpose if entry could not be peaceably effected. The plaintiff cannot complain of injury to his furniture, for he had no right to leave it there.

A. T. Lawrence, for the respondent.—The pulling down of the house while the plaintiff's furniture was there is sufficient evidence of forcible entry. The landlord cannot invoke the assistance of the law and at the same time take the law into his own hands. Until the expiration of the time limited by the magistrate's order the landlord's right of entry was suspended: *Newton* v. *Harland*, 1 Man. & G. 644; *Lows* v. *Telford*, 1 App. Cas. 414, 24 W. R. Dig. 157.

DAY, J.—I om of opinion that the justices' order for ejectment in no way affected the common law rights of the defendant. He was clearly entitled at the expiration of the tenancy to retake possession of his own property. The injury to the plaintiff's furniture was entirely due to its being left in the house, where it had no right whatever to be. There was no evidence whatever of forcible entry. The defendant's appeal must be allowed, and judgment entered for the defendant, with costs.

LAWRANCE, J., concurred.

Solicitors for the plaintiff, *Ford & Ford*, for *W. W. A. Tree*, Worcester.

Solicitors for the defendant, *Wood, Bigg, & Nash*, for *Yonge & Cox*, Worcester.

(a.) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

Q. B. Div. (A. L. Smith and Grantham, JJ.) April 13.

BOURNE v. WALL.
WALL (*Claimant*). (a.)

Bill of sale—Validity—Power to sell on or off the premises—Whether such power invalidates bill of sale—"Necessary for the maintenance of the security"—Form in the schedule to Bills of Sale Act, 1882.

A clause in a bill of sale giving the grantee "power to sell the goods by private treaty or public auction on or off

(a.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

the premises" is a clause necessary for the maintenance of the security, and does not vitiate the bill of sale.

Appeal from Croydon County Court in an interpleader issue.

In December, 1887, the defendant Wall gave a bill of sale on his furniture to the Mutual Loan Association. In December, 1889, the loan association pressed the defendant for the balance of £42 then remaining due upon this bill of sale. The defendant was unable to pay this sum, but his wife, the present claimant, paid this sum to the grantees of the bill of sale, the Mutual Loan Association, and she so paid it with moneys which were her own separate estate, and which she had recently received under the will of her father.

Mrs. Wall, the claimant, having paid out the loan association, took from them an assignment of the bill of sale in the month of January, 1890, so that she became the holder of the bill of sale granted by her husband over his furniture to the loan association.

The plaintiff had recovered a judgment against the defendant, and proceeded to levy execution against the goods of the defendant which were comprised in the bill of sale, as well as against some other goods which were the separate property of the wife purchased by her with her own money.

When the plaintiff proceeded to levy against the goods comprised under the bill of sale, Mrs. Wall, the claimant, set up the bill of sale, under which she claimed to be entitled to the goods seized.

The question now was whether this bill of sale was a valid bill of sale, containing, as it did, a clause giving the grantee "power to sell the goods by private treaty or public auction on or off the premises."

Before the learned county court judge it was contended for the plaintiff, the execution creditor, that this clause in the bill of sale, giving the grantee power to enter and sell the goods on the premises, was not in accordance with the form in the schedule and was bad accordingly, and that although the statute gives a power of sale, it does not give a right to sell on the premises; and in support of this contention the following cases were cited before the learned judge: *In re Morritt*, 35 W. R. 277, 18 Q. B. D. 222; *Watkins* v. *Evans*, 35 W. R. 313, 18 Q. B. D. 386; *Furber* v. *Cobb*, 35 W. R. 398, 18 Q. B. D. 494; *Ex parte Stanford*, 34 W. R. 507, 17 Q. B. D. 259; and it was also contended that the clause was not necessary for the maintenance of the security: *Lyon* v. *Morris*, 35 W. R. 707, 19 Q. B. D. 139; *Bardell* v. *Daykin* (*Jarvis, Claimant*), 3 Times L. R. 526.

The learned judge held that the bill of sale was bad by reason of the clause giving the grantee the power to sell the goods on the premises, and he so held on the authority of *Bardell* v. *Daykin*, a report of which case however was not before him at the time.

In *Bardell* v. *Daykin* it was held that a clause that the grantee might "at any time during the subsistence of the security affix such bills and placards having reference to the said chattels and things as he might think fit on any premises for the time being in the occupation of the grantor," was not a covenant necessary for the maintenance of the security, and that the bill of sale was therefore bad.

The learned judge, therefore, held that the bill of sale was bad, and gave judgment for the plaintiff, the execution creditor.

The claimant, the holder of the bill of sale, appealed.

Colam, for the appellant.

Carrington, for the respondent.

A. L. SMITH, J.—This is an appeal from the learned county court judge at Croydon, who held that this bill of sale was bad, as it gave power to the grantee to enter and seize the goods and sell them on the premises. He held that that power was not in accordance with the form in the schedule. Although that form is more or less a hard and fast one there is some latitude given, as the parties may insert in their own terms matters which are necessary for the maintenance of the security—that is, what the court may think necessary for the maintenance of the security.

I think the clause in the present case is one necessary for the maintenance of the security. A clause giving power to seize and sell on the premises by private sale is, in my judgment, a clause necessary for the maintenance of the security. There is direct authority for this in the judgment of Day, J., in *Lyon* v. *Morris*. Then, does the clause become unreasonable by reason of the power given to sell by public auction? I think not, and if that be so, we have it that a covenant to seize and sell on the premises by public auction is a clause necessary for the maintenance of the security. So, as to the other part of the clause that is objected to, I think the bill of sale is not vitiated by that part. The learned judge was led astray by the case of *Bardell* v. *Daykin*, but that was a very different case from the present, as the court there merely held that a clause giving the grantee power to affix bills and placards on any premises for the time being in occupation of the grantor was not a clause necessary for the maintenance of the security.

It seems to me that this bill of sale does not sin against the form in the schedule, and we think, therefore, that the judgment of the learned judge was erroneous, and that this appeal ought to be allowed.

GRANTHAM, J.—I am of the same opinion.

Appeal allowed.

Solicitor for the appellant, *Stanley Evans*.

Solicitor for the respondent, *Seal*.

Q. B. Div. (Mathew and Day, JJ.) April 9, 10.

In re LOUIS.

Ex parte INCORPORATED LAW SOCIETY. (*a*.)

Solicitor—Person not duly qualified—Affidavit prepared by process-server—Contempt of court—6 & 7 Vict. c. 73, s. 2—23 & 24 Vict. c. 127, s. 26.

A person who was employed by a firm of solicitors as a process-server prepared the usual affidavit with reference to a failure to effect service, whereupon an application was made to attach him for contempt of court in having acted as a solicitor contrary to section 2 of 6 & 7 Vict. c. 73.

Held, that he had not acted as a solicitor, and that no contempt of court had been committed.

This was an application by the Incorporated Law Society for an attachment against one A. H. Louis for contempt of court under section 26 of 23 & 24 Vict. c. 127. Louis had been employed by a firm of solicitors as confidential agent and process-server, and in that capacity had himself employed others. He had been in the habit of settling the usual affidavits upon an application for substituted service which were used by the persons actually employed in attempting to effect service.

(*a*.) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

The charge now made against him was that in preparing one of these affidavits he had acted as a solicitor within section 2 of 6 & 7 Vict. c. 73, although he was not duly qualified.

Channell, Q.C. (*Hollams* with him), in support of the application.—The defendant has been guilty of contempt of court within section 26 of 23 & 24 Vict. c. 127 because he has presumed to act as a solicitor. It is not necessary that he should do any of the particular acts specified in section 2 of 6 & 7 Vict. c. 73 if he does such an act as only a solicitor or his clerk ought to do. His conduct comes within the general words "act as a solicitor in any cause, matter, or suit." The preparation of an affidavit is a responsible act, for which a solicitor ought to be liable to the court. The court has a right to presume that the statements contained in the affidavit have been tested by a solicitor, and it has been pointed out in *Law Society* v. *Shaw and Waterlow*, 30 W. R. 820, 9 Q. B. D. 1, that the preparation of an affidavit is essentially the work of a solicitor. In the Stamp Act of 1870 it is enacted in section 60 that any unqualified person "who draws or prepares any instrument . . . relating to any proceedings in law or equity" is liable to a penalty, and an affidavit is clearly such an instrument.

Finlay, Q.C. (*Pollard* and *E. C. Robinson* with him), for the defendant.—It is admitted that the defendant has been guilty of no specific offence, but it is contended that he comes within the general words at the conclusion of section 2 of 6 & 7 Vict. c. 73. Those general words were not intended to enlarge, but merely to sum up, the specific offences before described. The defendant in settling the affidavit was doing no more than a solicitor's clerk might do any day, and was acting for the solicitor, not as a solicitor. It would be absurd to contend that a solicitor's clerk who prepares instruments relating to law proceedings is guilty of a breach of section 60 of the Stamp Act, and the defendant is in exactly the same position. If, instead of the affidavit, oral evidence had been given of the facts contained in it, the defendant could have been guilty of no offence. He has acted either as a clerk or as a witness, but not as a solicitor.

MATHEW, J.—I am of opinion that this motion must be dismissed, as the defendant has not been shown to have been guilty of any contempt of court. It is said that he has "acted as a solicitor" within the meaning of 6 & 7 Vict. c. 73, s. 2. That section specifies certain acts which no one is to be permitted to do unless he be a solicitor, and adds "or act as an attorney or solicitor in any cause, matter, or suit." It is not contended that the defendant has committed any of the specific acts which are prohibited by the section, but it is contended that he has "acted as a solicitor" within the general words. It appears that he has been carrying on the business of a process-server—we are not concerned with his transactions in any other capacity—and that he has carried on this business in entire good faith and has been employed by solicitors of undoubted respectability. It appears also that it has been part of his duty in his employment as a process-server, when a writ has been served, and when there has been a failure to effect service of a writ, to prepare in each case the usual affidavit for the use of the solicitor by whom he has been employed. This has been the course of business. Now, in the preparation of the affidavits of service where service has been effected, can it be said that the defendant has acted as a solicitor? The learned counsel for the Law Society hesitated as to this, and with reason, because, as regards this affidavit, it is plain that the defendant has acted, not as a solicitor, but for a solicitor and as a witness. Then, can any reasonable distinction be drawn between the case where an affidavit of service is made and the case where an affidavit is made of facts showing why personal service was not effected? The learned counsel for the Law Society urged that in the latter case it is necessary to have the assistance of a solicitor in order that there may be a proper cross-examination of the person who states the facts with respect to the failure to effect personal service. But how could there be any effective cross-examination in such a case? The solicitor could only act upon the statement of the person employed to serve the process, and here in place of the old process-server, with his strange proceedings, we have a person of undoubted respectability and character, who may be expected to employ only persons on whom reliance can be placed. In this case, therefore, as in the other, as it appears to me, the defendant has acted for a solicitor, and in the capacity of a witness. It was not disputed that if in place of the affidavit being produced the person employed to effect service were himself to state at chambers what had occurred, there could be no pretence for saying that in so doing he was acting as a solicitor. I think that the defendant in settling this affidavit did no more than make such a statement, and I cannot think that any additional security would have been afforded by his having had the assistance of a solicitor in the preparation of the affidavit. No single case has been referred to in which an affidavit prepared by the defendant has been used at chambers otherwise than by, or on behalf of, a solicitor, and the solicitor who makes use of such an affidavit is responsible for doing so, and is bound to satisfy himself before he uses it that the statements which it contains are, so far as he knows, true. I think, therefore, that no contempt of court has been committed. The result is that the motion will be dismissed, with costs.

DAY, J., concurred.

Motion dismissed.

Solicitor for the Incorporated Law Society, *E. W. Williamson.*

Solicitors for the defendant, *Haynes & Claremont.*

Q. B. Div. (A. L. Smith and Grantham, JJ.) April 7, 15.

TAWES v. KNOWLES. (a.)

Easement — Grant of adjoining tenements — Implied reservation—Mortgage.

The grantor of two adjoining tenements possessed a right of way from one tenement through another. Previous to the grant of these tenements to two respective grantees, the grantor had conveyed the servient tenement by way of mortgage without any reservation of the right of way. Subsequently, by her will, the grantor devised the two tenements to the predecessors in title of the respective plaintiff and defendant. The defendant's predecessor took the equity of redemption to the original servient tenement, and the mortgage was subsequently paid off.

Held, that, in an action by the plaintiff to secure the original right of way, the ordinary principles applicable to a conveyance in fee without any reservation of a right of way must apply to the mortgage, and that the defendant, as successor to the mortgagee, took the tenement without any such reservation.

Appeal from the judgment of his Honour Judge Digby Seymour, sitting at the county court, New-

(a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

castle-on-Tyne, in favour of the plaintiff. The facts are stated in the judgment.

Baker, for the appellant, the defendant, argued that, there being no reservation of the right of way claimed by the plaintiff in the mortgage to the plaintiff's predecessor in title, the plaintiff was estopped from any user of the right of way.

He cited *Wheeldon* v. *Burrows*, 28 W. R. 196, 12 Ch. D. 36, *per* Thesiger, L.J., 48-9; *Suffield* v. *Brown*, 12 W. R. 356, 4 De G. J. & S. 185; *Brett* v. *Clowser*, 5 C. P. D. 376, 29 W. R. Dig. 234; *Pearson* v. *Spencer*, 11 W. R. 471, 3 B. & S. 761; *Polden* v. *Bastard*, 14 W. R. 198, L. R. 1 Q. B. 156.

Warrington, for the respondent, the plaintiff, argued that the mortgage, having been paid off, amounted to a complete extinction of the security, and that the plaintiff resumed all the rights, including that of this right of way originally possessed by the original predecessor in title of both properties before they were divided.

He cited *Brown* v. *Alabaster*, 36 W. R. 155, 37 Ch. D. 490; *Bolton* v. *Bolton*, 11 Ch. D. 968, 27 W. R. Dig. 230.

Baker replied. *Cur. adv. vult.*

April 15.—A. L. SMITH, J., delivered the following written judgment of the COURT.—This is an appeal from the learned county court judge at Newcastle-on-Tyne, who found for the plaintiff. The plaintiff sued the defendant for trespass for removing a door, the point raised being whether the plaintiff was entitled to a right of way through the premises of the defendant. The defendant counter-claimed for an injunction restraining the plaintiff from trespassing upon the way. The houses of the plaintiff and defendant stand back to back, the plaintiff's house facing on to Church-way and the defendant's house on to Bedford-street. The plaintiff asserts that he has a right of way over and along the side of defendant's premises so as to enable him to pass from his Church-way premises into Bedford-street, and this the defendant denies. The plaintiff and defendant both claim title to their respective properties under the will of the late Mrs. Bell, who died in August, 1886, having made her will in January of that year.

In the year 1855 Mrs. Bell became possessed of the land upon which the plaintiff's and defendant's houses now stand. The Church-way house was first built and occupied by Mrs. Bell. In the year 1866 she built the Bedford-street house upon the vacant plot in rear of her Church-way house, according to a plan which unquestionably left a walled passage which passed across the Bedford-street house premises, so that she or other the occupier of the Church-way house might pass and repass from and to its rear to and from Bedford-street. There was a door placed at each end of this passage. It appears from the evidence that this passage had been intermittently used by the occupier of the Church-way house principally in order to get rid of the ashes without taking them through that house. On the 30th of May, 1882, Mrs. Bell conveyed the Bedford-street premises to Miss Davidson, the predecessor in title to the defendant, subject to Mrs. Bell's equity of redemption. By this conveyance she conveyed the whole of the Bedford-street premises, including the passage in question, and reserved no right of way whatever over it from the Church-way house to Bedford-street.

The question is, What is the effect of this conveyance upon the passage in question? It is, I think, clear that if this had been a conveyance in fee to the predecessor in title of the defendant, the defendant would have taken the Bedford-street premises, including the passage, freed from any right of way over which theretofore had existed in favour of the grantor. The case would have fallen directly within the second proposition laid down by the Court of Appeal in the case of *Wheeldon* v. *Burrows*, which is as follows:—"The second proposition is that if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. This rule is subject to certain exceptions, one of which is the exception which attaches to cases which are called ways of necessity."

This passage was not a way of necessity, nor does it fall within any of the exceptions mentioned in this case. After this conveyance in 1882, as before mentioned, Mrs. Bell made her will in January, 1886, and then died. By it she devised the Church-way premises to her husband for his natural life, and after his decease to her nephew Robert Johnson, the predecessor in title of the plaintiff; the Bedford-street premises she devised to her domestic servant Mary Neil, now Mrs. Knowles, the present defendant. At the date of her will and of her death the Bedford-street premises remained so conveyed to Miss Davidson. It is said that, inasmuch as the premises were only conveyed by way of mortgage, the rule above stated did not apply. I had considerable difficulty in following this argument, or the principle upon which it was formed, but it seems to me that the right of the plaintiff and the defendant must be ascertained as of the date of the death of Mrs. Bell; each party then took what her will gave them, no more and no less, and their respective estates do not depend upon what may subsequently have taken place. At this date Mrs. Bell, the testatrix, had conveyed, by way of mortgage, to the defendant's predecessor in title the Bedford-street premises, without any reservation of any right of way from the Church-way premises. At that date the sole interest Mrs. Bell had was an equity of redemption. It seems to me that whether the mortgage was subsequently paid off or foreclosed cannot determine what it was the defendant took under the will. In my judgment this case is to be decided upon the same principle as if the conveyance had been in fee, and on this ground the defendant is entitled to succeed. It is further argued for the defendant that even if this was not so the will did not give to the plaintiff's predecessor in title any right of way over the defendant's close, and that he had no cause of action. The law applicable to this point is settled by Erle, L.C.J., in delivering the judgment of the Exchequer Chamber in *Polden* v. *Bastard*. "There is a distinction," he says, "between easements such as a right of way or easements used from time to time and easements of necessity or continuous easements. The cases recognize this distinction, and it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass unless the owner, by appropriate language, shows an intention that they should pass." The right of way now claimed by the plaintiff is an easement used from time to time only, and is not a continuous easement, and, inasmuch as there are no appropriate words in the will, or, indeed, no words at all, to show an intention that it should pass, in our judgment upon this point also the defendant's contention is correct. The Conveyancing Act, in our opinion, does not apply.

This appeal must, therefore, be allowed, and judgment be entered for the defendant, with an injunction as claimed.

Appeal allowed.

Solicitors for the appellant, *Williamson, Hill, & Co.*

Solicitors for the respondent, *Crossman & Prichard.*

Court of Appeal.

From Chan. Div. April 20, 21.

In re LACON.
LACON *v.* LACON. (*a.*)

Ademption—Double portions—Presumption—Legacy to testator's three sons of all testator's shares in a partnership—Gift inter vivos *to one son, of two out of the testator's twenty-one shares—Difference in character of gifts—Gift* inter vivos *in lieu of salary for services rendered—How presumption may be rebutted.*

A testator by his will gave to his three sons equally as tenants in common all his shares and interest in a brewery business in which he was the principal partner, being at the date of the will the owner of twenty-one out of twenty-four shares in the business. Between that date and his death he made E. (one of the three sons), a partner, and assigned him two of his twenty-one shares, which were to be in lieu of a salary as manager. The two shares thus given carried with them certain powers which did not attach to those devolving under the will. E., at the time he was so made a partner, had had many years' experience in the business, and was at the time in fact a paid manager of an important branch of the business, and had been pressing for an increase of his salary as such.

Held (reversing the decision of Romer, J., ante, *p.* 299), *that, even assuming that the gift* inter vivos *to E. came within the definition of a "portion," which was doubtful, there was amply sufficient in the circumstances of the case to rebut the presumption that such gift was intended as an advancement* pro tanto *of the shares given him by the will, and accordingly there was no ademption.*

Whether the gift inter vivos *to E. was a gift in the way of a "portion,"* quære.

Appeal from Romer, J.

The facts appear by the report of the case below, *ante*, p. 299, and from the judgments of the Court of Appeal.

It may be mentioned as a matter on which some argument turned in the Court of Appeal that the deed of partnership of December 19, 1887, referred to in the report below, contained a clause providing that, if any partner should die during the continuance of the partnership, his executors or legatees should be at liberty within four months to give notice in writing of their intention to discontinue the partnership; but that if the executors, administrators, or legatees of a deceased partner should desire to continue in the partnership, or should not give notice to discontinue, they "shall be, and be considered as, partners, and be admitted into the partnership in the place of the deceased partner, and in respect of his share and interest therein upon the terms of these presents, so far as the same shall be applicable to the altered circumstances then existing, and so that the new partners or partner admitted under this clause shall have all the rights and powers of the deceased partner in whose place they or he shall be substituted (save and except that they or he shall not be acting partners or partner without the consent of the other partners or partner) and the share and interest of the deceased partner, and the share of profits coming to such new partners (if more than one) shall be divided amongst such new partners in shares and proportions as they may be entitled thereto or may mutually agree upon."

The defendant, Ernest Lacon, appealed from the judgment of Romer, J.

(*a.*) Reported by R. H. DEANE, Esq., Barrister-at-Law.

Rigby, Q.C., Neville, Q.C., and *D. G. Begg*, for the appellant.—The doctrine of presumption against double portions is, under the circumstances of this case, excluded: *Ex parte Pye*, 18 Ves. 140; *Lawes* v. *Lawes*, 30 W. R. 33, 20 Ch. D. 81; *Bengough* v. *Walker*, 15 Ves. 507; *In re Vickers, Vickers* v. *Vickers*, 36 W. R. 545, 37 Ch. D. 525. The two twenty-fourth shares passed to the appellant as increased remuneration in lieu of a salary, and it cannot be argued that he received these shares as a benefit in anticipation of that which he was to take under the will. The appellant was bound down, and in consideration of this was to receive this benefit as a gift. The term "portion" is defined in *Ex parte Pye* and in *Taylor* v. *Taylor*, 23 W. R. 719, L. R. 20 Eq. 155. This is not really a case which raises a presumption against double portions. The doctrine of ademption does not apply in the case of a specific legacy or in the case of a gift of residue. The doctrine does not apply in cases of real estate: *Davys* v. *Boucher*, 3 Y. & Coll. 397, 411, and it does not apply to the case of a specific gift like the present: *Backwell* v. *Child*, 1 Ambl. 260. In order to effect ademption the advance must be for the same purpose as the legacy: *Roome* v. *Roome*, 3 Atk. 181.

They also referred to *In re Pollock*, 28 Ch. D. 552, 33 W. R. Dig. 242, and to *Chichester* v. *Coventry*, 15 W. R. 849, L. R. 2 H. L. 71.

Sir H. Davey Q.C., and *Borthwick*, for the respondent, T. B. U. Lacon.—The appellant gave no consideration for the benefit; the only point on which any such argument could be founded is the alteration in the salary. It was really a gift, and a valuable one. Any doubt as to whether the doctrine of double portions would apply to a share of residue has long been set at rest. The questions really are (1) of fact, Was it a portion or not? (2) What is the meaning of a portion? Lord Cottenham, in *Pym* v. *Lockyer*, 5 My. & Cr. 29, at p. 46, &c., and the late Master of the Rolls in *Taylor* v. *Taylor*, laid down the rule thus: that at the time he makes his will the father is to be taken as making a scheme for the distribution of his property, and if, between the dates of his will and of his death, he makes a gift to a child, he is presumed to have anticipated the date of his own death. This may possibly be rebutted, but the presumption is that every gift is an anticipation of the testator's death, and is in part performance of his scheme, and not to be taken as altering or disturbing that scheme. If double portions are allowed the original scheme is disturbed and the shares of the other children diminished. [BOWEN, L.J.—How does the Wills Act affect this presumption, providing, as it does, that every will is to be read as speaking from the date of the testator's death?] This is a matter outside the will, and not affected by that provision. It is a presumption which the court raises from the facts. *Thynne* v. *Glengall*, 2 H. L. Cas. 131, was a case of satisfaction. *Montefiore* v. *Guedalla*, 8 W. R. 53, 1 De G. F. & J. 93, shows that a gift of residue may be adeemed. The facts are not such as will rebut the presumption of intended equality, and the differences between the two provisions are not sufficient to rebut the legal presumption against double portions: *Weall* v. *Rice*, 2 Russ. & Myl. 251; *Russell* v. *St. Aubyn*, 2 Ch. D. 398, 24 W. R. Dig. 258. There is no difference really in the character of the two gifts—that given by the will and that given by the testator in his lifetime. By the clause in the partnership deed as to the representatives or legatees of a deceased partner coming in, we have no option as to being acting partners or not—it rests with the surviving partners to exclude us from acting if they think fit. As far as we are concerned, if we come in

at all we come in as acting partners, and on precisely the same footing as the surviving partners. [BOWEN, L.J.—Does not the fact that the testator puts the appellant in a position of greater power than the other two brothers make the gift in his lifetime a gift of a different character from that given by the will?] Surely not. What is given in substance is the capital of the shares—that is the same in both cases. *Chichester* v. *Coventry* was a case of satisfaction, not ademption, and all the lords pointed out that the court will much more readily presume ademption than satisfaction.

P. S. Gregory (*Haldane, Q.C.*, with him), for H. S. H. Lacon, the third brother, supported the contention of the respondent.

E. S. Ford, for the trustee, took no part in the argument.

Rigby, Q.C., in reply.—There is amply sufficient here to rebut any presumption that the gift of the two shares to the appellant was intended to be in part substitution for what he would take under the will. He had already been thirteen years in the business, and it was contemplated that he would be in it another ten years before his father's death. That is twenty-three years of his adult life. He was doing the work of the firm. It may be naturally supposed that the testator intended to place the appellant, who knew the business and had been so many years in it, in practically the same position as regards remuneration as Mr. Nightingale, who occupied an analogous position in the business, and whose remuneration was very nearly the same, as upon our contention that of the appellant, would be. [KAY, L.J.—I think you are entitled to say that it was worth the father's while to keep the appellant in the business for the sake of enhancing the value of all the shares.] Yes. It is only a presumption that there is ademption, and a presumption that requires a very slight indication of a contrary intention to rebut it. [BOWEN, L.J.—Is there any case in which the doctrine of double portions has been applied when the son was performing services for his father?] Yes, *Lawes* v. *Lawes*. The whole burthen of the business now falls on the appellant. One of the two other brothers is ill, and the appellant does not consider him capable of managing the business as an acting partner.

LINDLEY, L.J.—The question here is both important and difficult. It is in form an appeal from a decision of Romer, J., making a declaration to the effect that certain shares in a brewery are divisible in sevenths, whereas the appellant, Mr. Ernest Lacon, contends that he is entitled to eight and a third shares, and his brothers to six and a third shares each.

The point depends upon what is called the presumption against double portions; and before going into the facts I may state at once what the doctrine is, and for that purpose I cannot do better than read the judgment of Lord Eldon in *Ex parte Pye*. He says (in 18 Ves., on p. 150), "Without going through all the cases that were cited, and those referred to in them, having compared the case in Atkyns with manuscript notes of that case, and looked into some other cases, one in Ambler, and some earlier, I may state as the unquestionable doctrine of the court, that, where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the court understands him as giving a portion; and, by a sort of artificial rule, in the application of which legitimate children have been very harshly treated, upon an artificial notion that the father is paying a debt of nature, and a sort of feeling upon what is called a leaning against double portions, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole or in part;" and then he goes on to say what has been done in some of the cases.

Now, what we have to consider is, first of all, the will of the late Sir Edmund Lacon, and, secondly, some partnership articles which were entered into by him after the date of his will, and the circumstances under which those articles were entered into; and what we have to see is, first of all, whether this is a case in which there are two portions, and, secondly, assuming that there are two portions, and assuming therefore that the presumption to which I have referred arises, whether there are or are not circumstances in this case which rebut that presumption.

The will fortunately is plain enough, and nothing turns upon the construction of it. The testator had four sons and two daughters. He had two businesses. He had a banking business at Norwich and at Yarmouth, and he had a brewery business at Yarmouth. He leaves his banking business (besides other property to which I need not refer) to his eldest son, the present baronet, of whom we need say nothing more. He leaves his interest in the brewery business, in which he had twenty-one out of twenty-four shares, to his younger children, Thomas, Henry, and Ernest. He then, after making various bequests in favour of his daughters and so on (which I pass over), bequeaths the residue of his property amongst all his children. That is the general scheme of the will. To use Lord Eldon's language in *Ex parte Pye*, there is nothing in the will which enables us to state the purpose for which these brewery shares were given to the three sons.

In 1884 the position of affairs (in addition to what I have already stated) included this factor, that the fourth son, Ernest, was then being brought up to the brewery business. He was being trained by his father to attend to that business, with a view ultimately, no doubt, of his becoming a partner in it. The same observation is not true of the eldest son, or of the two intermediate sons. It was the youngest son, and he alone, who was brought up to this business. Having, I suppose, become useful, he was paid a salary of £500, and later on, in 1887, of £1,000, a year. In that year it was considered desirable that some modification should be made in the terms of the partnership in the brewery business. Some modifications had become necessary as regards the provision for Mr. Nightingale, one of the partners, and it appears from the evidence that the son, Ernest, was urging his father to increase his salary, which was then, as I have said, £1,000 a year. That salary, as I understand, was not paid by the father, but by the firm, though of course the father, as having so large a share in the concern, was the principal paymaster. It seems from the evidence, which is that of Mr. Ernest Lacon and Mr. Waters, that there was a discussion, if it can be called such, in which the father, being a very reticent man, seems to have held his tongue, and merely listened to what was said by his son; but he so far acquiesced that upon one occasion when Ernest was pressing him for an increase of his salary, he said, "Oh, I have made you a partner"; and the evidence of Mr. Waters, the solicitor, tends to show, I think, conclusively, that what the father was doing, amongst other things—I do not say the whole of what he was doing, because that would be begging the question—unquestionably was for the purpose of increasing the allowance to his son Ernest. That was part of his object. The evidence of the solicitor goes to show that the testator thought at one time he would do that

sufficiently by giving him one share, but then he changed his mind and told Mr. Waters that he would give Ernest two shares. Then there was a question as to what the effect of that would be upon the allowance. That question arose by reason of a query put into the draft by Mr. Nightingale's solicitor as to Mr. Nightingale's allowance. The question as to Mr. Ernest Lacon's allowance was brought to his father's attention, and he said at once: "The allowance will have to be given up. The shares are in substitution for that." And so it came about that in 1887 Mr. Ernest Lacon ceased to be a salaried clerk or assistant, or whatever his position was in the concern, and became a partner in respect of two twenty-fourth shares, which of course were given him by his father, and were not contributed by the other partners.

The partnership articles recite the fact that the father has assigned or made over to his son Ernest two of his twenty-fourth shares in the partnership assets and property, and then they state the capital value of these two shares at £21,500. That, I suppose, is the sum at which they are to be taken in the books. Then follow the usual partnership articles. The son who is taken in, is to be bound to attend to the business and devote his whole time to it. Then, passing over unimportant matter, the 28th clause is addressed to the introduction by the father of his sons or legatees as partners under his will. It runs thus:—[His lordship here read the clause set out in the statement of the case, and proceeded:—] Then there is a proviso that "every partner admitted under this clause shall execute a deed covenanting with the other partners or partner for the time being jointly and separately to perform and observe the provisions of these presents so far as the same shall be applicable." And then there is a further proviso that "if the surviving partners or partner refuse to admit into partnership as acting partners or partner the executors, administrators, or legatees of the deceased partner claiming admission under this clause, then the said executors, administrators, or legatees shall have the option, to be exercised in manner hereinafter mentioned, within two calendar months after such refusal, of purchasing the shares and interest of the surviving partners or partner in the capital and assets (including the goodwill of the partnership)"—it is a very curious clause.

Now, what is the effect of that? The effect of that, as I understand it, is this, that it was competent for the testator to bequeath his shares to anybody he liked—to sons or to anybody else, and that the legatees should thereupon be at liberty to become partners, and if they become partners they would be bound to attend to the business, unless the survivors said that they should not. It is not, as I thought at one period of the argument, that these legatees could become partners, and escape the duty and burden of working as acting partners. The option of their working or not working would not rest with them, but with the survivors, and that is important with reference to a discussion which took place yesterday, and it displaces the force of the observation which fell from me, and, I think, from the court generally, that it would be reasonable to give Mr. Ernest Lacon two extra shares in consideration of his doing work, considering that his brothers did nothing. I think that observation falls to the ground. However, the position certainly is this: that it does give him rights under this deed as a partner admitted under the deed, which he would not have, and which his brothers would not have, if they were claiming simply under the will.

Not many months after these transactions took place the testator died without having altered his will. Now upon the will and the deed Mr. Ernest Lacon's position is unassailable. He has got two shares under the deed. He has got, under the will, one-third of all the remaining shares of his father. As a matter of construction there is no difficulty and no controversy about it. But then comes in the presumption against double portions, and his brothers say that by reason of that doctrine "you must treat the two shares which our father gave you in 1887 as given you in anticipation of, and on account of, and in part satisfaction of the same shares which you would have taken and which we should all have taken if no provision had been made for you." That rests upon the presumption I have mentioned.

Now upon the question whether these two provisions, the one by the will and the one by the deed, are portions, it appears to me that there is very considerable difficulty in saying that they are not. Certainly the purpose for which a provision is given is important, as appears from the language of Lord Eldon himself. I think that what the learned lord said about "purpose" in considering the nature of a provision by will is a point reasonably applicable to a provision made either by a deed, instrument, or will. But assuming that these two provisions are both portions—and having regard, as I have said, to the language of the cases upon this subject, and especially of the late Master of the Rolls in *Taylor* v. *Taylor*, I shall assume that they are portions — the question still arises whether there is or is not, under the circumstances of this case, enough to rebut the presumption that these shares are to be taken as given on account of, and in anticipation of, and in part satisfaction of what otherwise would have been taken under the will if they had not been given by the testator in his lifetime. Now here we differ from Romer, J. We think that the circumstances of this case are peculiar; and we think that there are circumstances sufficient to indicate an intention on the part of the father, not simply to anticipate as to one son the provision which he had made for all his sons, but an intention and desire to prefer that one son to the others, not only in point of time, but in point of the amount and nature of the provision which he was making.

It is to my mind very significant that this son alone had been brought up in the business. It is to my mind very significant that this provision was made for that son when he was asking for a further advance of salary, and Mr. Waters's evidence and his own evidence (though, of course, that must be taken as interested evidence) goes to show it was one method of increasing his allowance. It was not simply giving him now what he would have when his father died; it was something very different. I do not say it was not that, but it was that and a great deal more: and when we consider that it was to the advantage of the family that one son, at all events, should be brought up in the business, and be there, when his father died, as a partner, it appears to me that there is amply enough for us to say, under these circumstances, that the presumption (which is not a very strong one) is rebutted, and that, looking at what was done in 1887, and the reasons which brought about what was done, the purpose which the testator apparently had in his mind when he recast the partnership articles in 1887 was deliberately to prefer Ernest, not only in point of time, but in point of amount also.

I think, therefore, that the appeal ought to be allowed, and that, there being no controversy except this in the action, judgment ought to be given for the appellant both here and below.

BOWEN, L.J.—The question we have to decide is whether it was the intention of the father that the two shares which were received by the appellant

during his father's lifetime should be received by him as an advancement against the shares which the appellant was to receive under the will on the father's death. In order to establish that intention the respondent has invoked what is called the doctrine of double portions—a doctrine which is no doubt originally judge-made, and which is established by this court, but against which I should be the last person to endeavour to introduce any subtle or frivolous distinction.

The doctrine, so far as it applies to a case of this peculiar character, seems to me to have been made clear to the world by the judgment of Lord Cottenham in *Pym* v. *Lockyer*, 5 My. & Cr., at p. 46, which was read during the argument, and which I will read again, because it will make the few remarks which I am about to offer perhaps clearer than they otherwise would be. Lord Cottenham says:—"A father who makes his will dividing his property amongst his children must be supposed to have decided what, under the then existing circumstances, ought to be the portion of each child, not with reference to the wants of each, but attributing to each the share of the whole which, with reference to the wants of all, each ought to possess. If, subsequently, upon the marriage of any of them, it becomes necessary or expedient to advance a portion for such child, what reason is there for assuming that the apportionment between all ought therefore to be disturbed? The advancement must naturally be supposed to be of the particular child's portion, and so the rule assumes, as it precludes the child advanced from claiming the sum given by the will as well as the sum advanced."

Now, in order to establish a case for the application of this rule as to double portions, there must be two matters, I think, made out, and it will be seen upon analysis that there are two presumptions really which are applied, and not one. In the first place both of the gifts or donations must be gifts, and gifts in the nature of a portion. The first presumption here arises—it is said, that whatever gifts are made by the father, which it may be supposed will have to be distributed among the children, or are given by the father to one child with a view to establishing him in life, are presumed to be portions within the meaning of the rule. We have here to ask ourselves, in the first place, Were these two shares, which were received during the lifetime of the father, received under such circumstances as to justify their being treated and considered as a portion? But supposing both gifts are gifts in the nature of portions, then comes a further question, for the solution of which a further presumption is invoked. The question is whether it is intended that the former gift or portion is to take the place of an advancement of the gift which is given by the will, and there the presumption, which is invoked to answer the question, applies, which is that the former gift, the gift *inter vivos*, is intended as an advancement *pro tanto* of the gift under the bequest—a presumption, it is said, which is made in favour of equality amongst children—it being the view of the law that equality is what the father in dealing with his children would in most cases presumably intend.

This is a presumption which may be rebutted. The circumstances may show that a gift given during the lifetime is not intended as an advancement of the bequest. Circumstances may show (to put it in a slightly different way) that equality was not the intention of the father. The two questions, first, whether the gifts are both given in the way of portions, and, secondly, whether it was intended by the father that the first gift should be an advancement in satisfaction of the second, may well run together, and be blended together; and in my opinion this is just the case in which they do. I myself am not satisfied, to begin with, that the gift of the two shares—I call it a gift, although, perhaps, that expression "a gift" is not exactly an appropriate term—which was made by the father in his lifetime to the appellant, was in the nature of a portion within the meaning of the rule. To my mind the circumstances of the case displace the notion that the father here was giving them simply by way of advancement to the son. And, secondly, I think (for reasons which I will give in a moment) that here in every view the presumption in favour of equality is rebutted by the circumstances of the case. The circumstances show that the gift given during the lifetime was not intended as an advancement or anticipation of the bequest. The son had been thirteen years in the firm, at first in a subordinate position, and afterwards as the manager of the London business, receiving a salary of £1,000 a year. He had acquired experience, and he had earned confidence. He had in 1887 become a person unquestionably of use and value to the firm. He was a person who, if he had not been a son, might not unreasonably have dreamed of being in time, and at no very distant time, promoted to a share in the business of the firm. In 1887 he wished for an increase of salary, and was in such a position that he could press it upon his father. Doubless he would also look to be a partner at some time or another in the house.

Now a person in that position, who in the house of his father has done service, and substantial service, might well, if a favourable view was taken of it, be rewarded with a share or shares. When he receives the shares from his father, he receives, perhaps, what his father would have given with much more hesitation, or which, perhaps, he would not have given at all, if the relationship of father and son had not, indeed, existed. He receives what can hardly be characterized as mere bounty—it is bounty, but something else too. It is not a pure gift, although the element of free liberality enters into it. He is given, perhaps, more than he deserves, but he deserves something. It is a portion, perhaps, in one sense—that it is a provision which the father would not have made if the recipient had not been his son, but it is a portion which has in part been earned by previous services, and which is intended, of course, to be justified by services in the future. I doubt whether, under such circumstances, it would be safe to say that the two shares which are bestowed upon the son are simply a portion.

But the further question remains whether, assuming the two shares to be a gift in the way of a portion, we can see reason sufficient to displace the presumption of double portions; or, in other words, whether there is not a reason here from which we may safely infer that the gift of the two shares was not intended as an advancement *pro tanto* of the bequest? These shares were active shares; they were shares which actually gave the son a veto upon the introduction at a later date, the period of which was perfectly uncertain, and which might be delayed for years, of his other brothers. He had a grant of power and place given to him in the firm of a kind wholly incommensurate with the gift which he was to receive under the will. That grant and gift to him, treating it as a grant and gift, to my mind being wholly incommensurate with the gift under the will, is coloured with such a difference as to render it impossible for us to presume with safety that the gift of the shares was intended in any way to be an advancement towards the bequest.

It seems to me to be exactly upon that kind of reasoning that the courts have abstained, when there is a substantial and material difference between gifts *inter vivos* and gifts under the will, from treating one as an advancement towards the other. The doctrine

of double portions must be applied faithfully wherever it is found to be applicable, but, on the other hand, it is not to be extended.

The circumstances of this case convince me that the dealing between the father and the son in the year 1887 was not intended in any way by the father to be an advancement towards what the son was to receive under the will, and that it was not intended as a part performance of the distribution which the will was intended by the father to make of what the father should leave behind him at his death.

Upon these grounds I agree that the judgment of the learned judge of the court below ought to be displaced, although I agree with Lindley, L.J., in thinking that this is a very delicate and difficult case, and I am not surprised that judges should not be of one mind upon the subject.

KAY, L.J.—I will add a very few words. The question after all is, What was the intention of the father in this case? Did he intend when he made this gift (if it is to be called a gift) to his youngest son in his lifetime that it should be taken as an anticipation of the provision, which he at that time had made by the will, which ultimately became operative on his death.

There is a rule, which has been referred to, which is a guide where you can have no other guide to find out what the intention was. The rule is this, that if there are two provisions, or what in equity are ordinarily called portions, the one made by the will and the other in the lifetime of the testator, then the presumption arises that one portion is made in part satisfaction of the other; and then, if that presumption arises and is not rebutted, the donee has to bring into hotchpot that portion which he received in the testator's lifetime, and in that way deduct it from that which he otherwise would take under the will. Now by this will it is quite clear, I think, that the provision which was made for this and the other younger sons by dividing among them the testator's share and interest which he might have at his death in his brewery business was in the nature of a portion for each of those children. I take it that, for the purpose of determining that question, a "portion" means such a share of the father's personal property as he intends to be a provision for that son, or (as in this case) a substantial part of the provision for that son. The will was conceived in this way, as far as these younger sons are concerned. The shares which the testator might have at his death in the brewery business and in the property comprised in that business were to be divided equally among them; but besides that there was a certain share of the residue of the testator's property given to each, and also their names came in with a series of limitations of strict settlement of the testator's real estate. Still I do not doubt myself that the shares of the business (which seems to have been a valuable and extensive one) were such a substantial part of the provision made for the younger sons that a gift among them may properly be considered as coming within the definition of "portions" for those children.

Then the next question is, Was the gift made of two twenty-fourth shares in that same business by the testator in his lifetime to this, his youngest son, Ernest, a provision by way of portion? Now, on that subject I confess I have the same doubt which the other members of the court have expressed. One must look carefully at the circumstances under which that provision was made, and what presses very much upon my mind is this. This youngest son had been for thirteen years engaged as a clerk, and ultimately as a salaried manager, of an important branch—the London branch—of that brewery business. Before this gift—if it be a gift—of the shares was made to him, he went to his father and pressed him, not for a share in the partnership, but for an increase in his salary. The father, it is said, was a very reticent man, and this application was renewed at different times, and on one occasion when the conversation took place he asked his son to visit him at his country house, evidently for the purpose of renewing the conversation, and that he might have an interval to make up his mind what he should do. The son did visit his father at his country house, and he details (and there is no attempt at contradiction of what he says) what took place between him and his father; and, according to his description, his father certainly on that occasion maintained his character for reticence, but the son pressed him very much that his salary should be increased, and the father told him that he had come to the determination (I am not attempting to give the very words), instead of increasing his salary, to give him two twenty-fourth shares in the business, to make him an acting partner, and he indicated that that should take effect as from a date which had passed some (I think fifteen) months before, and that he was to bring into account the salary which he had received in the meantime, taking a share of the profits from that back date. Now, that was the arrangement which the father made with the son in answer to repeated pressure from the son that he should have a larger remuneration from his work as manager of the business. To my mind, that indicates plainly this, that the father was satisfied that the son had become a valuable manager of a part of the business; that he evidently desired to comply with the son's request, and something more, because the profits of the shares which he gave amounted to a larger sum than the son expected, or was asking for, and that he did so for the purpose of encouraging the son to carry on the management of the business, and to be an acting partner in it. The father evidently considered that that was very much for the advantage of the business.

Now just consider what the effect of that was. What was done in fact was this. A new deed was executed, and the other partners made no kind of objection upon the same, and these two twenty-fourth shares were given to the son by diminishing to that extent the shares which the father had in the business. So that practically they came out of the father's own shares; and there was an advantage to the other partners in this arrangement, because it relieved them of the payment of the salary which the business up to that time had been paying the son, and from the time when this arrangement was made the remuneration of the son was in fact paid by the father, because the father handed over to him, as I have pointed out, two of his own shares. If the father was right (and I cannot for one moment doubt that he was right) in giving every possible encouragement to this son to continue as an acting partner in the business, then he was doing the best thing he could do for the objects of his bounty mentioned in his will; because he was doing what he thought was the best thing to do to secure that the business should be so carried on that at the time of his death it should be as valuable or more valuable (and probably it was) than it was at the time when he admitted the son into this partnership. Now I am not satisfied that that is fairly to be considered a gift in the nature of a portion. The late Master of the Rolls, as has been pointed out, attempted something like a definition of what amounted to a portion within the meaning of the advancement clause in the Statute of Distributions, and he held in that case that small sums of money did not amount to advancement for that purpose, but whether his definition applies to a case of

this kind or not, I confess I think it would be a dangerous thing to say that in a case of this kind such a benefit given to the youngest son of the testator in the testator's lifetime was a gift of such a nature as to raise the presumption of double portions; and without expressing any final opinion, or saying more than that I seriously doubt that being so, I will proceed to the next question.

If by any proper use of language this can be called an advancement by way of portion, then we have to consider whether the presumption that would arise, that it was given in part satisfaction of the provision which had been made by the father's will, is or is not rebutted. As I began by saying, it all comes round to this:—What, on the whole of these facts, must be considered to have been the intention of the testator? Was it his intention to put this son, who was a skilled manager of the business, who had learnt it by some thirteen years' experience when he was admitted as a partner in the father's lifetime? Was it intended to put him, in consideration of that skill which he had shown, in a somewhat better position than the other younger sons of the testator in respect of the business, or not? Which is the more reasonable conclusion to come to? I cannot divest my mind of the conviction that the more reasonable conclusion is, that the testator did intend, in consideration of the experience which he had of the son's capabilities in carrying on an important part of this business, to put him in a somewhat better position in respect of his interest in the business than the other younger children, who had never taken any part in the business at all. It is important to observe that the other younger children are older than this youngest son Ernest; yet they were not admitted into the business during the father's lifetime at all. They were not experienced in the management of the business in any way. Why they were not does not appear. It may have been from some disinclination on their part, or it may have been because the father wished them not to take part in the business. Of that I know nothing, but the fact remains that here you have the one brother who was a skilled manager in the business, and the others who are now seeking to invoke this doctrine of double portions against him, who were not skilled managers in the business at all. It seems to me that in respect of that fact—that he was a skilled manager of the business—it is right and reasonable to suppose that the father intended that he should have this advantage which he gave to him in the father's lifetime, and I cannot help being moved a little by the consideration (though that, of course, by itself would not be enough to rebut the presumption) that the father never attempted to make any alteration in his will, and there is a good deal to be said for the argument that those who are now insisting that the doctrine of double portions applies are trying to introduce it so as to alter the natural effect of this man being brought in as a partner in his father's lifetime, and of the provision made by the will.

For all these reasons I agree with the other Lords Justices. I think that this is a case in which, if that doctrine applied at all (as to which, as I have said, I have considerable doubt), it is completely rebutted when you examine carefully all the circumstances of the case; and that, therefore, Ernest, the son in question, is not bound to bring into hotchpot or account for the two twenty-fourth shares which he took in this partnership during the father's lifetime.

Appeal allowed.

Solicitors, *Wellington Taylor; Grover & Humphreys; Maples, Teesdale, & Co.; Robins, Burges, Hay, & Co.*

From Q. B. Div. May 28.

WENMAN v. LYON & CO.
HONEYWILL (*Claimant*). (*a*.)

Bill of sale — "Marriage settlement" — Ante-nuptial agreement for a settlement—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4.

An agreement for a marriage settlement comes within the term "marriage settlement" in the exception contained in section 4 *of the Bills of Sale Act,* 1878, *and is, therefore, not a bill of sale within the meaning of the Act.*

Judgment of the Queen's Bench Division (ante, *p.* 301, [1891] 1 *Q. B.* 634) *affirmed.*

Appeal from the judgment of the Queen's Bench Division, *ante*, p. 301, [1891] 1 Q. B. 634.

The defendants recovered judgment in an action brought against them by the plaintiff, and issued execution for their costs. Certain furniture in the possession of the plaintiff which was seized was claimed by the trustee of an ante-nuptial agreement for a settlement made upon the plaintiff's marriage. By the agreement, which was not under seal, it was provided that upon the intended marriage taking place all the property of the plaintiff (including the furniture in question) should be assigned to the claimant upon trust for the wife for life for her separate use, with remainders over; and the plaintiff agreed to execute a proper deed of settlement after the solemnization of the marriage. Upon an interpleader issue, which was remitted for trial to the county court, the judge held that the agreement for a settlement came within the term "marriage settlement" in the exception contained in section 4 of the Bills of Sale Act, 1878, and was not, therefore, a bill of sale, and gave judgment for the claimant. The Queen's Bench Division affirmed this judgment. The execution creditor appealed.

Lewis Edmunds, for the execution creditor.

Jelf, Q.C., and *J. P. Rawlinson*, for the claimant, were not called upon.

Lord ESHER, M.R.—This agreement before marriage for a settlement is clearly a "marriage settlement" within the exception in section 4, and is excluded from the operation of the Act.

LOPES, L.J.—I am of the same opinion. I have no doubt that the term "marriage settlement" in section 4 was intended to include, not only settlements by deed, but also every instrument the intention and effect of which is to create a trust for the purpose of carrying out the provisions for the marriage.

KAY, L.J., concurred.

Appeal dismissed.

Solicitors for the execution creditor, *Stokes, Saunders, & Stokes.*

Solicitor for the claimant, *W. F. Stokes.*

From Q. B. Div. May 13.

VERNON AND OTHERS v. WATSON. (*b*.)

Friendly society—Misappropriation by officer—Conviction and order for repayment — Imprisonment for default—Remedy by action—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *s.* 16, *sub-section* 9.

The defendant, an officer of a friendly society, was

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

(*b*.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

charged under section 16, *sub-section* 9, *of the Friendly Societies Act*, 1875, *with misappropriation of certain money. He was convicted and ordered to pay a penalty and to repay the money, and, in default of compliance with this order, he was imprisoned for two months, with hard labour. An action having afterwards been instituted against him to recover the misappropriated money,*

Held, that his conviction and punishment under the statute was a bar to the remedy by action.

Appeal from the decision of a divisional court (Pollock, B., and Charles, J.) reported [1891] 1 Q. B. 401.

The action was brought by the trustees of a friendly society in the Derbyshire County Court against the defendant, who was an officer of the society, to recover money misappropriated by him. The defendant had previously been charged, under section 16, sub-section 9, of the Friendly Societies Act, 1875, with the misappropriation of the money, and had been convicted and ordered to pay a penalty and to repay the money. He made default in complying with this order, and was thereupon imprisoned for two months with hard labour, and served his sentence.

The county court judge gave judgment for the plaintiffs, but the Divisional Court, on the authority of *Knight* v. *Whitmore*, 33 W. R. 907, held that as the plaintiffs had availed themselves of the remedy provided by statute, and the defendant had been convicted and punished under the proceedings so taken, such conviction and punishment was a bar to the plaintiffs' remedy by action.

The plaintiffs appealed.

By section 16, sub-section 9, of the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), "If any person obtains possession by false representation or imposition of any property of a society, or, having the same in his possession, withholds or misapplies the same, or wilfully applies any part thereof to purposes other than those expressed or directed in the rules of he society, and authorized by this Act, he shall, ont the complaint of the society, or of any member authorized by the society, or the trustees or committee of management of the same, or by the central office, or of the chief registrar, or any assistant registrar by his authority, be liable on summary conviction to a penalty not exceeding £20 and costs, and to be ordered to deliver up all such property or to repay all moneys applied improperly, and in default of such delivery or repayment, or of the payment of such penalty and costs aforesaid, to be imprisoned, with or without hard labour, for any time not exceeding three months, but nothing herein contained prevents any such person from being proceeded against by way of indictment if not previously convicted of the same offence under the provisions of this Act."

Hextall, for the plaintiffs.

Bowen Rowlands, Q.C., and *J. H. Etherington Smith*, for the defendants.

The following cases were cited or referred to:—*Sinden* v. *Banks*, 9 W. R. 415, 3 E. & E. 623; *Reg.* v. *Hemsworth*, 3 C. B. 745; *Vallance* v. *Falle*, 32 W. R. 770, 13 Q. B. D. 109.

Lord HALSBURY, L.C.—I am of opinion that this appeal must be dismissed. The Legislature has, for reasons of its own, passed a statute which gives a peculiar procedure—a procedure which is not common to our law. It is partly criminal and partly civil. Ordinarily, the mere fact that a person had undergone a punishment for the misappropriation of money would be no answer to an action of civil debt for the money. The old principle, that criminal proceedings must be instituted before suing for the debt, has nothing to do with the present case. That was merely a question as to the priority of procedure.

In the present case the proceedings are mixed by the Legislature. The justices have the power to punish for the misappropriation of the money and to order its repayment, and in default of the payment of the penalty or the repayment of the money to order the defendant to be imprisoned. The Legislature has expressly saved the right to indict the defendant for his offence; but there is no saving of the civil right to sue him for the money which he has misappropriated.

In this case the defendant has been ordered to repay the money, and on his default execution has issued against him in the manner prescribed by the Act—that is to say, he has been imprisoned. It is, I think, impossible to say that, on the true construction of the section, that imprisonment does not amount to execution against him. That execution has been satisfied, and therefore there is no power now to sue for the debt.

Lord ESHER, M.R.—Section 9 makes some offences punishable which were not criminal before the passing of the statute. The magistrates are, I think, bound by it to inflict penalties for those offences in addition to ordering the repayment of the money. It is part of the sentence that the money should be repaid, and the result of non-payment is that the defendant may be sent to prison. That is, therefore, both a punishment and a mode of exection, and it is execution with regard to the repayment of the misappropriated money. Therefore, before a tribunal having jurisdiction, the defendant has been ordered to repay a sum of money, and execution has issued against him for the amount by imprisonment under the section. The plaintiffs were not obliged to proceed under the section, but they might have sued civilly for the money. They have chosen the former remedy, and I do not think a civil action is now open to them.

FRY, L.J.—I agree that this appeal fails. The section inflicts a penalty for certain acts, and enables the justices to order the repayment of money misappropriated. It couples the default in the payment of the penalty with the default in the repayment of the money, and enables the justices to commit the defendant to prison for either default. That imprisonment amounts to execution, and is, therefore, a satisfaction of the judgment. No civil action can, therefore, be afterwards brought for the same cause of action.

Solicitors for the plaintiffs, *Warriner & Kinch*, for *Stone*, Derby.

Solicitors for the defendant, *Fitzpayne*, for *Briggs & Clifford*, Derby.

High Court of Justice.

Chan. Div. Kekewich, J. — May 11.

BLACKMAN v. FYSH. (a.)

Will—Life estate—Forfeiture—"Taken in execution by any process of law"—Receiver—Equitable execution—Contingent remainder—Executory devise.

The testator by his will of the 28th of November, 1870, devised real estate to his son for life, and after his death

(a.) Reported by H. C. ROPER, Esq., Barrister-at-Law.

to all the children of his said son, whether then or thereafter to be born, who should attain twenty-one, or, being a daughter, should marry under that age, as tenants in common. He declared that his said son should not have any power to sell or dispose of his life estate, and, in case his said son should attempt to sell or dispose of the same, or become bankrupt, or the estate should be taken in execution by any process of law for the benefit of any creditor, then he declared that the devise to such son should immediately become void as if such son were then actually dead, and that the estate so devised to him should thenceforth vest in the persons who, under the devises thereinbefore contained, would be next entitled thereto. The testator died in February, 1879; *the son took possession; and on the 9th of December,* 1887, *a receiver was appointed of the rents of the son's estate. At that date one of the son's children had attained twenty-one, two had not attained that age or married, and one was not yet born.*

Held, that by the receivership order the son's estate had been taken in execution within the intention of the testator, and that it had ceased.

Held, further, that, in order to carry out the testator's intention, the gift over must be construed, not as a contingent remainder, but as an executory devise, so as to enable all the son's children in existence at the date of the order, or born or to be born thereafter, to share in the property on their attaining twenty-one or marrying.

By his will, dated the 28th of November, 1870, James Henry Fysh gave and devised certain real estate in the parish or lordship of Tilney All Saints and Tilney St. Lawrence, in the county of Norfolk, in the following terms:—

"I give and devise unto my son James Henry Fysh all my messuages, lands, tenements, and hereditaments situate in the parish or lordship of Tilney All Saints and Tilney St. Lawrence, in the county of Norfolk, as the same are now in the occupation of Stephen Gregory, and of what nature or tenure soever the same may be, to hold the same unto my said son for his natural life, and from and after his decease I give and devise the same estates unto, between, and amongst all and every the child and children of my said son, whether now or hereafter to be born, who shall live to attain the age of twenty-one years, or who, being a daughter, shall marry under that age, to hold the same to such child or children, if more than one, in equal undivided shares as tenants in common, and not as joint tenants, and to his, her, or their several and respective heirs and assigns for ever." And after devising certain other real estates to his daughters and their children, the testator provided as follows:—"And in case my said son or either of my said daughters shall depart this life without leaving lawful issue, or, leaving issue, all such issue shall depart this life under the age of twenty-one years and without leaving issue, then I give and devise the estates hereinbefore given and devised to such son or daughter so dying or whose issue shall so fail unto the survivors or survivor of my said children in equal undivided shares, and to the issue of such survivors or survivor, to hold to them, him, or her and their, his, or her issue for such and the same estates and interests therein, and subject in all respects to the same charges and restrictions as are herein declared with respect to the estates by this my will originally given and devised to such surviving children or child. I hereby expressly declare and direct that neither of them, my said son or daughters, shall have any power to sell, dispose of, mortgage, charge, or otherwise anticipate his or her life estate and interest in the estates hereby given and devised to such son or daughters respectively, or the rents or income arising from the same. And in case my said son or daughters, or any or either of them, shall attempt to sell, dispose of, mortgage, charge, or anticipate the same, or in case such son or daughters shall become bankrupt or insolvent, or the estates hereby given or devised to such son or daughters shall be taken in execution by any process of law for the benefit of any creditors or creditor, then I hereby declare that the gift and devise thereof to such son or daughter shall immediately become absolutely void and cease as if such son or daughters were then actually dead, and that the estates so given and devised to such son or daughter shall thenceforth absolutely vest in and belong to the person or persons who, under the devises and limitations hereinbefore contained, would be next entitled thereto."

On the death of the testator, on the 23rd of February, 1879, J. H. Fysh took possession of the property, and by an order made on the 9th of December, 1887, in an action of *Lickorish* v. *Fysh*, J. S. Lickorish was appointed receiver of the rents, profits, and moneys receivable by the said J. H. Fysh in respect of his interests under the will.

By an order of the 2nd of March, 1888, made in an action of *Gregory* v. *Fysh*, it was by consent ordered that S. Gregory, who had recovered judgment against J. H. Fysh for £545 3s., should be appointed receiver of the rents and profits of the said real estate at Tilney All Saints and Tilney St. Lawrence.

James Henry Fysh was twice married. By his first marriage, which took place on the 19th of August, 1862, he had two children, the plaintiff, Mary Harper Blackman, who was born on the 7th of October, 1863, and Alice Fysh, born on the 18th of May, 1871, besides others who died as infants. By his second marriage, which was celebrated on the 30th of December, 1887, he had two children, Ernest James Fysh, who was born on the 24th of June, 1888, and Frank Horton Fysh, born on the 20th of September, 1889.

The plaintiff claimed a declaration that the life interest of J. H. Fysh had ceased, and that she and her husband were absolutely entitled to the property.

Renshaw, Q.C., Macnaghten, and *A. J. Chitty,* for the plaintiff.—The life estate of J. H. Fysh ceased when the first receivership order was made or when he consented to the second order: *Ex parte Evans,* 28 W. R. 127, 13 Ch. D. 252; *In re Pope,* 34 W. R. 654, 693, 17 Q. B. D. 743; *In re Shephard,* 38 W. R. 133, 43 Ch. D. 131; *Hurst* v. *Hurst,* 31 W. R. 327, 21 Ch. D. 278; *Craven* v. *Brady,* 17 W. R. 505, L. R. 4 Ch. 296. The limitation over thereupon took effect as a contingent remainder in favour of the plaintiff, who alone had attained twenty-one: *Festing* v. *Allen,* 12 M. & W. 279, 5 Hare, 573; *In re Lechmere and Lloyd,* 18 Ch. D. 524, 30 W. R. Dig. 225. [KEKEWICH, J., referred to *Miles* v. *Jarvis,* 24 Ch. D. 633, 32 W. R. Dig. 231, and *Marshall* v. *Gingell,* 31 W. R. 63, 21 Ch. D. 790.] *In re Bedson's Trusts,* 32 W. R. 410, 25 Ch. D. 458, 33 W. R. 386, 28 Ch. D. 523; Jarman on Wills, 4th ed., p. 864; *Doe d. Woodall* v. *Woodall,* 3 C. B. 349. The will is not affected by the Contingent Remainders Act, 1877.

Methold, for the children born after the receivership order.—The life estate ceased and the limitation over took effect as an executory devise in favour of all the children of J. H. Fysh born before or after the date of the order: Fearne on Contingent Remainders, 10th ed., pp. 17, 263; *Cogan* v. *Cogan,* 1 Cro. Eliz. 360. A remainder cannot be created by proviso: *Brandon* v. *Aston,* 2 Y. & Coll. C. C. 30; *Sulley* v. *Barber,* 59 L. T. N. S. 824, 37 W. R. Dig. 200; *Duppa* v. *Mayo,* 1 Wm. Saunders 288; 8 & 9 Vict. c. 106; s. 8, 32 Hen. 8, c. 34.

Richings, for the second daughter.—The limitation over takes effect in favour of the plaintiff and the second daughter only.

Swinfen Eady, for J. H. Fysh.—The receivership orders do not amount to a taking in execution. Our life estate was a legal estate, and the creditor ought to have issued an *elegit*. The orders were therefore improper, as no receiver was necessary. When we consented to the second order that was not an "attempt to dispose" of the estate. It could only be an "attempt" if it would have been effectual but for this clause. Receivership orders are only equitable execution in certain cases, not in all, and they are not a taking in execution by process of law, so the estate was not forfeited: *Neate* v. *The Duke of Marlborough*, 3 My. & Cr. 407; *Ex parte Charrington*, 37 W. R. 130, 22 Q. B. D. 187; *Manchester and Liverpool District Banking Co.* v. *Parkinson*, 37 W. R. 264, 22 Q. B. D. 173; *Hatton* v. *Haywood*, 22 W. R. 356, L. R. 9 Ch. 229; *Anglo-Italian Bank* v. *Davies*, 27 W. R. 3, 9 Ch. D. 275; *Graham* v. *Lee*, 5 W. R. 328, 23 Beav. 388.

Edward Clayton, for the trustee in bankruptcy of the plaintiff's husband.

Renshaw, Q.C., in reply.—The orders are good and made by a court of competent jurisdiction; they cannot be questioned now. The testator intended the estate to go over if the personal enjoyment of it was interfered with. The first part of the will creates a contingent remainder, and a clause accelerating the interests cannot turn it into an executory devise. If it is an executory devise the class was fixed at the date of the first order, when the plaintiff had already attained twenty-one, and no children born after that time can take.

KEKEWICH, J.—This will gives rise to some questions of considerable difficulty, depending, not on the language of the testator, which, if read with reference to what has occurred and the claims set up, is apparently easy, but, in consequence of events which have happened—events which were contemplated by the testator himself—the two questions which call for decision, though intimately connected, are really independent. The first being whether, by reason of the receivership orders, or either of them, the defendant, J. H. Fysh, has forfeited his life interest. Of course, I use the word "forfeited" in the common sense, without reference to the particular language of the will, which does not employ the word "forfeiture." J. H. Fysh is made tenant for life with remainder to his children. To that remainder I shall have to return presently. The testator, after having disposed of the property in that way, and said all that he thought necessary about the remainders, provides against any disposition by his son of that estate for life. In doing so he refers, not only to the son's estate, but to the estates given to the daughters of a like character, and makes one comprehensive clause which, without being otherwise than in ordinary form, is rather a collection of forms than one form. It begins by declaring and directing that his son (reading it as applicable to the son only) shall not have power to sell or otherwise anticipate his life estate. I read that as an introductory paragraph expressing the object of the testator in what he is proceeding to do, and construing what he afterwards proceeds to do. Then he goes on to direct that if his son shall attempt to sell or anticipate his life interest [his lordship here read the clause] it shall go over in the manner which gives rise to the second question. Reading that by the light of his introductory paragraph I cannot doubt that he contemplated and wished to provide against his son being voluntarily or otherwise deprived of what has been called the personal enjoyment of the estate. That is the object of all these clauses, to secure the personal enjoyment to the donee, and to insist on the estate for life not going to a trustee in bankruptcy or other person who would interfere with that enjoyment. Reading it in that way I do not feel so much difficulty in the words "taken in execution by any process of law." On the 9th of December, 1887, a receivership order was made at the instance of Lickorish, a judgment creditor of J. H. Fysh, and he (Lickorish) was appointed receiver of the estate to a limited extent, so that for a time, and to a certain extent, J. H. Fysh was deprived of the estate. As, in my opinion, that order is sufficient to work a forfeiture, I think it unnecessary to say any more about the other order, which has peculiarities of its own not more favourable to the debtor. It is said that the former order is not a taking in execution by any process of law or for the benefit of creditors. The estate is taken, is taken by a process of law; the order stands and must be accepted as good. The estate is taken by a process of law, and it is taken for the benefit of a judgment creditor. The only question that remains is whether it can be strictly said to be "taken in execution." What is the meaning of "taken in execution"? Read irrespectively of authorities it means taken by process of law for the enforcement of a creditor's right in order to give effect to the rights of the creditor. So read there can be no doubt that it was so taken. It is said that the testator has used a technical phrase, and it must be read strictly, and that the appointment of a receiver is not execution. It has been called equitable execution over and over again. In *In re Pope* it was clearly declared to be a form of execution, and it was explained how that was. In the later case of *In re Shephard* there are no doubt strong expressions to show that it is not to be regarded as execution. Fry, L.J., says: "The idea that a receivership order is a form of execution is, in my opinion, erroneous"; but he explains this later on when he says: "It has often been spoken of by judges as equitable execution, but I am afraid that this concise expression has led to the erroneous idea that the appointment of a receiver is a form of execution which can be obtained without showing to the court the existence of the circumstances creating the equity, on which alone the jurisdiction arises," and that may be read as meaning that it is a form of execution, but is not execution of the particular character with which the court was then dealing.

It is only right to have regard to the particular case in hand, and not to extend the language of judges to a different state of facts from that before them. There they were determining whether the appointment of a receiver belonged to that class of executions by which a debt is enforced without any notice to the judgment debtor. They held that it was not equitable execution, but something different; equitable relief subject to the rules of equity, one of which is that the party must be summoned before the court and have an opportunity of being heard. That was really the question they had to consider, and I cannot take it that they determined that in an instrument such as this, where one must have regard to the intention of the testator, a receivership order which deprives a tenant for life of the enjoyment of his estate is not a taking in execution by any process of law for the benefit of a creditor. In that very case one of the Lords Justices pointed out that you may have a receivership order even at the instance of a legal mortgagee if circumstances justify it. So here, although apparently the tenant for life had the legal estate and the judgment creditor might and ought to have issued an *elegit*, I must, as there is the receivership order not touched, take it for granted that the judgment creditor was entitled to the receivership order. That being so, this proviso operates to deprive the tenant for life of his estate as from the date of that order.

The testator has given this property to J. H. Fysh for life, and then, by words which admit of no doubt, any doubt at least that has been suggested in argument, has given the property to the son's children, to sons at twenty-one and to daughters at twenty-one or marriage, in the common form of gift. If, therefore, I can find that the son is dead, I know to whom the estate will go, that is to his children to be ascertained at his death, or within a few months of it, and it is only those who take, and they will take vested interests at twenty-one or marriage. There is no doubt about that. Then, having determined the life estate on an event which he contemplates, and which has happened, the testator says what is to happen to the property in that event. Mr. Renshaw says that he has done so in a form meant to meet the case and avoid difficulties, but I hope there is a more modern and better form. There is a form common in settlements where the wife's property, after failure of her issue, is limited to her next of kin, according to the Statute of Distribution, excluding her husband. The form has often been tested, and is well understood. This form is intended to answer the same purpose. It is not perfect. The difficulty is that it contemplates as an actual event what is not an actual event. That is a necessary element in the case which has to be faced. Then one has to consider that the form ought to tell who are to take, not only in the events contemplated by the earlier part of the will, but at the time mentioned in the latter part, when the estate has determined on the occurrence of the unnatural event. The clause fails to do that with precision. The testator regards his son as actually dead, and says that the estate is to vest in the persons who, under the limitations hereinbefore contained, would be next entitled thereto. He does not say, as in the form I referred to, "to the persons who would have been entitled thereto if he had died at that moment"; but he expressly refers back to the devises hereinbefore contained. Who are the persons who would have been so entitled? All the children who attained twenty-one or married; there is no question about that. The clause seems to me to mean that the son is to be regarded as dead, and the estate is to go over as if he were dead to the persons specified in the will. The question is, Can they take? If this is a contingent remainder they cannot, because there is no estate to support the contingent remainders, and the will is before the late Act. Therefore, the one child who had attained twenty-one, the only child who had attained that age on the 9th of December, 1887, would take the whole in fee. That depends on *Festing* v. *Allen*. Both Mr. Renshaw and Mr. Methold relied on the definition of a remainder given by Mr. Jarman, which is also to be found in the same words in other books. It is an "estate which is so limited as to be immediately expectant on the natural determination of a particular estate of freehold limited by the same instrument." I have been referred to the case in Croke's Elizabeth, and to the remarks of Mr. Fearne upon it, and they point to and support the conclusion that you cannot have a remainder by proviso—that is to say, you cannot determine an estate by proviso so as to make the estate which comes in by virtue of the proviso a remainder.

That is the result of the authorities. If you can construe it as a remainder the difficulty is out of the way, but here I cannot do that, and I must rely on the case before the late Master of the Rolls, *In re Lechmere and Lloyd*, and on *Miles* v. *Jarvis*, which show that if you can give effect to the intention of the testator by construing the clause as an executory devise you ought to do so rather than defeat that intention. Here his intention to benefit all the children is clear, and if I construe the proviso as a remainder I exclude some of them and defeat his intention. I therefore come to the conclusion that the proper way to construe the will is to hold that the proviso creates an executory devise and not a remainder. Then who is to take? The plaintiff had attained twenty-one on the 9th of December, 1887, so she undoubtedly takes a share. Another daughter was *in esse* at that time, so she also takes if she attains twenty-one. Of Mr. Methold's clients one was *in esse* in the eye of the law and the other was not, but I think they must all be let in, as well as any children of J. H. Fysh who may be born hereafter. If it were a remainder the rule is stated at page 313 of Fearne on Contingent Remainders, "Where a contingent remainder is limited to the use of several who do not all become capable at the same time; notwithstanding it vests in the person first becoming capable, yet shall it devest as to the proportions of the persons afterwards becoming capable before the determination of the preceding estate." So if it were a remainder I should be obliged to let in those coming into being before the date of the order and no more. But construing it as an executory devise I am obliged to let in the whole of the children. That decision is assisted by *In re Bedson's Trusts*, where there was a bankruptcy, and the Court of Appeal affirmed Pearson, J., and let in the whole class. Pearson, J.'s judgment having been affirmed I do not think it otherwise than right to refer to what he said: "It is said that the words 'as if he was naturally dead' mean that the line is to be drawn at the date of bankruptcy, and that no child born after that date can possibly take any part in the fund. To my mind the proper meaning of the words is this, that the devolution is to take place in the same way as if the son had been then dead—that is to say, the fund is to devolve upon all his children who shall attain twenty-one."

That is what the testator here has intended and has said. So I must hold that not only the plaintiff but all the other children of J. H. Fysh take contingently on their attaining twenty-one or marriage.

Solicitors, *Collyer-Bristow, Russell, & Hill*, for *Leak, Till, & Stephenson*, Hull; *Field, Roscoe, & Co.*, for *W. R. D. Ward*, King's Lynn; *The Official Solicitor; Sayle, Carter, & Simpson; Ward, Perks, & McKay.*

Chan. Div. } Romer, J. } Feb. 19, 20.

KNOWLES v. SCOTT. (*a*.)

Company—Voluntary winding up—Liquidator, to what extent trustee—Companies Act, 1862, *s.* 138.

A liquidator in a voluntary winding up is an agent of the company, but not, strictly speaking, a trustee for, nor liable as such to, the creditors or contributories; and an action for damages will not lie against him for delay in handing over to a contributory his proportion of the surplus assets of the company, unless fraud, mala fides, *or personal misconduct can be proved against him.*

Dicta *of* Lord Selborne, L.C., *in* Black & Co.'s case, 21 *W. R.* 249, *L. R.* 8 *Ch.* 254; *of* James *and* Mellish, L.JJ., *in* In re Oriental Inland Steam Co., 22 *W. R.* 810, *L. R.* 9 *Ch.* 557; *and of* James, L.J., *in* In re London and Caledonian Marine Insurance Co., 27 *W. R.* 713, 11 *Ch. D.* 140, *explained.*

Trial of action.

This action was brought by a shareholder in the Leeds Forge Co. (Limited) against the liquidator

(*a*.) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

under a voluntary winding up of that company with a view to its reconstruction.

The company (hereafter referred to as the old company) had transferred all its business and assets to a new company, incorporated on the 5th of January, 1889, under the name of the New Leeds Forge Co., in consideration of a cash payment and a transfer of fully paid-up shares in the new company.

The plaintiff was entitled, in respect of his holding in the old company, to 400 fully paid-up ordinary shares in the new company, and also to a cash bonus of £6 per share.

The defendant received the cash payment from the new company in the early part of the year 1889, and the shares in the new company, to which he was entitled as liquidator, were held at his disposal as from March in that year, and on the 5th of April, 1889, he made his first transfer and payment to shareholders of the old company of the shares and cash payable to them.

The plaintiff alleged that he, or his solicitors on his behalf, had ever since the 16th of March, 1889, made frequent applications to the defendant for the shares and cash to which he was entitled, as he was desirous of selling them, the shares having risen to a considerable premium; that the liquidator had declined to accede to these applications, on the ground that 200 out of the 400 shares, and the bonus attributable to them, were the subject of a litigation then pending between the plaintiff and a Mr. Fox, and that the defendant could not deal piecemeal with the plaintiff's shares; and, further, that though the plaintiff had insisted on his right to the 200 shares which were unaffected by the litigation, and the bonus attributable to them, and had offered to give the defendant an indemnity in respect of them, the defendant refused either to pay the cash or transfer these shares. The plaintiff accordingly issued his writ on the 8th of November, 1889, claiming a declaration that the defendant was a trustee for the plaintiff of the 200 shares, and of all dividends declared thereon up to that date, and also of the bonus, amounting to £1,200, and an order on the defendant to transfer and pay the shares and cash, and damages.

On the 21st of January, 1890, the plaintiff received from the defendant a certificate for the 200 shares, and also the sum of £1,200, and a further sum of £97 10s. in respect of interim dividend received on the 200 shares; the action was therefore reduced virtually to an action for damages.

The plaintiff brought forward evidence showing that the shares had fallen considerably in value since the summer of 1889.

The defendant by his defence submitted that he was entitled to a reasonable time, after receipt of the shares and cash payable by the new company, within which to distribute the same among the shareholders of the old company, and that he had made the necessary transfers and payments within a reasonable time; and further alleged that he had never held or claimed to hold the shares or bonus, or to have any interest therein, except as liquidator, and that he had acted *bonâ fide* in the interest of, and as agent for, the old company, and submitted that he was under no personal liability to the plaintiff.

Haldane, Q.C., and *W. D. Rawlins*, for the plaintiff.—When a person fails to perform a duty undertaken by him in respect of another's property he is liable to the person injured by such failure, though there be no *mala fides*: Lewin on Trusts, 8th ed., p. 338. The defendant as liquidator was bound to obtain the shares and money from the new company and hand them over to the shareholders in the old company. A liquidator has repeatedly been spoken of as a trustee, and the property of a company in liquidation as trust property: *In re Oriental Inland Steam Co.*, 22 W. R. 810, L. R. 9 Ch. 557, 559, 560, *per* James and Mellish, L.JJ.; *Black & Co.'s case*, 21 W. R. 249, L. R. 8 Ch. 254, 262, *per* Lord Selborne, L.C.; *In re London and Caledonian Marine Insurance Co.*, 27 W. R. 713, 11 Ch. D. 140, *per* James, L.J. The damages must be assessed as in an action of detinue, to which this action at its commencement bore an analogy; and the plaintiff is entitled, as damages, to the difference in the value of the shares when first distributable and when received by the plaintiff: *Williams* v. *Archer*, 5 C. B. 318; *Williams* v. *Peel River Land, and Mineral Co.*, 55 L. T. N. S. 689, 35 W. R. Dig. 67; to which must be added interest on the bonus and dividends: 3 & 4 Will. 4, c. 42, s. 28; *Meredith* v. *Bowen*, 1 Keen, 270.

Chadwyck Healey, Q.C., *Grosvenor Woods*, and *W. B. Lindley*, for the defendant.—No precedent can be found for this action, because no such action lies against a liquidator. A liquidator is the agent of the company: *In re Anglo-Moravian Hungarian Junction Railway Co.*, 24 W. R. 122, 1 Ch. D. 130, 133; and no action lies against the agent of a disclosed principal for mere negligence or omission, the action being properly brought against the principal, unless there has been some active misfeasance by the agent: Story on Agency, 9th ed., p. 376; *Law* v. *Cotton*, 12 Mod. 472, 488, 1 Lord Raym. 646. Assuming that the liquidator was guilty of negligence (for the plaintiff does not charge him with fraud or *mala fides*) the company should have been made defendant: *De Rosaz* v. *Anglo-Italian Bank*, 17 W. R. 724, L. R. 4 Q. B. 462; so a liquidator sues in the name of the company: Companies Act, 1862, s. 95. A liquidator, though subject to certain obligations imposed by statute, is not, strictly speaking, a trustee, and cannot be held to be in the position of a trustee so far as to be liable to creditors and contributories in respect of delay in getting in and distributing the assets. [They distinguished the cases relied on by the plaintiff as to a liquidator being a trustee, and the property of a company in liquidation being trust property.] The plaintiff could have asked for an allotment of the shares under the Companies Act, 1862, s. 138. As to damages, *Williams* v. *Peel River Land and Mineral Co.* decides that the difference in value asked for by the plaintiff is the maximum, not that it should be given in all cases. The sums on which the plaintiff asks for interest do not come within the statute.

Haldane, Q.C., replied.

ROMER, J.—In my judgment this action fails. It is an action, brought by a shareholder against the liquidator of a company in process of being wound up voluntarily, for damages arising from delay in delivering up to the plaintiff his proportion of cash and shares forming part of the company's assets, such delay being attributed to the negligence of the liquidator.

It is admitted that it is not a case of dishonesty or fraud, or of the liquidator knowingly and wilfully, in other words *malâ fide*, declining to hand over to the plaintiff his proportion of the assets. At most it is only a case of a liquidator making an honest mistake in judgment. That being so, I need not consider the exact circumstances of the case on which the defendant relies, as showing that in fact he was justified in what he did, and had been guilty of no negligence. For, in my opinion, even assuming the plaintiff's case as I have stated it to be correct, such an action as this cannot be maintained against a liquidator. The action is certainly novel; admittedly there is no precedent for it. The ground on which it is based is

that the defendant as liquidator is a trustee for the plaintiff of his proportion of the assets in the liquidator's hands, and is liable as a trustee for negligence. In my judgment a liquidator is not a trustee in the strict sense of the word, nor is he subject to such liability as is contended for by the plaintiff. The consequences would be very serious if such a doctrine were to be upheld. If a liquidator were held to be a trustee for each creditor or contributory of the company, his liability would indeed be onerous, and would render the position of a liquidator one which few persons would care to accept.

On the plaintiff's behalf reference has been made to the *dicta* of distinguished judges in various cases, which describe a liquidator as a trustee, or as holding assets of his company in trust. No doubt, in a sense and for certain purposes, a liquidator may fairly enough be described as a trustee; but he is not, in my judgment, a trustee in the strict sense in which the plaintiff must use the term to enable him to succeed in this action. A director is not a trustee for the shareholders of the company, though he is often spoken of as a trustee, and no doubt rightly enough for certain purposes. The cases to which the plaintiff referred were *In re Oriental Inland Steam Co.; Black & Co.'s case*, and *In re London and Caledonian Marine Insurance Co.* In the first case James, L.J., used the expression "trust property," but that was with reference to the case then before the court; and, in my opinion, the Lord Justice used that phrase in order to point out that the property of the company had ceased to belong beneficially to the company after it had been wound up. In that case also a liquidator is spoken of as holding the assets fixed by the Act of Parliament, subject to a trust for equal distribution amongst the creditors, and it is said that the 95th section of the Act of 1862 constitutes "a trust for the benefit of all the creditors." These expressions are, however, evidently used, not in a general sense, but, and no doubt correctly, as showing that a liquidator holds the assets with certain obligations resting on him, and are obviously not intended to apply to a case like the present, nor was it intended to describe the liquidator of a company as a trustee for each creditor or contributory of the company.

In *Black & Co.'s case* the expression used is that the liquidator is "a statutory trustee." That phrase again was, I think, used, not in the sense contended for by the plaintiff, but with reference to the powers of a company and of its directors as distinguished from the powers of a liquidator, and I take it as intended to point out what the duty of the liquidator is. In *In re London and Caledonian Marine Insurance Co.* James, L.J., in pointing out that possibly a creditor who had not been paid his debt might have his remedy against the liquidator personally, confined his observations to a case where the liquidator had acted "knowingly and wilfully," or to a case where he had been guilty of bad faith or gross or personal misconduct.

In my view a voluntary liquidator is more correctly described as the agent of the company, an agent who has, no doubt, cast upon him, by statute and otherwise, special duties, amongst which may be mentioned the duty of applying the company's assets in paying creditors and distributing the surplus among the shareholders. James, L.J., referred to this as being his true position in the case of *In re Anglo-Moravian Hungarian Junction Railway Co.* If this be the true position of a liquidator (and I think that agency more nearly defines his true position than trusteeship), it is clear that he cannot as agent be sued by a third party for negligence, apart from misfeasance or personal misconduct.

It is said, if this be so, the plaintiff had no remedy. That is not the case. He certainly could have applied to the court under section 138 of the Companies Act, 1862. All I hold is, that a liquidator is not liable to an action for damages for delay in performing his duty when that delay was not wilful or fraudulent, and in no way arose from *mala fides* on his part.

The action therefore fails, and must be dismissed, with costs.

Solicitors for the plaintiff, *W. & J. Flower & Nussey*, for *Berry, Robinson, & Scott*, Bradford.

Solicitors for the defendant, *Chinery, Aldridge, & Co.*, for *T. & H. Greenwood Teale*, Leeds.

Q. B. Div. (Day and Lawrance, JJ.) April 24.

FECITT v. WALSH. (a.)

Sale of food—Adulteration of milk—Daily supply of milk under a contract—Samples taken from separate cans—Separate informations in respect of samples found to be adulterated—Evidence as to other samples—Effect of contract—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 9—*Sale of Food and Drugs Act,* 1879 (42 & 43 *Vict. c.* 30), *s.* 3.

The appellant entered into a contract with the guardians of a union to furnish a daily supply of milk at a certain price; the milk was to be tested on each delivery, and a reduction was to be made in the price if there should be less than a certain proportion of cream. An inspector of weights and measures, acting under section 3 *of the Sale of Food and Drugs Act,* 1879, *procured a sample from each of five cans in which the daily supply was being delivered. Two of the samples being found to be deficient in cream, two separate informations were laid against the appellant under section* 9 *of the Sale of Food and Drugs Act,* 1875, *one in respect of each of the two samples.*

Held, that it was right to lay separate informations; that the inspector was justified in taking separate samples; that the justices were justified in rejecting evidence as to the three other samples; and that, notwithstanding the contract, an offence had been committed against the statute.

Appeal from a conviction under the Sale of Food and Drugs Acts, by way of a case stated by justices under 20 & 21 Vict. c. 43.

The appellant, who was a contractor for the sale of milk, entered into a contract with the guardians of a poor law union to provide a daily supply of new milk free from adulteration at the price of eightpence per gallon.

By the terms of the contract the milk was to be tested on each delivery, and it was provided that whenever it should contain less than six degrees of cream, one penny per gallon was to be deducted from the price for every degree less than six.

The respondent, who was an inspector of weights and measures, acting under section 3 of the Sale of Food and Drugs Act, 1879, procured samples from each of five cans in which the daily supply was being delivered. The samples having been analyzed two of them were found deficient in cream, and thereupon two informations were laid against the appellant under section 9 of the Sale of Food and Drugs Act, 1875, which is as follows:—"No person shall, with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

article so altered without making disclosure of the alteration, under a penalty in each case not exceeding twenty pounds." The appellant desired to give evidence as to the analysis of the three other samples, but the justices refused to admit such evidence, and convicted the appellant, adjudging him to pay a fine of £10 and costs in each case. The questions for the opinion of the court were, first, whether it was right to lay separate informations; secondly, whether it was right to take separate samples from the five cans; thirdly, whether the justices were right in rejecting evidence as to the three other samples; fourthly, whether, having regard to the contract, any offence had been committed against the statute.

Little, for the appellant.

Poland, Q.C., and *W. H. Cross*, for the respondent.

DAY, J.—The first question which we have to decide is, whether more than one information could properly be laid. The milk, which was in course of delivery to the union under a contract, was in five cans, which was the usual daily supply. As between the appellant and the union, it would seem that each day's transaction constituted one sale. But we have here to deal with section 3 of the Sale of Food and Drugs Act, 1879, which says that an inspector or a constable "may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk." That is what the officer did in this case: he procured several samples, one from each of the five cans.

The section goes on to say that proceedings are to be taken "in like manner in all respects as if such officer, inspector, or constable had purchased the same from the seller or consignor under section 13 of the principal Act." So far as the officer was concerned there were five separate transactions; the effect of the Act is that he is to be deemed to have been the purchaser in each case. Therefore an information would lie in each case. The answer to the first question is, that more than one information could properly be laid.

The second question is, whether the officer was justified in taking separate samples. It is said on the part of the appellant that the milk was only divided into five parts for convenience in delivery, and that if all the milk had been put together, and a sample taken from the whole, it might have been found to contain a sufficient amount of cream; and that by the terms of the contract provision was made for testing each day's supply, and any deficiency in cream was to be met by a reduction in the price. But it is clear that the contract has nothing to do with the matter, and the officer was justified in proceeding on each sample separately.

The third question is, whether the appellant was entitled to give evidence as to the other samples. In my opinion, the result of any analysis of the other samples was quite immaterial, and the justices were right in refusing the evidence.

The fourth question is, whether, having regard to the contract, there was any offence under the statute. It is said that the contract is an answer to the charge that the milk was sold "without making disclosure of the alteration." But, as I have already said, I think we have nothing to do with the contract.

I am of opinion that the appeal must be dismissed.

LAWRANCE, J., concurred.

Appeal dismissed.

Solicitor for the appellant, *J. W. Rudd.*

Solicitors for the respondent, *Ridsdale & Son*, for *Hulton*, Preston.

Q. B. Div. (A. L. Smith and Grantham, JJ.) April 9, 10, 15.

KUTNER v. PHILLIPS. (a.)

City of London Court—Jurisdiction—Defendant having "employment" within City—Jurisdiction of court—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 74, 185—*London (City) Small Debts Extension Act*, 1852 (15 & 16 *Vict. c. lxxvii.*), *s.* 39.

The City of London Court has jurisdiction to try an action when the defendant has "employment" within the City of London, although he does not dwell or carry on business therein, and although no part of the cause of action arose therein, as section 39 *of the London (City) Small Debts Extension Act*, 1852, *which gave this extended jurisdiction, has not been repealed by any of the subsequent County Court Acts, but is still in force.*

Summons for a prohibition referred to the court by Pollock, B.

The summons was taken out, on behalf of the defendant in the action, for a writ of prohibition directed to the judge of the City of London Court and the plaintiff in the action, to prohibit any further proceedings in the action, upon the ground that the City of London Court had no jurisdiction to hear the action.

A default summons had been taken out in the City of London Court for a sum of £38, for money lent and interest.

No part of the cause of action arose within the City.

The plaintiff resided in Manchester, and the defendant resided in Lambs' Conduit-street, Holborn, outside the City of London, but he was "employed" as a clerk to a merchant in the City, so that he had "employment" within the City.

At the trial in the City of London Court objection was taken on behalf of the defendant that the judge had no jurisdiction to hear the action, as the defendant did not dwell or carry on business within the City, and no part of the cause of action arose therein. The learned judge held that he had jurisdiction, inasmuch as the defendant had "employment" within the City, and that was sufficient to give the City of London Court jurisdiction under section 39 of the London (City) Small Debts Extension Act, 1852.

During an adjournment of the hearing the present summons for prohibition was taken out on behalf of the defendant, and the question was whether section 39 of the above Act of 1852 was still in force, or whether that section was not repealed by the later County Courts Acts, and more especially by section 74 of the County Courts Act, 1888.

Section 39 of the London (City) Small Debts Extension Act, 1852 (15 & 16 Vict. c. lxxvii.), provided: "Such summons may issue provided the defendant or one of the defendants shall dwell or carry on business or have employment within the City of London or the liberties thereof at the time of the action brought, or provided the defendant or one of the defendants shall have dwelt or carried on business or shall have had employment therein at some time within six months next before the time of the action brought, or if the cause of action either wholly or in part arose therein."

Section 74 of the County Courts Act, 1888, is substantially the same, except that it does not give jurisdiction where the defendant has employment within the district of the court, but only where he dwells or carries on business within the district, or

(a.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

where the cause of action arose wholly or partly within the district.

The arguments in the case sufficiently appear in the judgment.

C. C. Scott, for the defendant, in support of the application.

Sir R. E. Webster, *A.G.*, *Danckwerts*, and *Rubie*, for the judge and the plaintiff, against the application.

Cur. adv. vult.

April 15.—A. L. SMITH, J., read the following judgment:—

This is an application by the defendant for a writ of prohibition, directed to the plaintiff and the judge of the City of London Court, to prohibit further proceedings in this action, which was being prosecuted by means of that which is technically known as a default summons, upon the ground that, inasmuch as the defendant did not dwell or carry on business within the City of London or liberties thereof, but only had employment therein, the court had no jurisdiction to entertain the plaint.

In the year 1847, by the statute 10 & 11 Vict. c. lxxi., s. 40, jurisdiction was given to the court now called the City of London Court over defendants dwelling or carrying on business within the City or the liberties thereof.

In the year 1852 this jurisdiction was expressly enlarged, and by section 39 of the London (City) Small Debts Extension Act, 1852 (15 Vict. c. lxxvii.) it was enacted that a summons upon plaint might issue from the court "provided the defendant or one of the defendants shall dwell or carry on business or have employment within the City of London or the liberties thereof at the time of the action brought, or provided the defendant or one of the defendants shall have dwelt or carried on business or shall have had employment therein at some time within six months next before the time of the action brought, or if the cause of action either wholly or in part arose therein."

It was surmised at the bar that the reason for this extension of jurisdiction was that at this time many persons had ceased as theretofore to reside within the City, and as the court was supported by fees the extended jurisdiction was given to keep up the efficiency of the court; but, be this as it may, this extended jurisdiction was then in fact expressly given by statute. The question for determination is, has it since been taken away, or, in other words, has this section, which gave the extended jurisdiction, been repealed in whole or in part.

It is admitted on the part of the applicant that there has been no express repeal of this section; but it is argued that by reason of the legislation which has since taken place, and especially by reason of the provisions of the County Courts Act, 1888 (51 & 52 Vict. c. 43), it has been repealed by implication. Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with, or repugnant to, the provisions of an earlier one, that the two cannot stand together, in which case the maxim "*leges posteriores priores contrarias abrogant*" applies: 2 Inst. p. 685.

Unless the Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together: see *Thorpe* v. *Adams*, 19 W. R. 352, L. R. 6 C. P. 125.

Lord Coke in *Gregory's case*, Coke's Rep. Part 6, 19b, lays it down that "a later statute in the affirmative, shall not take away a former Act, and *eo potius* if the former be particular and the later general." Lord Hardwicke in the case of *Middleton* v. *Crofts*, 2 Atk. 650, at p. 674, is to the same effect.

This being the law, it now becomes necessary to examine the legislation which has taken place since 1852, and especially the County Courts Equitable Jurisdiction Act of 1865 (28 & 29 Vict. c. 99), the County Courts Acts Amendment Act of 1867 (30 & 31 Vict. c. 142), the County Courts Act of 1875 (38 & 39 Vict. c. 50), and the last Act relating to county courts, being the Consolidation Act of 1888 (51 & 52 Vict. c. 43).

By the County Courts Equitable Jurisdiction Act, 1865, equitable jurisdiction was granted to the City of London Court, therein called the City Court, in the same way and to the same extent as it was then granted to the county courts. There is nothing in this Act or in the rules framed thereunder in any way to suggest that the jurisdiction of the City Court was in any way altered or affected. By the County Courts Act Amendment Act, 1867, procedure by way of default summons was first given to the county courts and the City Court (see section 2), and the name of the City Court was thereby altered to that of the "City of London Court." By section 35 of this Act it was enacted that "the rules and orders in force for the time being for regulating the practice of and costs in the county courts, and forms or proceedings therein, shall be in force in the City of London Court," to the exclusion of any rules and orders now in force in that court; and the same fees shall be taken for proceedings in which jurisdiction is hereby given to the court as upon similar proceedings in the county courts, and such fees shall be applied in the same manner as the fees taken under the provisions of the said Act of 1852; provided that nothing in this Act, or in any of the Acts specified in Schedule D to this Act, shall take away, lessen, or diminish any of the powers, rights, or privileges of the judge of the said court, or the authority of the mayor, aldermen, and commons of the City of London in common council assembled in relation to such court, or to the judge or officers thereof, or to the fees taken therein, as such powers or authority existed previously to the passing of this Act."

Here I find a recognition of the City of London Court, and, as it seems to me, of its jurisdiction as granted by the Act of 1852. There is nothing in the rules or forms inconsistent with such jurisdiction, but, what is more, I find that by section 33 of the Act of 1867 five of the sections of the Act of 1852, namely, sections 118 to 122 inclusive, are expressly repealed, leaving wholly untouched the 39th section, which gave the extended jurisdiction to the court. There can, I apprehend, be no doubt that up to this date, at any rate, the City of London Court retained its extended jurisdiction unimpaired. The Act of 1875 further dealt with default summons, and left the matters of jurisdiction untouched.

I now come to the Act of 1888, and it was upon this that Mr. Scott mainly relied on behalf of the defendant. He said that section 185 was the section which now regulated the procedure of the City of London Court; that by this section it was provided that "the rules and orders in force for the time being for regulating the practice of and costs in the county courts, and forms of proceedings therein, shall be in force in the City of London Court to the exclusion of any other rules and orders"; that section 74 of the Act only applied to defendants dwelling or carrying on business within the jurisdiction of the county courts, and that the rules and forms—namely, rule 9 of order 5, and form 15, and

rule 10 of order 5, and form 14—were only applicable to defendants dwelling or carrying on business within the jurisdiction, and were wholly inapplicable to a defendant who had only employment therein, and consequently, as by section 185 these rules, to the exclusion of all others, were those now in force in the City of London Court, it must be taken that the court had no longer any jurisdiction to proceed against a defendant who only had, or had had, employment within the City, and that the part of section 39 of the Act of 1852, at any rate, which gave jurisdiction over defendants employed within the City, must be held by implication to be repealed. The answer of the Attorney-General to this argument was conclusive. He first pointed out that section 185 in the Act of 1888 was all but identical with section 35 in the Act of 1867, where, as already stated, the jurisdiction was left untouched. He next pointed out that section 185 of the Act of 1888 in terms recognized the Act of 1852 as existing, and not by way of repeal; that section 74 of the Act of 1888 was in a part of the Act relating to "procedure and trial," and not to "jurisdiction"; that the Act of 1888 was a consolidation Act repealing the County Courts Acts from 1846 downwards, and re-enacting the material parts thereof; and that the rules and forms drafted thereunder were drafted to fit the county courts of the kingdom in general, and not the special jurisdiction of the City of London Court; and last, but by no means least, he pointed out that such a point as the present was expressly met by rules 24 and 28 of order 51, which, in my opinion, really concludes the matter.

There is, in my judgment, no foundation for the suggestion that the jurisdiction of the City of London Court, granted by the Act of 1852, has been repealed by implication.

Mr. Scott referred to the case of *Blades and another* v. *Lawrence*, 22 W. R. 643, L. R. 9 Q. B. 374, as showing that the City of London Court was now identical with the county courts as to jurisdiction. In my judgment it in no way touches the point now under discussion—namely, the jurisdiction of the City of London Court—and all that case decided, or was intended to decide, was that the judge of that court was to be proceeded against by rule, and not *mandamus*, since that was the procedure applicable to county courts, the City of London Court amongst the number, and that case is entirely beside the point of what defendants the court has jurisdiction over.

Mr. Danckwerts had also another point; it was this:—By section 22 of the Act of 1852 nineteen-fortieths of the fees were to be the judge's fees, nineteen-fortieths to be the clerk's fees, and two-fortieths were to be the high bailiff's fees, and in certain events the Corporation of London would be entitled to them, having in that event to pay the judge and officers. If, said Mr. Danckwerts, the extended jurisdiction is to be taken away, as the applicant now desires, obviously the fees coming to the corporation would be diminished, and that would be a lessening or diminishing of the rights or privileges or authority of the corporation within the meaning of the proviso to section 185, which are therein expressly reserved, and that, therefore, shows also that by the Act of 1888 it never was intended to curtail the jurisdiction granted by the Act of 1852.

But whether this be so or not, in my judgment this application must be refused, with costs here and below.

GRANTHAM, J., delivered a written judgment to the same effect, basing his judgment upon the broad ground that you cannot take away the jurisdiction given to a court in distinct terms by Acts of Parliament by mere inference or implication from passages in subsequent Acts, unless the language of those Acts makes the continued existence of the jurisdiction absolutely inconsistent with the subsequent legislative enactments.

Application for prohibition refused.

Solicitors for the applicant, *Judge & Priestley.*

Solicitor for the judge and the plaintiff, *The City Solicitor.*

Q. B. Div. (Cave and Jeune, JJ.) March 9.

HENDERSON v. UNDERWRITING AND AGENCY ASSOCIATION (LIMITED). (a.)

Practice—Action on marine policy of insurance—Discovery—Part transit over land—Appendix K, No. 19.

In an action on a policy of insurance whereby certain goods were insured during their transit by post from Cadiz to Alexandretta, in Syria, the defendants sought to obtain from the plaintiff, prior to the delivery of the defence, the ordinary affidavit of ships' papers.

Held, that, inasmuch as the policy covered such portion of the transit as was by land as well as the portion which was by sea, the peculiar practice relative to the affidavit of ships' papers was not applicable, but that the defendants were entitled to discovery in the ordinary form under ord. 31, r. 12.

Appeal from chambers.

Action on a policy of insurance whereby the plaintiff insured with the defendant company two title deeds relating to certain houses and land at Aleppo in Syria, on their transit from Cadiz to Alexandretta, against certain perils, including peril of transit and conveyance and thieves. They were sent through the post, and in the course of their transit were lost.

Before delivery of the defence application was made at chambers for the usual order in actions on marine policies, namely, that the plaintiff should make an affidavit disclosing the ships' papers.

The master having refused the application the defendants appealed to Denman, J., at chambers, who referred the question to the court.

Hollams, for the defendants.—The question is whether or not this is a policy of marine insurance. The practice of granting discovery to underwriters on a policy of marine insurance has long been in existence, and has not been superseded by the Judicature Acts: *West of England and South Wales District Bank* v. *Canton Insurance Co.*, 2 Ex. D. 472, 26 W. R. Dig. 77; *China Steamship* v. *Commercial Assurance Co.*, 30 W. R. 224, 8 Q. B. D. 145. Grave inconveniences would arise if it is to be held that this was not a marine insurance because part of the transit was over land. When the substantial portion of the transit is by sea carriage the case is clearly one of marine insurance.

Scrutton, for the plaintiff.—The order here asked for would be an extension of the old practice of granting discovery in cases of marine insurance, and the defendants are entitled to nothing more than discovery in the ordinary form.

Hollams replied.

CAVE, J.—I do not think that this is a case to which the peculiar practice which prevails in marine insurance actions can be held to apply. No doubt the risk here is in some respects a marine risk; but that is

(a.) Reported by G. K. PALEY, Esq., Barrister-at-Law.

not enough. It would be proper, however, that the plaintiff should make an affidavit of documents in the ordinary form under ord. 31, r. 12, at once. To that much, I think, the defendants are entitled.

JEUNE, J., concurred.

Order accordingly. The defendants to have fourteen days to deliver defence after affidavit filed.

Solicitors for the plaintiff, *Harcourt & Sons.*

Solicitors for the defendants, *Waltons, Johnson, & Bubb.*

Court of Appeal.

From Chan. Div. June 3.

In re WITHALL. (a.)

Costs—Taxation—Solicitor—Negotiation fee—Commission paid by client to estate agent—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order, schedule I., r.* 11.

In 1874 *the owner of an estate in Devonshire appointed a local surveyor as the estate agent, with a view to its development as a building estate, and agreed that his remuneration should be two and a half per cent. on the purchase-money of all the land sold during his agency. In* 1884 *an offer to purchase a small part of the estate was made direct to the owner, and, the local agent being then ill, the negotiation for the sale was conducted, at the owner's request, by the owner's London solicitor, who went to Devonshire for the purpose. The local agent, however, assisted to some extent in the transaction by preparing plans and advising as to the price and as to the restrictive covenants to be imposed on the purchaser. On completion of the purchase, a sum of* £360 (*being two and a half per cent. on the purchase-money*) *was paid to the local agent by the vendor, on its being represented to the vendor that it was also remuneration for work done during the preceding ten years.*

Held, by the Court of Appeal (Lindley, Bowen, *and* Fry, L.JJ.), *affirming* North, J., *that this was "a commission paid by the client to an estate agent" within the meaning of rule* 11 *of the General Order under the Solicitors' Remuneration Act,* 1881, *and that the vendor's solicitor was not entitled to the scale fee for negotiating the sale under schedule I., part I.*

Appeal from North, J.

In 1874 Sir Percy Shelley, the owner of the Boscombe Estate, near Bournemouth, appointed a Mr. Hankinson, a local surveyor, to act in the general management of that estate with a view to its development as a building property, and agreed that his remuneration should be two and a half per cent. on the capitalized value, at twenty-five years' purchase, of the rents reserved by all leases granted during his agency, and two and a half per cent. on the purchase-money of all lands sold during the same period.

Mr. E. C. Withall (now deceased) had, during his life, acted as Sir P. Shelley's solicitor, and in May, 1884, Mr. Hankinson being at the time ill, Mr. Withall was informed by Sir P. Shelley that a proposal for purchase had been made to him, and Mr. Withall was requested to go down to Bournemouth. Mr. Withall accordingly went to Bournemouth and had several interviews with Sir P. Shelley and the solicitor of the intending purchasers, the Conservative Land Society, and also with Mr. Hankinson, and ultimately a part of the property was sold to the Conservative Land Society for £14,400 subject to certain restrictive covenants as to the character of buildings, roads, &c., which were to be defined by Mr. Hankinson.

It appeared from the evidence of Mr. Hankinson, who was cross-examined, that he assisted in the negotiations by preparing plans and advising Sir P. Shelley and Mr. Withall on almost every point that arose, especially as to the price and as to the restrictive covenants to be imposed on the purchasers. When the contract was completed Mr. Hankinson sent in a charge for £360, being two and a half per cent. on the £14,400, which charge Sir P. Shelley paid, on being reminded that the amount, although large, was "a remuneration for work done during the preceding ten years."

After the death of Mr. Withall his executrix sent in his bill of costs to the vendor for negotiating and carrying through the sale above mentioned, and the present litigation arose in respect of an item of £76 which was charged for as the scale fee for negotiating the sale, and which, on taxation, was allowed by the taxing master. Objection was taken by Lady Shelley, the legal personal representative of Sir P. Shelley (who had died), to the allowance of this item, on the ground that, as Mr. Hankinson had been paid a commission on the sale, the solicitor, Mr. Withall, was not entitled to charge a negotiating fee in respect thereof.

The taxing master overruled the objection, and (*inter alia*) stated the following as his reasons for so doing: "It appeared to me that this (the payment made to Mr. Hankinson) was not a payment in respect of this particular sale, which the surveyor (Mr. Hankinson) neither effected nor negotiated, but for general services rendered as a retained estate agent and manager who, instead of receiving an annual salary, was paid by a percentage, an arrangement calculated to give him a special interest in promoting the development of the estate, and that it was not such a payment as would disentitle the solicitor to his fee for a negotiation which he was specially retained to conduct, and did, in fact, successfully carry into effect, fixing the price and completing the contract. The position of the surveyor with regard to the sale was, in fact, that of a salaried agent, though, instead of an annual salary, he was paid by a commission, and I considered that the circumstances were not such as made the payment to him a payment to an "estate or other agent," within the meaning of rule 11 of the Solicitors' Remuneration Order. The magnitude of the fee paid to Mr. Hankinson, which is so greatly in excess of the ordinary surveyors' fee, is of itself sufficient to show that it was not made in respect of this particular sale, but for general services; and the agreement under which he made and was paid his commission would have equally entitled him to it even if he had never been consulted about the sale or interfered in it."

Rule 11 of the General Order made under the Solicitors' Remuneration Act, 1881, so far as material, provides that "the scale for negotiating shall apply in cases where the solicitor of a vendor or purchaser arranges the sale or purchase, and the price and terms and conditions thereof, and no commission is paid by the client to an auctioneer or estate or other agent."

On an application by Lady Shelley to have the taxing master's certificate varied, the following judgment was delivered by

NORTH, J.—I think in this case the taxing master has made a mistake. The question arises under rule 11, which says:—[His lordship read the rule, and continued:—] Mr. Hankinson in his affidavit says

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

this:—"The original offer was made direct to Sir Percy Shelley, and the negotiations were, in the first instance, conducted by his solicitor, Mr. Charles Withall. I was at the time recovering from an illness and unable to go to my office, but Mr. Withall attended on me on one or two occasions in company with Sir Percy Shelley and Mr. Bazalgette, the solicitor of the purchasers, at my private house, and I assisted in the negotiations by preparation of plans and advising." Then he is cross-examined, and he says:—"I remember the sale in 1884 to the Conservative Land Society. I prepared plans for it in relation to the negotiations, pending the negotiations before the signing of the contract, and gave advice to Sir Percy Shelley and his solicitor in relation to the negotiations on almost every point that arose. For instance, as to what price should be asked, which would require local knowledge which I possessed. I also advised that certain restrictions should be imposed as to building, and saw and had letters from Mr. Bazalgette, solicitor to the purchasers, pending the negotiations, dealing with the points which arose. I also saw and corresponded with Mr. Withall thereon. Mr. Withall brought Mr. Bazalgette with him to my house on one occasion."

As to that there is no dispute. It is not contradicted. Now Mr. Withall, the solicitor, is dead, but there is not the slightest reason for doubting the accuracy of the statement there made. It seems to me clear that he did take part in what went on with respect to the negotiations. Neither party found the purchaser. I do not think that, in itself, is material. If a vendor takes a proposed purchaser to his solicitor and says, "This man wants to buy my property, you negotiate the terms of it with him for me," the solicitor might earn the scale fee, although he did not find the purchaser in that sense. Mr. Withall, in point of fact, did, to a certain extent, conduct the negotiations, but, in my opinion, he did not do so entirely. There were certain points he could not carry out himself; he was in communication with Mr. Hankinson about them, and some correspondence took place between them. Further than that, the arrangement was only for a sale upon certain terms and conditions which were settled by Mr. Hankinson.

Under these circumstances, in my opinion, Mr. Hankinson was taking part in the negotiations, and he was doing work for which, beyond all question, but for the existing arrangement as to the mode of payment, he would have been entitled to be paid in some way—whether by commission or not, if there had been a special bargain about it, one cannot tell; that is to say, if he had been called in on this occasion he might or might not have been paid by commission. I do not think the commission would have been as large as he got in the present case, but I do not see any reason to doubt that he, at any rate, might have had a commission. Then we find that, although the negotiations are to a certain extent conducted by Mr. Withall, yet he does not conduct them altogether, and they are partly conducted by Mr. Hankinson.

Then it is said that the latter part of rule 11 prevents the scale applying because it says that the solicitor of the vendor is to arrange the terms, and no commission is to be paid to an auctioneer or estate or other agent. In my opinion, the commission was paid in this case in respect of this very matter to Mr. Hankinson because he was the estate agent. It is quite true that if he had not been called in at all he still would have been entitled to this commission in respect of some other work. That is perfectly true, and if he had not been called in or consulted at all on this occasion, the fact that he had received for other work a payment measured by the amount realized by the sale made by the solicitor would not make it a payment of commission within the meaning of the rule. But Mr. Hankinson has done part of the work, he did part of the business in conducting what had to be done between the time of the parties coming together and the time when the contract was completed; he has taken a material and essential part in it. I will not say that Mr. Withall could not have done it without him if it had been left to Mr. Withall alone, but it was not; Mr. Withall was obliged to get the assistance of Mr. Hankinson for the purpose. He was to be paid for that work beyond all question, and the bargain was that he was to be paid by commission on it. It is not the less a commission because the sum paid here covered other work done in respect of other matters as well as what was done on this occasion.

Now, the taxing master, in his answers to the objections, says that no doubt a payment was made to the surveyor, and if it were a payment made entirely in respect of this particular sale no question could arise, and he uses the phrase in two other passages in the answers. I do not think it is essential that the commission which is paid should be paid entirely in respect of the transaction in question. If a commission is paid in respect of that transaction, it is immaterial, in my opinion, whether the commission covers other things done by the same person or not. In my opinion, the taxing master ought not to have allowed the fee which is given as the payment for all the work, when part of the work was not done by the solicitor. It is impossible to say that the whole of the work was done by him without the intervention of an estate agent who was paid a commission. I think the taxing master was wrong in allowing the scale fee. But, on the other hand, I think Mr. Withall was entitled to some payment for what he did. As to that, I understand his right to make out a bill in respect of those matters is not disputed.

Mr. Withall's executrix appealed.

T. Rolls Warrington, for the appellant.—The payment by the client to Hankinson was not a commission paid in respect of the negotiation in the particular sale in question, but it was remuneration for general services; it was calculated, no doubt, as a percentage on the price obtained in this sale, but Hankinson, even if he had done nothing at all in respect of this sale, would nevertheless have still been entitled to receive this payment. The words "commission paid to an estate agent" in rule 11 mean a payment made to the estate agent for negotiating work done by him in respect of the sale for which the solicitor is also claiming the negotiating fee. That appears plain by looking at the earlier part of the same rule, as to payment of a commission to an auctioneer, which must mean payment in respect of the actual auction. [BOWEN, L.J.—The solicitor here utilized the knowledge and obtained the advice of the local agent, who was paid for his services by a payment which included this matter: *Re Wilson*, 29 Ch. D. 790, 34 W. R. Dig. 185.]

Cozens-Hardy, Q.C., and *D. L. Alexander*, for Lady Shelley, were not called on.

LINDLEY, L.J.—I think the construction put by North, J., on rule 11 is the right construction, and that the taxing master made a mistake in thinking, as he appears to have done, that the commission paid to the agent must be paid entirely in respect of the work done on the occasion of the particular sale. In the present case Mr. Withall obviously could not have got on with the work without the advice and assistance of the local agent, who had the local knowledge; and Hankinson had given advice in the very matter of this purchase, both as to the price to be

accepted and also by preparing plans and advising the vendor as to the insertion of restrictive covenants. Hankinson was paid for everything he had done, including this amongst other things.

I therefore think that the case comes within the words as well as the scope and meaning of rule 11, and I adopt the view of North, J., and the reasoning of his judgment in its entirety. The appeal must be dismissed, with costs.

BOWEN, L.J.—I agree.

FRY, L.J.—I am of the same opinion.

Solicitors for the appellant, *Hays, Schmettan, & Co.*

Solicitors for the respondent, *Blake & Heseltine.*

From Chan. Div. April 7.

In re PORRETT. (*a.*)

Practice—Solicitor—Costs—Taxation—Petition of course for delivery of bill of costs—District Registrar of Liverpool—Jurisdiction—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *ss.* 62-66—*R. S. C.*, 1883, *ord.* 35, *r.* 6a, *sub-rules* (1), (2); *ord.* 62, *r.* 18.

A registrar of the Liverpool District Registry has no jurisdiction on a petition of course to make an order on a solicitor for delivery and taxation of his bill of costs.

Decision of Kekewich, J. (ante, *p.* 333), *reversed.*

Appeal from the decision of Kekewich, J., reported *ante*, p. 333.

The question raised by this appeal was whether a registrar of the Liverpool District Registry had power on an originating petition of course to make an order on a solicitor for delivery and taxation of his bill of costs.

The solicitor, D. H. Porrett, who resided in, and had his office at, Sheffield, had been employed by the Animal Products Co., whose registered office was in Liverpool; the costs, in respect of which the order appealed from was made, were incurred in certain bankruptcy proceedings taken by Porrett in London on the instructions of the company.

On a petition of course intituled in the Chancery Division of the High Court, and presented in the Liverpool District Registry by the company, the district registrar made an order directing Porrett to deliver to the company his bill of costs, and referring it to one of the district registrars at Liverpool to tax and settle the same.

A motion by Porrett to discharge the order of the district registrar was refused by Kekewich, J. (see *ante*, p. 333).

Porrett appealed.

Sir Horace Davey, Q.C., and *Bardswell*, for the appellant.—The effect of ord. 35, r. 6*a*, and of ord. 62, r. 18, has been misconstrued by the judge below. Sub-rule 2 of ord. 35, r. 6*a*, only applies to petitions requiring an answer, and it is only with respect to such petitions presented in the Liverpool or Manchester district registries that the district registrar has jurisdiction to act as a registrar of the Chancery Division. [They were stopped.]

Warmington, Q.C., and *A. Durandu* (*P. O. Lawrence* with them), for the company, the respondents.—Under the present practice (ord. 62, r. 18) every order of course on a petition not requiring an answer is made by a registrar of the Chancery Division. By ord. 35, r. 6*a*, the Liverpool and Manchester district registries are each made a branch of the High Court, and the registrar of each of these districts is put in the same position as a registrar of the Chancery Division, and has also the duties of a taxing master. All causes or matters in these registries in the Chancery Division have been assigned by the Lord Chancellor to Kekewich, J., under ord. 5, r. 9. [KAY, L.J.—Ord. 35, r. 6*a*, only says that the Liverpool District Registrar shall act as taxing master in a cause or matter pending in the Chancery Division and proceeding in that district.] The presentation of the petition makes it a matter pending. It is competent for any person to present any originating petition in the Liverpool or Manchester district registry, subject to the liability of being transferred. We admit, however, that all proceedings in an action, whether by petition or summons, must be taken in the court where the action itself is pending. There is no express provision in the Judicature Act or the rules that an originating petition of course to deliver and tax a solicitor's bill of costs may be presented and dealt with in the Liverpool or Manchester district registries, but such a power is implied from ord. 35, r. 6*a*, sub-rule (2). The words of sub-rule (2), "petitions presented in the district registries of Liverpool and Manchester," imply that all petitions may be presented in those districts, and the other words of sub-rule (2) only contain a limitation with respect to petitions requiring an answer, but do not exclude petitions not requiring to be answered. If there were no implied jurisdiction to present any originating petition at all in the Liverpool and Manchester district registries, why should there have been a practice prescribed for petitions requiring to be answered.

Davey, Q.C., in reply.—District registries were established by the Judicature Act, 1873, ss. 60—66, exclusively for the purpose and object of carrying on proceedings in an action begun by writ of summons. District registrars have only the ordinary jurisdiction to tax in causes commenced by writ of summons or originating summons. The defendant in an action begun in a district registry has an absolute right to have the proceedings carried on in London by appearing there: ord. 12, r. 7. Ord. 35, rr. 1—6*a*, expressly apply only where a cause or matter is proceeding in a district registry, and none of them give jurisdiction to originate a cause or matter there. No originating petition of course brought either under the Companies Acts or under the Solicitors Acts, or any other statutory jurisdiction, can be presented in the Liverpool or Manchester district registries. It lies on the respondents to show that this district registrar had authority to make this order for taxation. The district registrar of Liverpool is only entitled under ord. 35, r. 6a, to act as a registrar of the Chancery Division in certain cases and for certain purposes, and sub-rule (2) expressly limits his jurisdiction to act as such registrar, in the case of petitions, to petitions requiring answer.

LINDLEY, L.J.—This appeal is of some considerable importance to solicitors. In form it is an appeal from an order made by a district registrar of the Liverpool District upon a petition of course. It directs a solicitor, Mr. Porrett, to deliver his bill of costs; then it orders that that bill be referred to one of the district registrars at Liverpool to be taxed; and then there are other directions to which I need not refer.

Now, the costs which are to be so taxed are costs for work done by Mr. Porrett, who is a Sheffield solicitor, with reference to certain proceedings in bankruptcy taken by him in London at the instance of the petitioner, the petitioner being a limited company, having

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

its registered office, as I understand, in Liverpool; so that the case may be put in this way—that the client lives in Liverpool, the solicitor lives in Sheffield, and the work done was done by him in London. The solicitor is not within the limits of the Liverpool District; the work done was not done within the limits of that district. It so happens that the client, the petitioner, lives within the district.

Now Mr. Porrett says, "You, the district registrar, have no authority to make an order upon me for the delivery of my bill, and for the taxation of that bill by the district registrar of Liverpool"; and he further says, "Even if there is any authority which would warrant such an order as that, this is a case in which the order ought to be transmitted to London in order that my bill may be taxed by a London taxing master."

The question, put in that short form, is one of importance, because it affects the power and authority of the Liverpool and Manchester district registrars to tax the bills of solicitors for work done outside the limits of those districts.

Now it is for those who support the order complained of, to show under what authority that order was made. Having attended closely to the Act of Parliament and to the rules (to which I will refer presently), the conclusion at which I have arrived is this, that there is no such authority. It is a negative conclusion which can only be got at by going carefully through the various Acts and rules. Certainly there is nothing in the terms of the Judicature Act of 1873, which created these district registries, which authorizes the district registrar of Manchester or of Liverpool to make such an order as this. There is no rule which authorizes, in terms, any district registrar, except possibly of Liverpool and Manchester, to make any order of the kind at all. It is no part at present of the general law or practice of the High Court that a taxing order such as this can be made by a district registrar. It is said that there is an exception as regards the district registrars of Liverpool and Manchester. We must look further into the matter to see whether that exception is established.

Now the order to tax a solicitor's bill is got in one of two ways. There is either a petition of course or, if there are special circumstances, there is a special petition. We need not deal with special petitions, because this is not a case in which a special petition is required. The order on a special petition, as I understand, is even now always made by the judge. An order on a petition of course used to be got at the Rolls. Under the present practice the order under a petition of course is made by one of the registrars of the Chancery Division, under ord. 62, r. 18. That rule refers both to petitions which require an answer, and to petitions which do not. The difference between the two happens to become of some little importance when we criticize the rules which are relied upon as giving the Liverpool District Registrar the jurisdiction or authority which he claims.

So far, therefore, as the Acts and rules to which I have referred are concerned, there is no power given to make orders for the delivery and taxation of bills to the district registrars, of any sort or kind.

But in 1886 and 1887 certain orders were made which do confer upon the registrars of the Liverpool and Manchester districts powers which are not enjoyed by the registrars of other districts. Order 35 relates to "proceeding in district registries," and rule 1 and the subsequent rules down to 6*a* each contain the words, "where a cause or matter is proceeding in a district registry." That is the language with which rule 6*a* begins. [The Lord Justice read rule 6*a*, and continued:—] The first point to consider is, what is the meaning of the expression "where a cause or matter is proceeding in a district registry"? "Is proceeding" must mean "is proceeding according to the statutory enactments or the rules made by the proper authority." A cause or matter cannot be said to be proceeding in a district registry simply because it has been improperly commenced there; the language is addressed to proceedings which are properly commenced and are properly proceeding.

Is there any authority for the making of an order of this kind by the registrar of the district? He cannot have such authority simply because someone asks him to make the order. When we examine what was done in 1887 we find that the power of the district registrar to make orders on originating summonses is expressly conferred. [The Lord Justice read rules 1 and 2 of the Rules of the Supreme Court, May, 1887, see Annual Practice, 1890—1, at p. 603, and continued:—] The first part of this rule 2, as to petitions requiring to be answered, applies to one portion of ord. 62, r. 18, to which I have already alluded. In the second part of this rule 2 nothing is said about orders of course; its terms contain nothing to confer upon the registrars of the Liverpool and Manchester districts any power to make an order of course.

Now the orders of course which remain according to the present practice are very few. The most important, probably, is the order of course made upon a solicitor to deliver his bill and have it taxed. There are other orders of course which relate to mere procedure. I do not know, and I certainly do not intend to say, that there is no power on the part of these district registrars to make orders of course of that latter sort as to matters which are properly pending before them. I think it very likely there is, because if there is a cause or matter commenced in the Chancery Division, properly proceeding in the district registries of Liverpool or Manchester, then ord. 35, r. 6*a*, would apply, and the registrars of those districts would have all the authority of the Chancery Division in those district registries, and could make those orders. But in the present case we have to deal with an order of a totally different kind—an order made upon originating petition—and I cannot anywhere find in any of the rules any authority whatever on the part of the district registrar to make such an order as this. It is very remarkable that, although in some cases, for anything I know, there may be orders made by the district registrars to tax certain costs relating to matters over which they have jurisdiction under ord. 35, r. 6*a*, yet the directions which Kekewich, J., has given as regards even such matters as these, are as follows:—"Delivery and taxation of bills of costs: On an application against a solicitor for delivery and taxation of a bill of costs, and delivery up of deeds, the district registrar shall hear the application, complete the evidence, and then refer it to the judge" (see Annual Practice, 1890—1, at p. 605); so that even in those cases it is not for the registrar to make the order, it is for the judge to make it. I do not think that that regulation applies to orders such as the one in the present case. I apprehend that it applies to such orders, if any, as can be properly made under ord. 35, r. 6*a*, *i.e.*, orders for taxation in causes or matters commenced in the Chancery Division, properly proceeding in these district registries. This is not a case in which we have to deal with a cause or matter commenced in the Chancery Division which was in any sense properly proceeding in this district registry; and having regard to the nature of the application on which this order was made, no authority whatever can be found, in the Judicature Act or in the rules, for this district registrar to make this order.

Under these circumstances it appears to me that the order must be discharged, with costs both here and below, and if Mr. Porrett has paid the costs he must have them back, and if he has deposited any money, that money must be returned to him.

KAY, L.J.—I also think that the order made by the district registrar in this case is without any vestige of authority. It is an order made on a petition for taxation, which petition need not be answered. It was merely a petition of course; such a one as used, before the orders now in force, to be dealt with by the secretary of the Master of the Rolls. The old practice which is mentioned in ord. 62, r. 18, was, that upon the presentation of such a petition as this the order was "drawn up, passed, and entered in the office of the secretaries of the Master of the Rolls." Ord. 62, r. 18, substituted for that practice in the office of the secretaries of the Master of the Rolls, a power for the senior registrar of the Chancery Division to make the order on the petition. [The Lord Justice read ord. 62, r. 18, and continued:—] The registrar of the local district must show, if he can, how he has got this power, which this rule says must be exercised by a registrar of the Chancery Division. There are only two ways in which it is possible for him to do that. He must somehow or other, find that power in ord. 35, r. 6*a*, or in sub-rules (1) and (2) of that rule; and really the only sub-rule in any way bearing on the point is sub-rule (2), which enables the district registrars of Liverpool or Manchester respectively to answer petitions requiring an answer, and which are presented in these district registries respectively, and says in terms that ord. 62, r. 18, "shall as regards such petitions"—*i.e.*, petitions which require an answer—"be construed as if the district registrars of Liverpool and Manchester respectively were mentioned in place of the registrars of the Chancery Division." It leaves out, however, and I have no doubt designedly leaves out, the other part of rule 18 of order 62, which refers to petitions that do not require an answer, and upon which the order is made by the registrars of the Chancery Division, and it does not give to the registrars of the Liverpool and Manchester district registries any power whatever to make such order. Therefore, rule 35, sub-rule (2), does not help them, but, on the contrary, it seems to me to indicate most clearly that it never was intended that they should have such a power as this to make orders upon petitions of course. I am speaking now of originating petitions of course, like this petition, which is what we have to consider.

Then the only other possible way in which it can be suggested that such a power is vested in the registrars of the districts of Liverpool and Manchester is under rule 6*a* itself of order 35. As Lindley, L.J., has pointed out, that rule begins with the words, "Where a cause or matter . . . is proceeding in the district registry" of Liverpool or Manchester; so that the only power that it gives to the district registrar is to do the things which are contemplated by the rule in a cause or matter which at the time is proceeding in such district registry; and it provides that "the district registrar shall act in respect thereof"—*i.e.*, in respect of the cause or matter then proceeding in the district registry—"as taxing master, according to the directions to be given from time to time" by the judge.

Upon that, a most courageous argument has been advanced. It was said: "This is a proceeding which was at the time pending in the district registry because this is an *ex parte* petition: this originating petition was presented in the district registry, and, therefore, when the application was made to the district registrar to make the order, there was a proceeding pending in the district registry." Of course, if that were the true construction of the rule, you might make any kind of application you liked in the district registry, and say, "It is pending, because I began it there." It is quite obvious, that is not the meaning of the rule. The meaning of the rule is like the meaning of the previous rules of the same order—*i.e.*, where a proceeding has to be taken in a pending cause or matter—and it will not do to say that an originating proceeding is a pending cause or matter for the purpose of that rule. The light which is thrown upon rule 6*a* by sub-rule (2) makes the matter clear beyond the possibility of doubt. Sub-rule (2) excludes carefully any suggestion of a power to the district registrar to make an order like this upon an *ex parte* petition not presented in any cause or matter. Reading the two together, it is impossible, to my mind, to have the least doubt that no such power was ever given to the registrars in Liverpool or Manchester, or was intended to be given by these rules. There the matter begins and ends, because it has not and could not have been contended that in any other part of the Judicature Act or rules is there anything with regard to power being given to these district registrars to make an order of this kind.

I think that the district registrar has exceeded his authority entirely, and the order must be discharged, with the consequences which have been indicated by my learned brother.

Appeal allowed.

Solicitors, *Jaques & Co.; George Thatcher*, for *Fisher, Sandys, & Crosfield*, Liverpool.

From Q. B. Div. [and Q. B. Div.] April 10; June 8.

In re AN ARBITRATION BETWEEN WILLIAMS AND STEPNEY. (*a*.)

Arbitration—Power of arbitrator to award costs—Submission before, arbitration after, the 1st of January, 1890—Submission silent as to costs—Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 2, 25.

Where an arbitration took place after the commencement of the Arbitration Act, 1889, pursuant to a submission which had been entered into before the commencement of that Act, and which contained no power to the arbitrator to deal with the costs of the reference and award,

Held, that the combined effect of sections 2 and 25 of the Act was to give the arbitrator power to deal with them.

Motion to set aside the award of an arbitrator, on the ground that he had exceeded his jurisdiction in giving the successful party the costs of the reference.

The submission to arbitration had been entered into by a clause in a mining lease made in 1839, but the hearing and the award took place in 1890. The submission was silent as to the power of the arbitrator to deal with the costs, but the arbitrator in his award had given the costs to the successful party. The other side appealed.

W. Graham and *Glascodine*, for Sir E. Stepney, in support of the motion.—The arbitrator has exceeded his powers. He had no power to award costs under the submission, which is silent as to the costs of the reference, but he acted as if the Arbitration Act of 1889 applied to the reference. In that he was wrong, as by section 25 "this Act shall not affect any arbi-

(*a*.) Reported by CECIL CHAPMAN and A. P. PERCEVAL KEEP, Esqs., Barristers-at-Law.

tration pending at the commencement of this Act, but shall apply to any arbitration commenced after the commencement of this Act under any agreement or order made before the commencement of this Act." The commencement, by section 29, was the 1st of January, 1890. Section 25, therefore, applies only to proceedings on an arbitration, and has no reference to submissions entered into before the passing of the Act. The consent of the parties to the submission in this case must be taken to have been made subject to the law as it then was. To hold otherwise would be manifestly unfair.

Blake Odgers, for Mr. Williams, in support of the award.—The award is right, because section 2 of the Arbitration Act, 1889, says that "a submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the first schedule of the Act." At the end of the first schedule it is provided that "the costs of the reference and award shall be in the discretion of the umpire or arbitrators, who may direct to and by whom, and in what manner, those costs, or any part of them, shall be paid, and may tax or settle the amount of the costs to be so paid, or any part thereof, and may award costs to be paid between solicitor and client." These provisions apply because of section 25, which makes this Act apply to an arbitration commenced after the commencement of this Act under any agreement or order made before the commencement of the Act. That is exactly the case here, and the party who objected to the application of the Act ought to have given notice of intention to withdraw.

MATHEW, J.—This motion must be allowed. The arbitrator was wrong in supposing that he had power to deal with the costs. To hold otherwise would clearly alter the agreement made between the parties without giving them any opportunity of expressing a contrary intention.

It is clear that up to January 1, 1890, it was competent to the parties to a submission to agree that the arbitrator should have no power to deal with the costs, and it still continues to be competent to the parties to make an agreement to that effect. But it is contended that where the submission is silent as to costs, section 2 of the Arbitration Act, 1889, confers on the arbitrator, whether the submission was entered into before or after the commencement of the Act, a power to award costs. Such a construction is to my mind unreasonable, and contrary to the intention of the statute. I think that the word "submission" in section 2 refers only to submissions subsequent to the Act, and the word "arbitration" in section 25 applies to the procedure in arbitration as distinguished from the submission to arbitration.

DAY, J., concurred.

June 8.—From this decision Mr. Williams appealed.

Blake Odgers, for the appellant.

W. Graham, *Gwynne James*, and *Glascodine*, for the respondent.

The arguments were the same as in the court below.

Lord ESHER, M.R.—In the present case the question turns on the construction of sections 2 and 25 of the Arbitration Act, 1889. Section 2, if it stood alone, would no doubt relate only to submissions entered into after the commencement of the Act. That is an ordinary rule of construction—that an Act, unless it is expressly said to be so, is not retrospective. It would apply, therefore, to submissions which were entered into after the Act came into force, but even to those submissions it would add something which they did not already contain. The argument, therefore, that the Legislature would not assume to alter the intention of the parties is fallacious. But in the present case this submission, which was made before the Act came into force, is silent as to the costs of the reference. If section 2 applies to it, therefore, it reads into the submission a power to the arbitrators to deal with those costs, unless a contrary intention is expressed therein. But section 2 of the Act does not stand alone. There is section 25, which says that "this Act" shall apply to arbitrations commenced after the Act in pursuance of an agreement or submission entered into before the Act. "This Act" means the whole of the Act, including section 2, and not merely, as the respondents contend, "so much of this Act as relates to proceedings in arbitrations." There is nothing either in the context or the subject-matter of the Act which compels us so to read it. Therefore if the whole Act applies to arbitrations commenced after the Act in pursuance of submissions before the Act—which is precisely the case here—section 2 applies, and if section 2 applies the arbitrators have power to give costs. When it is remembered that, under the old system, if a submission was silent as to the costs of the reference, neither the arbitrator nor the court had power to award them to the successful party, but each party had to pay his own costs, the justice of such an addition becomes apparent, and it may well have been that the Legislature, knowing this, sought, by section 2, to remedy this injustice, and by section 25 made the whole Act, including the enactments of section 2, applicable to such a case as the present.

I am therefore unable to agree with the decision of the Divisional Court, and I think that this appeal must be allowed.

LOPES, L.J.—In this case all the proceedings in the arbitration took place after the 1st of January, 1890, but the submission, which gave no power to the arbitrator to award costs, was entered into before that date. The Divisional Court have held that the Act gave the arbitrators no power to award costs, and they have therefore set aside the award. I am unable to agree with them. The question entirely depends on the construction of sections 2 and 25 of the Arbitration Act, 1889. The object of section 2 is to bring some useful provisions of general applicability into every submission unless the contrary is expressed in the submission, among them being the power to arbitrators to deal with the costs. I agree that if it stood alone that section would apply only to submissions entered into after the passing of the Act. But then comes section 25, by which "this Act" is made applicable to such a case as the present where the arbitration is after and the submission before the commencement of the Act. Clearly "this Act" means the whole Act, and includes section 2 and the schedule. It is impossible therefore to escape the conclusion that section 2 is intended to apply to such a case as the present, nor is it unreasonable that it should do so, considering, as the Master of the Rolls has pointed out, that if the submission was silent on the subject there was no power under the old rules to award costs to a successful party, however heavy they might be. In my opinion the section was introduced to avoid this hardship. I therefore agree that this appeal must be allowed.

KAY, L.J.—I am of the same opinion. The Master of the Rolls has so exactly expressed my view of the case that I have nothing to add.

Appeal allowed.

Solicitors for the appellant, *Grundy & Co.*, for *Home & Williams*, Llanelly.

Solicitors for the respondent, *Field, Roscoe, & Co.*, for *Johnson & Stead*, Llanelly.

High Court of Justice.

Chan. Div. North, J. March 10.

In re WEBSTER. (*a.*)

Solicitor—Costs—Common order to tax—Suppression of material facts—Right to obtain second order of course —Solicitors Act, 1843, *s.* 37.

A client is not entitled to obtain a second common order to tax as of course where he has allowed the first to lapse by effluxion of time, nor may he suppress material facts in obtaining the order.

Motion.

This was an application by a solicitor to discharge a common order to tax his bill of costs.

The client, Peat, issued a writ in the Queen's Bench Division against the solicitor, Webster, on the 27th of June, 1890, for a sum of money alleged to have been received by the solicitor for the client's use. On the 1st of July, 1890, the solicitor delivered his bill of costs, and on the 17th of July he delivered his defence in the action, in which he claimed to be entitled to set off an amount equal to the plaintiff's claim for professional charges and other items. On the 30th of July, 1890, issue was joined and a settled account pleaded. On the 1st of October, 1890, the plaintiff obtained *ex parte* in the Chancery Division the common order for taxation of the defendant's bill. No mention of the existing action was mentioned on this application.

The order was served on the defendant on the 29th of October, 1890. On the 3rd of December, 1890, the plaintiff commenced a second action in the Queen's Bench Division against the defendant, claiming a further sum in respect of money received by the defendant for the use of the plaintiff. On the 3rd of February, 1891, an order was made consolidating the two actions. On the 5th of February the defendant delivered his defence claiming the same set off as in the other action. Both actions were entered for trial.

On the 11th of February the plaintiff obtained a second common order to tax. No mention of the former order or of the existing actions were made on this application. This order was served on the 16th of February. Notice of motion was given to discharge this order for irregularity upon the grounds of the suppression of material facts in the petition on which the order was made, and that the application for the order ought to have been made to the Queen's Bench Division, in which the consolidated actions were pending, and that the order did not contain any special directions applicable to the case.

Oswald, for the solicitor.—The order of the 11th of February was irregular and should be discharged. The order of the 1st of October to tax exhausted the client's remedy by order of course. The effect of the order is to prevent the solicitor from commencing any proceedings in regard to his bill pending the reference for taxation. The order of the 11th of February was obtained by a suppression of material facts: *In re Thompson*, 34 W. R. 112, 30 Ch. D. 441; Seton on Decrees, 4th ed., p. 604; *In re Farington*, 33 Beav. 346, 13 W. R. Ch. Dig. 85; *In re Barnard*, 2 De G. M. & G. 359. The application should be made to the Queen's Bench Division: *In re Pollard*, 36 W. R. 515, 20 Q. B. D. 556.

Foa, for the client.—There is nothing in the Solicitors Act to show that a second order of course cannot be obtained. The form of order is the same in both divisions: *Lumley* v. *Brooks*, 37 W. R. 454, 41 Ch. D. 323.

Oswald replied.

NORTH, J.—The order of the 1st of October produced an effect, though it was not served on the solicitor until the 29th of October, and on the next day became ineffectual for the future by the lapse of time, as it was always capable of being put in force against the solicitor if he had taken any proceedings against his client to recover his costs. Nothing, however, was done under the order. The first point urged on behalf of the solicitor is that the order of the 1st of October exhausts the client's statutory remedy by order of course, and that he could not afterwards obtain a second order of course to tax the same bill. A further point was that material facts were suppressed when the second order was obtained. I think that when a client has obtained the common order to tax, which prevents the solicitor from suing the client for the bill during the reference, the client ought not to apply for a precisely similar order of course, suppressing the fact that a prior order had been obtained and allowed to become ineffectual. If he could do so it would follow that a client might obtain monthly successive orders of course for taxation, and during a whole year prevent the solicitor from taking any proceedings for the recovery of his bill. I do not think the Act intended him to have this power. A second order upon special grounds he might, of course, be entitled to.

The existence of the action which the client had commenced against the solicitor, and in which the amount of the bill of costs was set off, was a second fact suppressed. The form of order in such a case is in a different form. The order for taxation after action brought provides for the stay of further proceedings against the client in respect of the bill pending the reference, and if anything is due to the solicitor for the taxation of his costs of the action, and the addition of the amount to the sum found due. In the present case other matters than the bill of costs only are involved, and the order was obtained by a suppression of material facts.

The question arises whether I shall discharge the order altogether as having been irregularly obtained, or whether it should be left standing so far as it directs the master to tax and certify the amount due. As a general rule an irregular order should be discharged. In *In re Thompson* the Court of Appeal, whilst holding that, under the circumstances, the clients ought not to have obtained the common order to tax, but ought to have obtained a special order upon a statement of the facts, yet allowed the order to stand, but not allowing the clients the costs of obtaining it. Following this case, I leave the order which directs the taxation of costs standing, and discharge the part which directs payment of the amount found due.

The question of payment of the costs of this application and of the amount to be certified under the order for taxation I leave to be dealt with by the judge at the trial.

Solicitors, *W. S. Webster; H. K. Gow.*

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a.) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

Chan. Div. }
Kekewich, J. } May 14.

In re CORDOVA UNION GOLD CO. (LIMITED). (*a.*)

Company—Winding up—Calls—Agreement to pay unpaid capital at future dates—Right of liquidator to immediate call of whole sum—"Liability"—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 7, 102.

By an agreement made on the reconstruction of a company it was provided that the new company should allot to the shareholders shares in proportion to their paid-up capital in the old company, and that the sums remaining unpaid on such new shares should be paid to the new company on certain fixed dates, the last two of which had not yet arrived. The agreement was confirmed, and, in response to a circular by the new company inviting applications for shares on the terms of the agreement, the respondents applied for and received allotments of shares. In the memorandum of association of the new company it was stated that one of the objects of the company was to carry out the agreement; it was adopted by and scheduled in full to the articles. The new company was now being wound up compulsorily, and the liquidator applied for an order for the immediate payment of all the unpaid instalments.

Held, that the contract had been superseded by the statutory rights of the liquidator, and that he was entitled to an immediate call.

Adjourned summons.

This was an application by the official liquidator of the company that a call to the amount of one shilling per share might be made in respect of two instalments of sixpence per share payable under the terms of the allotment on the 1st of August, 1891, and the 1st of February, 1892, respectively.

The winding-up order was made in March, 1890, and the liquidator now proposed to call up all that remained unpaid on the shares. This was resisted by some of the contributories under the following circumstances.

The company was registered in October, 1888, for the purpose of acquiring the business and property of the Union Gold Co., and to adopt and carry into effect an agreement of the 8th of October, 1888, made between the Union Gold Co. of the one part and Joseph Wace, on behalf of the Cordova Co., of the other part.

By the agreement the new company were, in consideration of the sale, to allot to every member of the old company in respect of each share held by him on which 20s. stood credited on the books of the old company one £1 share in the new company with 15s. credited as paid thereon, and a similar proportion in respect of shares on which less was credited as paid. The sum remaining to be paid up on each share to be allotted by the new company was to be payable to the new company as follows:—1s. per share on allotment; 1s. per share on the 1st of February, 1889; 6d. per share on the 1st of August, 1889; 6d. per share on the 1st of February, 1890; 6d. per share on the 1st of August, 1890; 6d. per share on the 1st of February, 1891; 6d. per share on the 1st of August, 1891; and 6d. per share on the 1st of February, 1892.

This agreement was mentioned in the memorandum of association, where it was stated that one of the objects of the new company was to adopt and carry it out. The articles of association provided for its adoption, and it was scheduled in full to the articles.

The shareholders in the old company passed resolutions confirming the agreement, and the new company then sent them a circular inviting them to take shares on the terms of the agreement.

It was admitted that the respondents had taken their shares on these terms.

Warmington, Q.C., and *A. Cross*, for the summons.—The court is not bound by the agreement; it can order the shareholders to pay up what remains unpaid on their shares without attending to any contract as to when and how calls shall be paid: Companies Act, 1862, s. 102. The winding-up order has overridden the agreement, and their only remedy is against the company. If that is not the case, still they are not within section 25 of the Act of 1867. The contract is between the shareholders and the company.

W. D. Rawlins, for the shareholders.—The court will not alter the bargain which has been made, adopted in the circular, and stated in the memorandum and articles. The question is within the discretion of the court: *Waterhouse* v. *Jamieson*, L. R. 2 H. L. Sc. 29, 18 W. R. H. L. Dig. 8.

KEKEWICH, J.—This company is being wound up by the court, and the application is made by the official liquidator to enable him to discharge his duty to the court and to those whom he represents. That may be important, because there might be a difference on a question of a like character if it arose in a voluntary winding up. The contributories say, in answer to the call, "We stand on our contract, we are prepared to pay what the contract obliges us to pay, and at the time mentioned in the contract; there is no suggestion that we are playing false, but we are not liable to pay, and we decline to pay in advance of the date named in the contract." That contract is found in the agreement under which the present company purchased their assets. True, they purchased under a scheme for the reconstruction of another company, but that is immaterial. The company acquired their property on the terms of issuing shares to certain persons, and, according to clause 6 of the agreement to purchase, the shares which those persons took as part of the purchase-money were to be paid for by certain instalments. Without going through the articles of association, which expressly confirm the contract, I take it that all those articles must be read with reference to the contract, and that, unless the parties bound by the contract are themselves content to vary that clause, they must be construed as preventing the company from demanding payment for the shares except under the contract. The contract is valid and clear, but it seems to me that it is a contract intended to endure only during the life of the company, and to have no application after its dissolution—that is, a dissolution in the sense of a winding up by the court, for the company is still in existence. I say that for this reason. The Legislature has said that not only shall companies have powers of winding up similar to those which every partnership has, but subject to the court, but there shall be also, in the interest of creditors, power to direct a winding up by the court, and then new rights shall intervene. There is no occasion to trace the history of winding up, but if my recollection is right the first Act to introduce the rights of creditors was an Act of 1856. At all events, nearly forty years ago the Legislature interfered in favour of creditors, and since that time, through an officer called a liquidator, the creditors have had a right beyond the ordinary right to insist on the assets of the company being realized and distributed rateably between them. That right having supervened seems to me to be destruction to the contract which no doubt endured during the life of the company. One constantly has to deal with contracts intended to

(*a.*) Reported by H. C. ROPER, Esq., Barrister-at-Law.

endure to eternity, but limited as I have mentioned. Contracts for the supply of goods and things of that kind, all of which are binding on the company, and are equally binding after the dissolution in the sense that the contracting parties can sue for damages, but it has never been suggested that a company is really bound to accept the goods after an order for its winding up has been made. The necessary breach of contract is an essential element of the case, and damages are assessed on that footing.

Mr. Rawlins says that this contract has this peculiar character, that the company have purchased the property on the faith of it, and issued shares to his clients on certain terms. That is so, but it makes no difference. They must be taken to have sold their property with knowledge of the provisions of the Act of 1862, and that if these provisions defeat the contract they are defeated, notwithstanding the contract. It often happens that a vendor takes his purchase-money in shares, and sometimes these shares are not taken as fully paid-up. He is liable for the amount not paid, although he may have stipulated not to pay for a certain time. However, that is not really an argument, it is the same case, but I point it out to show that if that argument is to prevail it will have an extensive operation.

Section 102 of the Companies Act, 1862, enables the court to make a call and to make an order to enforce it to the extent of the liability of the contributories, and, unless they can show that they are not liable, the call may be made for the money in question. Mr. Rawlins does not say that his clients are not liable, but that they are not liable *in præsenti*. I turn to section 7, and I find that the liability of a member may be limited to the amount, if any, unpaid on the shares respectively held by them.

I must read those words into section 102, where it is said that a call may be made to the extent of the shareholder's liability. The extent is fixed by the memorandum of association, and may be of the character mentioned in section 7, but of no other, except that by guarantee and so forth. The limitation here of the amount payable is a limitation to the amount unpaid. The liability for the payment remains, so the court may make a call, and, if I am right as to the contract enduring for the life of the company only, their only remedy is in damages. It follows that the liquidator is entitled to call up what remains unpaid on the shares. Mr. Rawlins' last hope lay in the discretion of the court. The court is bound to see that the creditors are paid. If I have such a discretion I shall not exercise it in favour of the respondents, when many of the contributories in a similar position have taken a different view. It would be hard, because the court is merciful, to let off sixteen persons who have fought and failed, and for the same reason I think they must pay the costs of the adjournment.

Solicitors, *Arthur Heiron; Henshall Fereday.*

Chan. Div.
Kekewich, J. } Jan. 22, 23, 31.

In re MABBETT.
PITMAN *v.* HOLBORROW. (*a.*)

Annuity—Life annuity charged on land—Power of trustees to sell land and purchase Government annuity—Death of annuitant before completion of sale—Right of representatives to value of annuity.

A testatrix bequeathed life annuities charged on land, and, subject to the annuities, devised the land to trustees on trust for sale. By codicil she empowered the trustees to purchase Government annuities, to be in place of the annuities given by her will, and directed that the purchase-money should be a first charge on the proceeds of sale of the land, and that, upon purchase of the Government annuities, the land should be discharged. The trustees sold the land, and, pursuant to the conditions of sale, a sufficient sum was deposited in a bank for the purchase of the Government annuities, but such annuities were not actually purchased. One of the annuitants died after the date of the contract of sale, but before completion or payment of the purchase-money. Another annuitant died subsequently to completion.

Held, that the representative of the annuitant who died before completion was not entitled to the value of her annuity, but that the representative of the other annuitant was so entitled.

Adjourned summons.

Mary Mabbett by her will, dated the 14th of November, 1889, gave certain annuities, which she charged on specified parts of her real estate, including an annuity of £10 per annum to Mary Reed for her life, an annuity of £20 per annum to John Reed for his life, and annuities to Thomas Hooper and others during their respective lives, and subject to such annuities the testatrix devised the real estates charged therewith to her trustees upon trust to sell the same and divide the proceeds of sale as therein mentioned. The testatrix devised and bequeathed her residuary real and personal estate to her trustees upon trusts for sale and conversion and division of the net proceeds as therein mentioned, and directed that a portion of such net proceeds should be invested, and the income thereof paid to Sarah Pitman during her life, and on her decease the capital should be laid out in the purchase of Government annuities for Frances Pitman and Louisa Pitman, or the survivor of them, as therein mentioned.

By a codicil, dated the 23rd of November, 1889, the testatrix gave an annuity of £10 per annum to Frances Pitman for her life, and charged the same on specified real estate, and gave a like annuity to Louisa Pitman, and charged the same on other real estate, and proceeded:—"I declare that my trustees may purchase Government annuities for the annuitants named in my will or any codicil thereto for the respective amounts of the annuities given to them by my will or any codicil thereto; such Government annuities, if purchased, to be in place of the annuities given by my will or any codicil thereto, and the purchase-money of such Government annuities and the legacy duty thereon, and all charges and expenses connected with the purchase thereof to be provided out of and to be the first charge upon the proceeds of sale of the respective estates upon which the said annuities are respectively charged, and the said estates, upon the purchase of Government annuities, to be respectively discharged from the payment of the annuities respectively charged thereon."

The testatrix died on the 18th of May, 1890. Mary Reed died in September, 1890, and was buried on the 21st of that month. No representation had been taken out to her. Her annuity was paid down to the date of her death.

The real estate charged with the annuities of Mary Reed, John Reed, and Thomas Hooper, and with the annuity given by the codicil to Louisa Pitman, was by direction of the trustees put up for sale by auction in lots, and sold on the 7th of August, 1890. By the conditions of sale it was provided that the vendors should purchase Government annuities in place of the annuities charged on the properties comprised in the sale, thereby discharging such properties from such

(*a.*) Reported by JAMES H. BAKEWELL, Esq., Barrister-at-Law.

Q. B. Div. (Day and Lawrance, JJ.) April 30.

REG. v. HULTON. (a.)

Gaming—Bet—Lottery—Prize for naming winners of horse races—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3, 4—*Betting Act,* 1874 (37 *Vict. c.* 15), *s.* 3, *sub-section* (3)—42 *Geo.* 3, *c.* 119, *s.* 2—4 *Geo.* 4, *c.* 60, *s.* 41.

A newspaper proprietor published weekly a book of racing intelligence, which contained a coupon announcing that sums of money would be given to persons who correctly inserted the names of the winning horses in certain races (named on the coupon) which were to take place in the ensuing week. The book, with the coupon, was sold at the price of one penny.

Held, that the transaction was not a bet or a lottery within the Betting Acts, 1853 *and* 1874, *or the Acts* 42 *Geo.* 3, *c.* 119, *and* 4 *Geo.* 4, *c.* 60.

Case stated by the stipendiary magistrate for the city of Manchester under 42 & 43 Vict. c. 49.

At a court of summary jurisdiction in the city of Manchester four informations were preferred against the respondent, charging him with offences against the Betting Act, 1874, s. 3, sub-section (3), the Betting Act, 1853, ss. 3 and 4, and the Act 4 Geo. 4, c. 60 (for the suppression of illegal lotteries), s. 41.

The material facts were as follows:—

The respondent was the proprietor and publisher of the *Sporting Chronicle* and other publications, and carried on his business at large offices at Manchester, rated at £375 per annum, and containing plant worth £14,000. He published every Saturday a small book called the *Weekly Handicap Book*, or *Racing Record*, the retail price of which was one penny. It contained a variety of information about past and future horse races, and on the last page of each number was a coupon, which was the subject of these charges. This coupon was in the following form:—"The weekly coupon. Eighty pounds for six winners on one coupon, or forty-five pounds for five winners on one coupon. In case of general failure, a consolation award of ten pounds for four winners on one coupon. The following races are selected for the ensuing week:—" Then followed a list of six horse races which were to be run in the ensuing week, with spaces for the insertion opposite the name of each race of the name of a horse to be selected by the holder of the coupon. The coupons, when filled up, were to be sent to the respondent's office by a certain date.

There was evidence that the races named in the coupon were carefully picked out with a view to make the selection of the winning horses very difficult. 27,000 coupons of the *Handicap Book* published on the 16th of August, 1890, were returned to the offices duly filled up; not one contained six winners, or even five; one contained four winners, and £10 was sent to the person who filled it up.

The Betting Act, 1853, provides (section 1) that "no house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof . . . betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, . . . and every house, &c., opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance, and contrary to law."

Section 3 imposes a penalty (on summary conviction) upon the owner or occupier of a house who uses the same, or permits the same to be used, for the purposes above mentioned.

Section 4 imposes a penalty upon such owner or occupier who shall receive money "as a deposit on any bet on condition of paying any sum of money or other valuable thing on the happening of any event or contingency of or relating to a horse race, &c." and upon "any person giving any acknowledgment, note, security, or draft on the receipt of any money or valuable thing so paid or given as aforesaid, purporting or intended to entitle the bearer or any other person to receive any money or valuable thing on the happening of any such event or contingency as aforesaid."

The Betting Act, 1874, s. 3, imposes a penalty on any person sending, exhibiting, or publishing any letter, circular, telegram, placard, handbill, card, or advertisement (3) "inviting any person to make or take any share in or in connexion with any such bet or wager."

42 Geo. 3, c. 119, s. 2, prohibits the keeping of "any office or place to exercise, keep open, show, or expose, to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a little goe, or any other lottery whatsoever not authorized by Parliament."

4 Geo. 4, c. 60, s. 41, imposes a penalty upon any person selling any ticket, chance, or share in any lottery (except such as are authorized by Parliament) or publishing any proposal or scheme for such sale, and enacts that such person shall be deemed to be a rogue and a vagabond.

The magistrate was of opinion that the transaction proved was not a bet or a lottery within the above-mentioned Acts. The question for the court was whether that view was correct.

Poland, Q.C. (*Horace Avory* with him), for the appellant.—The publication of this *Weekly Handicap Book* is an invitation of persons by advertisement to take a share in connection with a bet or wager. The penny is paid, not for the book alone, but for a promise to pay money on an event or contingency relating to a horse race. It is, in fact, a bet, and the respondent's offices are used as a betting house within the meaning of section 1 of the Betting Act, 1853, and the respondent has committed offences within sections 3 and 4 of that Act, and section 3, sub-section (3), of the Betting Act, 1874. This is also a lottery: it is a "distribution of prizes by lot or chance" ("Webster's Dictionary"), for the naming of the winning horses is so difficult that skill is useless, and it can only be done by guesswork. The fact that the penny is paid for the book as well as for the chance of a prize makes no difference: *Morris* v. *Blackman*, 2 H. & C. 912, 12 W. R. C. L. Dig. 80; *Taylor* v. *Smetten*, 11 Q. B. D. 207, 31 W. R. Dig. 115.

Sir Charles Russell, Q.C. (*Joseph Walton* with him), for the respondent.—In order to make out that this is an offence under the Betting Acts it must be established that the respondent's offices are a gaming house, and it is clear that they are not. The Betting Act, 1853, is intended to put down "ready-money betting," as is shown by the preamble:—"Whereas a kind of gaming has of late sprung up tending to the injury and demoralization of improvident persons

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf on their promises to pay money on events of horse races and the like contingencies." What the respondent does is merely to offer a prize (with a view to increasing the circulation of his weekly racing guide) to persons who are able, whether by skill or chance, to select the winning horses in certain races. This is not a bet, for there is no mutuality in the transaction. [He was stopped.]

Poland, Q.C., replied.

DAY, J.—This is an appeal from the refusal of a magistrate to convict the respondent of offences under the Betting Acts and the Lottery Acts. As to the latter charge I am clearly of opinion that this is not a lottery; it is not a distribution of money by chance; it is not like a lottery or within the mischief of a lottery. It would be difficult also to say that this was a bet, it was argued that it was, because a person who bought one of these books paid a penny by way of backing the six horses whose names they filled in on the coupon. But the person who takes this coupon cannot really lose anything, he receives a prize if he guesses certain winning horses aright. The whole system is evidently a scheme for furthering the respondent's business by increasing the circulation of his publications. The reward is extremely difficult to obtain, the chances being so very great against winning. It is nowhere near a bet. Nor does the transaction come within the words "receiving money as a deposit on any bet on condition of paying any money on the happening of any event or contingency of or relating to a horse race." It is clear from the preamble and from the whole scope of the Act that those words are intended to prevent people who do make bets from making them in such a way as to contravene the statute.

I think, therefore, that the magistrate was perfectly right. If this is a demoralizing practice, as to which I express no opinion, it is for the Legislature to interfere, and not for us to misconstrue Acts of Parliament.

LAWRANCE, J.—I am of the same opinion.

Appeal dismissed.

Solicitor for the appellant, *The Solicitor to the Treasury.*

Solicitors for the respondents, *Collis & Mallam*, or *Cobbett, Wheeler, & Cobbett*, Manchester.

Q. B. Div. (Charles, J.) April 22.

BISHOP OF BANGOR *v.* PARRY.

Charity—Lease—Consent of Charity Commissioners—Effect of lease for more than twenty-one years without consent—Charitable Trusts Amendment Act, 1855 (18 & 19 *Vict. c.* 124), *s.* 29.

A lease of charity property for more than twenty-one years, made without the consent required by section 29 of the Charitable Trusts Amendment Act, 1855, *does not secure for any purpose, but is absolutely void.*

Trial of the action before Charles, J., without a jury.

The facts of the case, so far as material for the purposes of this report, were these:—

The plaintiffs were the trustees of Bishop Rowlands's Charity, called the Bottwnog Grammar School, and as such were the owners of Llyslew Farm, in the parish of Llanidan, county of Anglesey.

The farm was occupied by John Hughes up to 1872, and as he had spent a great deal of money upon it in the shape of permanent improvements, the trustees agreed to grant him a lease for forty-five years at a rent of £220 per annum, that being much below the real value of the property.

A lease was accordingly executed by the trustees on the 10th of February, 1872. The trustees were unaware that section 29 of the Charitable Trusts Amendment Act, 1855, rendered it unlawful for them to grant a lease for more than twenty-one years without the consent of the Charity Commissioners, or other authority, and on this being brought to their knowledge they applied to the Charity Commissioners, who for various reasons refused to approve of a lease for so long a period.

In the year 1876 a notice given by the trustees to Hughes with reference to the Agricultural Holdings Act, 1875, treated him as a yearly tenant, and he made no objection. He continued in occupation of the farm till his death intestate in December, 1886, when Mrs. Catherine Parry, the defendant, took out letters of administration to his estate.

On the 12th of November, 1887, the trustees gave her a twelve months' notice to quit. An agreement was subsequently made by the plaintiffs with the defendant in her personal capacity, and not as administratrix, for her occupation of the farm at the yearly rent of £220 for one year certain from the 12th of November, 1888.

At the expiration of that period she refused to quit, and this action was brought to eject her. The defence was that the forty-five years' lease was not absolutely void, but enured for twenty-one years, that being the term for which the plaintiffs had the power to grant a lease without the consent of the Charity Commissioners. The defendant counter-claimed for damages for breach of the covenant in the lease for quiet enjoyment.

Section 29 of the Charitable Trusts Amendment Act, 1855, is as follows:—

"It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of Parliament, under any Act already passed or which may hereafter be passed, or of a court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the board [of Charity Commissioners for England and Wales], any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion after more than three years of any existing term, or for any term of life, or in consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years."

Kemp, Q.C., and *Malcolm Douglas*, for the plaintiffs.

J. Bryn Roberts, for the defendant.

The following cases were referred to:—*Magdalen Hospital* v. *Knotts*, 27 W. R. 602, 4 App. Cas. 324; *Attorney-General* v. *Morgan*, 2 Russ. 306; *Soprani* v. *Skurro*, Yelv. 18; *Watson* v. *Master of Hemsworth Hospital*, 14 Ves., p. 333; *Andrew* v. *Pearce*, 1 Bos. & P. New Rep. 158.

CHARLES, J., stated the facts, and proceeded:—The gentleman who advised the trustees about the case appears to have been of opinion at one time at any rate that although the lease was of no use for forty-five years, it was of use for twenty-one years; and if it was of use for twenty-one years it would entitle Mrs. Parry to remain in possession, because the twenty-one years would not expire until the 25th of March, 1893, and her defence before me has been based upon that alternative view. It was not argued before me—it was impossible to argue—that the lease

was good for forty-five years. That could not be argued; but it was submitted, although it was not good for forty-five years, in consequence of the provisions of the statute, it was good for twenty-one years, and although the grant for anything in excess is a bad grant under the statute, still that bad grant enures for the benefit of Mrs. Parry to the extent of twenty-one years. I have had an opportunity of listening to the elaborate argument upon this matter, for which I am much indebted, and of considering the various points which were made on behalf of Mrs. Parry with reference to this lease, but I am clearly of opinion that this lease is absolutely void.

Various cases were referred to in which persons who have a limited interest professed to grant more than that limited interest warranted, and in all these cases the grant, though bad for the excess, was held to be good for so much as was within the competence of the lessor to grant; but those authorities are, in my opinion, entirely inapplicable to a case like the present. An analogy to a case like the present is to be found in leases void under the statute of Elizabeth, to one example of which I was referred. In the case of *Magdalen Hospital* v. *Knotts*, a question arose as to a lease which had been granted by a charitable body in contravention of the statute of Elizabeth, which had enacted that all these leases should be utterly void to all intents and purposes; and it was argued, although the language of the statute was so strong, still the lease was not utterly void to all intents and purposes, but only in fact a voidable lease. The Lord Chancellor, however, held, and the other noble lords concurred with him, that the statute meant what it said, and that the lease, having been made in contravention of the statute, was utterly void, and was not capable of being supported for any purpose whatever. There is a difference between the language of that statute and the language of this statute, but the difference, such as it is, does not assist the present defendant, in my opinion. All that the statute of Elizabeth said was that the lease with which it dealt was to be utterly void, but this statute says it is contrary to law to grant this lease at all, and, therefore, the trustees in granting it committed an unlawful act—an act, therefore, which I cannot hold to be good for any purpose whatsoever.

Further, I do not, as a matter of fact, feel able to come to the conclusion that Mr. Hughes ever, in fact, occupied in the capacity of a lessee for twenty-one years. On the contrary, I find that he was treated by the landlord, and that he apparently acquiesced in that treatment, as a tenant from year to year. I think that that is the true view of his position. The relation of a yearly tenant was constituted, in my opinion, if not from the very first, as soon as he had paid an instalment of the rent reserved by the document, that is to say, as soon as rent had been paid at the rate of £220 a year he became a tenant from year to year upon such of the terms of that document as were applicable to a yearly tenancy. [His lordship commented on the evidence, and continued:—] That disposes of the defence to the action, and entitles the plaintiffs to recover possession of the farm.

But there is also a counter-claim, as to which it is necessary I should say something. The counter-claim is based upon a covenant for quiet enjoyment which is contained in the void lease of 1872, and it is said that covenant for quiet enjoyment still exists, and has been broken, and the defendant is entitled to damages in respect of the breach of the covenant for quiet enjoyment—entitled to damages if not against all the plaintiffs, at all events against three of the plaintiffs, who are three of the persons who were actually parties to the document of 1872. If damages were recoverable at all, I agree that the measure is what was suggested by the evidence called by Mr. Roberts. The measure of damages would be this. How much would a lease for the residue of the forty-five years be worth at the present time? [His lordship commented on the evidence which had been given on this point, and continued:—] I do not feel it necessary to investigate that matter any further, for I am clearly of opinion that this counter-claim cannot be sustained in point of law. It would be a most extraordinary thing to hold that it could. The lease is an unlawful lease, and therefore should never have been granted. It is worthless; but, although it is worthless, it is said that the persons granting it are bound by the covenants contained in it, and, although the lease is void as a lease, still the covenants contained in it are to be available for the benefit of the lessee. I cannot come to such a conclusion. None of the authorities which have been cited to me go anything like the length of warranting such a conclusion—a conclusion which it seems to me is contrary to—I will not say common sense—but it is contrary to the law which regulates these matters. I think that, therefore, the counterclaim, which claims to recover damages for the loss of the value of the unexpired residue of the forty-five years' lease, cannot be sustained at all. I decide that upon the ground I have mentioned. [His lordship then dealt with other matters not material for the purposes of this report.]

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Hughes & Pritchard*, Bangor.

Solicitors for the defendant, *Roberts & Jones*, Bangor.

Q. B. Div. (A. L. Smith and Grantham, JJ.) April 8.

BISHOP v. TAYLOR & CO.
HARRIS (*Third party*). (*a.*)

Vendor and purchaser—Lease—"Usual" covenants—Covenant "not to assign or part with possession of premises without consent of lessor, such consent not to be unreasonably withheld"—Rescission—Return of deposit money.

A covenant in a lease that "the lessee is not to assign or part with the possession of the premises without the consent of the lessor, such consent not to be unreasonably withheld," is an "unusual" covenant, and an intending purchaser of the lease, who has signed an agreement for the purchase of the lease from the lessee, and paid a deposit thereunder, is not bound to complete the purchase when such covenant is not disclosed to him before signing the agreement, but such purchaser may refuse to complete the purchase, and may recover back the deposit.

Hampshire v. Wickens, 26 W. R. 491, 7 Ch. D. 555, *followed.*

Appeal from Wandsworth County Court.

The action was brought to recover a sum of £25, received by the defendant as agent for the plaintiff, under the following circumstances.

The plaintiff was the lessee of certain premises which he wished to dispose of, and with that object he placed the matter in the hands of the defendant Taylor, who was an auctioneer, in order that Taylor might find a purchaser for the lease. Taylor intro-

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

luced the third party Harris, and subsequently an greement was entered into between the plaintiff and Harris, dated the 30th of August, 1890, whereby Harris agreed to purchase the lease from the plaintiff, he sale to be completed by September 29, and Harris ras to pay £25 deposit. This deposit was paid to the lefendant Taylor, but the agreement was silent as to rhen the deposit was to be paid in the event of the urchase and sale not being completed.

The purchase was not completed by the 29th of leptember, and Harris refused to complete the agreeaent and to purchase the lease, because the lease ontained a covenant which was not disclosed to him rior to his signing the agreement of the 30th of August, a covenant which, he alleged, was an onerous ovenant, which entitled him to refuse to complete the greement. The covenant in the lease was that "the essee was not to assign or part with the possession f the premises without the consent of the lessor, uch consent not to be unreasonably withheld." The laintiff was ready and willing to complete the purhase, and had obtained the consent of the lessor to he assignment, but Harris refused to complete.

The plaintiff then brought this action against Taylor for the deposit of £25, which had been placed n his hands. Harris also claimed the return of the £25 from Taylor, who refused to give it to either arty, but who was ready to hand it over to the arty declared to be entitled to the same, as he was a nere stakeholder, and had no interest himself in the £25.

The deputy county court judge distinguished the ase from *Reeve* v. *Berridge*, 36 W. R. 517, 20 Q. B. D. 523, as the covenant in that case restrained the lessee from carrying on certain trades, whereas the parties here carried on the same business, and he held that the covenant not to assign or part with the possession of the premises without the conent of the lessor, such consent not to be unreasonably withheld, was not such an onerous covenant as would ntitle Harris to refuse to complete the purchase, nore especially as, if the lessor unreasonably withheld is consent, the lessee might assign without breach of he covenant: *Sear* v. *House Property and Investment Society*, 29 W. R. 192, 16 Ch. D. 387; *Treloar* v. *Bigge*, 22 W. R. 843, L. R. 9 Ex. 151; and *Hyde* v. *Warden*, 26 W. R. 201, 3 Ex. D. 72. He therefore eld that Harris was not justified in refusing to comlete the purchase, and that, consequently, he had orfeited the deposit of £25, and he gave judgment or the plaintiff for the £25, to be paid over to him by Taylor, and taxed costs as against Harris.

Harris appealed.

Ellis J. Davis, for the appellant.—The case of *Hampshire* v. *Wickens*, 26 W. R. 491, 7 Ch. D. 555, decided by Jessel, M.R., in 1878, was not cited to the deputy-judge. By that case it was decided that a covenant "not to assign without the lessor's consent," was an "unusual" covenant in a lease, and hat the purchaser of the lease would not be bound o accept the lease containing that covenant, when uch covenant was not disclosed before the agreenent. The present case is absolutely concluded by hat case.

Elliott, for the plaintiff.—The case of *Hampshire* v. *Wickens* was somewhat different from the present, as here there was in addition a covenant that the essee would not put up any bills for letting apartnents without the lessor's consent. That would be n onerous covenant, and would entirely distinguish hat case from the present. This covenant could not be an onerous covenant, as, according to the cases cited in the court below, if the lessor unreasonably withheld his consent to an assignment, then the lessee might assign without committing a breach of the covenant. That was the ground of the decision; the covenant is, therefore, not an onerous one within *Reeve* v. *Berridge*, and the case is different from *Hampshire* v. *Wickens*.

Morton Smith, for the defendant Taylor.

A. L. SMITH, J.—When this lease was tendered to Harris, he refused to complete the agreement and purchase the lease, and he so refused because there was a covenant in the lease that the lessee was not to assign or part with the possession of the premises without the consent of the lessor, "such consent not to be unreasonably withheld," and he said that this was an unusual covenant which entitled him to refuse to purchase the lease, as he had no notice of the same when he signed the agreement.

The case went to trial and several cases were cited, but the case of *Hampshire* v. *Wickens* was not cited. In that case Jessel, M.R., laid down what are "usual" covenants and what are "unusual" covenants in a lease, and he lays it down in that case that a covenant in a lease not to assign without the lessor's consent is an "unusual" covenant. It seems to me, therefore, that the claim of Harris was well founded, as he was not bound to purchase the lease with this unusual covenant in it, such covenant not having been disclosed to him at the time of his signing the agreement. Judgment should therefore be entered for the third party, Harris, for the return of the £25 deposit by the defendant, with costs here and below. As Taylor is a mere stake holder, he ought not to have appeared here, and he is not entitled to costs.

GRANTHAM, J.—I am of the same opinion. The case clearly comes within *Hampshire* v. *Wickens*, where the late Master of the Rolls, speaking of a similar covenant, says, "I am therefore of opinion that it is not a usual covenant." That case is binding on us here.

Appeal allowed. Judgment for the third party, Harris.

Solicitor for the plaintiff, *Hanne*.

Solicitor for Harris, *J. Davis*.

Solicitor for the defendant, *W. Reeve*.

IN BANKRUPTCY.

Q. B. Div. (Cave and Charles, JJ.) May 5, 29.

Ex parte CULLEN.
In re PARROTT. (*a*.)

Bankruptcy—Proof—Proxy—Attestation of instrument of proxy by person appointed proxy—Validity—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *schedule I., rr.* 15, 16—*Bankruptcy Rules*, 1886, *rr.* 245, 247—*Appendix, Forms* 75, 76.

Under the Bankruptcy Act, 1883, *a proxy cannot be an attesting witness to the instrument of proxy by which he is appointed.*

Appeal from an order of his Honour Judge Hughes in the county court at Macclesfield, by which he reversed the decision of the official receiver admitting a proxy given by the appellant.

On the 12th of November, 1890, the appellant, Mrs. Cullen, who was a creditor in the bankruptcy, made a proof against the estate.

(*a*.) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

The meeting of creditors was to be held on the 14th of November, 1890, and Mrs. Cullen, being unable to attend the meeting, gave a special proxy to Mr. T. A. Daniels, her solicitor, to vote for a certain person as trustee.

The attesting witness to the instrument of proxy was Mr. T. A. Daniels himself, and an objection was taken on this account at the meeting, which was overruled by the official receiver.

The decision of the official receiver was, however, subsequently reversed by the county court judge.

Mrs. Cullen now appealed.

F. C. Willis, for the appellant.—The simple question is whether the proxy himself can attest the instrument of proxy. All that he has to do is to obey the directions given to him.

He referred to *Seal* v. *Claridge*, 29 W. R. 598, 7 Q. B. D. 516; *Freshfield* v. *Reed*, 9 M. & W. 404.

Herbert Reed, for the respondent.—No person can be a witness who has to do with the transaction. A party to a deed cannot be a witness, and although a proxy is not a party in the sense of being a party to a deed, he is an attorney to act in the stead of the person giving the proxy. The essence of an attesting witness is that it should be a third person who should attest. It is very important that there should be the evidence of some independent person of the giving of the proxy.

Cur. adv. vult.

May 29.—CAVE, J.—The only question we have to decide in this case is whether, under the Bankruptcy Act, 1883, a proxy can be an attesting witness to the instrument of proxy. By rule 15 of schedule I. to the Act a creditor may vote either in person or by proxy. By rule 16 every instrument of proxy shall be in the prescribed form, and shall be issued by the official receiver, or after the appointment of a trustee by the trustee, and every insertion therein shall be in the handwriting of the person giving the proxy. Form 75 in the appendix to the Bankruptcy Rules, 1886, contains after the words of the instrument of proxy the words "signature of witness," and below that, the word "address." It also contains a form of certificate to be signed by the witness of a creditor blind or incapable of filling up the proxy. Form 76 is similar.

Now it was not disputed that an attesting witness was required to an instrument of proxy, and the only question we have to decide, and do decide, is whether the proxy himself can be such witness. The only authority on the subject that was cited to us is *Seal* v. *Claridge*, in which it was held by the Court of Appeal that the grantee of a bill of sale under the Bills of Sale Act, 1878, s. 10, sub-section (1), although he was a solicitor, could not be the attesting witness thereof. That section required that the execution of every bill of sale should be attested by a solicitor of the Supreme Court, and that the attestation should state that before the execution of the bill of sale the effect thereof had been explained to the grantor by the attesting solicitor, and the ground of the decision was that an attestation by the grantee was not sufficient, as he was a party to the transaction, and, consequently, had the greatest possible interest in deceiving the grantor if he was inclined to be fraudulent or to be guilty of malpractice. In that case the case of *Freshfield* v. *Reed* was referred to, but that case has not much bearing on the present, as it only decided that a consent in writing, duly attested, means attested by a witness, and that a consent is not attested simply by the consenting party being a party to the deed to which his consent is required if his signature to the deed is not attested by a witness.

Attestation is not necessary, as was observed in *Seal* v. *Claridge*, unless it is required by an instrument creating a power or by some statute, and where it is so required the provisions of the instrument or statute, whether express or implied, must be complied with. Obviously, the requirement of an attesting witness is inconsistent with the grantor attesting his own signature, and we have the authority of the Court of Appeal for going a step further and saying that a party to the transaction cannot be an attesting witness. It is true that Lord Selborne, L.C., fortifies his conclusions in that particular case by considerations drawn from the language of the statute, which in that case required an attesting witness, but we think it is impossible to read his judgment without understanding it as laying down the general rule stated above.

It is true that no authority in English law can be found for the proposition, which is probably due to the fact that the far wider rule excluding witnesses on the ground of interest obscured the narrower, but far more reasonable, rule incapacitating a party to the transaction from being an attesting witness. This rule has, however, as it seems to us, a somewhat more definite legal origin than the general consent of mankind. In the Roman law of wills the heir was supposed to buy and the testator to sell the succession and family, and the ceremony was transacted openly, with all the symbols of a sale, in the presence of an officer and of a certain number of witnesses. While the testament *per æs et libram* continued neither the testator, nor heir, nor any of the families of either could be a witness, because they were supposed to be the parties to the contract. When the symbolical sale ceased, and testaments were in writing and secret, the heir himself was considered to be a competent subscribing witness, and afterwards, when the will was open, the heir was still looked upon as a competent witness though he knew the contents. Gaius, however, reprobated this custom, and Justinian pronounced it illegal (Instit. Lib. 2, Tit. 10, s. 10). Justinian, however, did not interfere with the competency of legatees or persons entrusted with *fidicommissa* who had always been regarded as strangers to the transaction.

Now this general rule or principle excluding those who are parties to the transaction from being competent attesting witnesses would clearly apply, as in *Seal* v. *Claridge* it was held to apply, to the grantee of a bill of sale, and incapacitate him from being an attesting witness to the bill of sale. Does this principle apply to the case of a proxy? There is indeed no contract between the creditor and the proxy such as was supposed originally in the Roman law to exist between the testator and the heir, nor is the proxy a party to the document or required to sign it, nor does he take any beneficial interest under it. But as he is the donee of the power conferred by the instrument, we do not see how it can be said that he is a stranger to the transaction. It must also be remembered that the witness in the case of a blind or illiterate creditor has duties to perform with reference to the proxy beyond that of attesting the mark of the creditor. Such duties seem to require the presence of an independent person other than the donee of the power, and it would be inconvenient to lay down a different rule as to the person who could be an attesting witness in the two cases. With the object or policy of requiring an attesting witness, and if one is required, of limiting his duty to attest the signature of the person executing the document, we have nothing to do; but where an attesting witness is required, we have only to follow the law laid down by the Court of Appeal in *Seal* v. *Claridge* and say that at any rate he must not be a party to the transaction.

Some difficulty has, no doubt, been thrown in our way by a decision under the Statute of Frauds. By section 5 of that Act it was required that a devise of lands should be in writing signed by the devisor and attested by three or four credible witnesses. Under that statute difficulties arose in establishing wills because a devisee or legatee was incompetent as a witness to the will, but apparently only on the ground that he took a beneficial interest under it. To remedy this state of things 25 Geo. 2, c. 6, was passed, which, by section 1, enacted that a beneficial devise, legacy, estate, interest, or appointment to an attesting witness should be null and void, and that such person should be admitted as a witness notwithstanding such devise, &c. In the case we refer to a mere executor or trustee who took no beneficial interest under the will was held to be a competent attesting witness: *Bettison* v. *Bromley*, 12 East, 250. This decision purported to be based on earlier authorities, but when those authorities are examined they only decide that such an executor or trustee is a competent witness at the trial in a matter concerning the estate, and not that he is competent to be an attesting witness. The decision in East appears to be founded on the assumption that the only objection to the competency of an attesting witness was that of interest. This may be accounted for either by the fact that no general rule rendering a party to the transaction incompetent as an attesting witness was known to the judges who decided that case, or that, following the Roman law, they held it not to apply to persons only intrusted with *fidei-commissa*. However this may be, we have in *Seal* v. *Claridge* an express and recent decision of the Court of Appeal laying down a general principle on the subject, and it is not for us to disregard it or endeavour to whittle it away by one of those fine-drawn and subtle distinctions which are the opprobrium of English law and the despair of all those who seek to evolve from it a rational and intelligible system. The case is one of some difficulty, but for the reasons given above we have come to the conclusion that the learned county court judge was right, and we therefore dismiss the appeal, with costs.

CHARLES, J., concurred.

Appeal dismissed.

Solicitors for the appellant, *Stephens & Stephens.*

Solicitor for the respondent, *L. W. Byrne.*

Court of Appeal.

From Q. B. Div. June 8.

REG. *v.* JUDGE OF HALIFAX COUNTY COURT AND BAIRSTOWE. (a.)

County court—Jurisdiction—Validity of patent—Patents Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 117—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 56.

A county court has no jurisdiction to entertain an action in which the validity of a patent is in question.

Decision of the Queen's Bench Division (ante, *p.* 492, [1891] 1 *Q. B.* 793) *affirmed.*

The effect of the Patents Act, 1883, *is to confine the jurisdiction in patent actions to the High Court.*

Appeal from the decision of a divisional court (Pollock, B., and Charles, J.), reported *ante*, p. 492, [1891] 1 Q. B. 793.

An action was commenced by one Sutcliffe against Bairstowe in the Halifax County Court to recover thirteen guineas damages for the infringement of a patent.

Bairstowe disputed the validity of the patent, and thereupon the county court judge nonsuited the plaintiff, on the ground that he had no jurisdiction to entertain the action.

A rule *nisi* for a *mandamus* having been obtained was discharged by the Divisional Court, on the ground that the privileges granted to an inventor by letters patent are a franchise, and that the title to them is, therefore, excluded from the jurisdiction of the county court by section 56 of the County Courts Act, 1888.

Sutcliffe appealed.

Lewis Edmunds and *R. A. Dale*, for the appellant.

T. Terrell and *Malcolm Douglas*, for the respondent.

The arguments used and cases cited were the same as in the court below.

Lord ESHER, M.R.—Personally I agree entirely in the decision of the Divisional Court and in the reasons given by them. I think that a grant of letters patent is such a "franchise" as is mentioned in the proviso to section 56 of the County Courts Act, 1888. But when attention is paid to the Patents Act, 1883, it is clear, to my mind, that the jurisdiction of county courts as regards patents is ousted, and that the trial of such actions as the present is confined to the High Court. It was contended that if that were so the jurisdiction of the court of the County Palatine of Lancaster was ousted also, but that is not so. The court of the County Palatine had always the same jurisdiction as the High Court of Chancery. It is only limited as regards area. That is apparent from the Chancery of Lancaster Act, 1890 (53 & 54 Vict. c. 23). Looking, then, at the Patents Act, 1883, it is clear from section 117, which defines court as "her Majesty's High Court of Justice in England," that the trial of such actions is confined to the High Court. Can it be contended that that Act is impliedly repealed by the County Courts Act, 1888? It is perfectly plain that the latter Act does not affect the Patents Act in any way. I am, therefore, of opinion that this appeal must be dismissed.

LOPES, L.J.—I felt some doubt at first—as I now think, wrongly—whether the word "franchise" in section 56 did include a grant of letters patent. But after looking at the definition given in Blackstone Comm., vol. 2, p. 37, that doubt has disappeared. The question, however, becomes immaterial, since it is quite plain from the Patents Act, 1883, that such actions as this can only be tried in the High Court, and cannot be tried in the county court.

KAY, L.J.—I am of the same opinion, and for the same reasons. I agree that a grant of letters patent is included in the word "franchise," and I am also clear that, under the Patents Act, 1883, which is in no way affected by the County Courts Act, 1888, these actions can only be brought in the High Court. It is inconceivable that while the former Act gave a special and carefully-defined jurisdiction to the High Court in such cases, the latter Act should give to county courts a perfectly open jurisdiction over them.

Appeal dismissed.

Solicitors for the plaintiff, *Ford & Ford*, for *C. T. Rhodes*, Halifax.

Solicitors for the defendant, *J. H. Bridgford*, for *W. H. Boocock*, Halifax.

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

From Q. B. Div. May 28.

ARMOUR v. BATE. (a.)

Practice—Trial—Plaintiff not appearing—Burden of proof on defendant—Defendant entitled to judgment—Form of judgment—R. S. C., 1883, ord. 36, r. 32.

Where, upon a trial being called on, the defendant appears and the plaintiff does not appear, the defendant, if he has no counter-claim, is entitled to judgment under ord. 36, r. 32, even though, upon the pleadings, the burden of proof lies upon him.

The judgment under the above rule should be a judgment dismissing the action, and not a judgment for the defendant.

Appeal from the judgment of Wills, J., at the trial of the action.

The action was brought to recover £300 deposited by the plaintiff with the defendant. The statement of defence alleged that the plaintiff was formerly employed by the defendant as manager of his business; that the £300 was deposited by the plaintiff with the defendant in lieu of a fidelity guarantee, and upon the terms that the defendant should hold the same as security for the due and faithful performance of the plaintiff's duties, and should indemnify himself thereout for any loss which he might sustain by reason of the plaintiff not duly and faithfully performing his duties; that the plaintiff acted negligently and dishonestly in the management of the business; and that by reason thereof the defendant suffered loss to an extent exceeding £300. The plaintiff, in reply, joined issue upon the defence.

Upon the trial being called on, the plaintiff did not appear, and Wills, J., on the application of the defendant, without any evidence being given, gave judgment for the defendant.

The plaintiff appealed.

By ord. 36, r. 32, "if, when a trial is called on, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action, but if he has a counter-claim, then he may prove such counter-claim so far as the burden of proof lies on him."

Joseph Walton, for the plaintiff.—Ord. 36, r. 32, does not apply where the burden of proof is on the defendant, as in this case. The deposit was admitted, and the burden of proving the dishonesty of the plaintiff lay upon the defendant. No evidence having been offered, he was not entitled to judgment. Rule 32 only applies where the burden of proof lies upon the plaintiff. Secondly, if ord. 36, r. 32, is applicable, the judgment is wrong in form, the rule only authorizing a judgment dismissing the action, and not a judgment for the defendant. A judgment for the defendant would imply that the charges made against the plaintiff had been proved.

Gully, Q.C., and *C. A. Russell*, for the defendant.—If the plaintiff does not appear and ask for the relief claimed, he abandons his claim, and the defendant need not give any evidence to show why he should not pay the money claimed. The claim is abandoned, and the defendant is entitled to judgment under ord. 36, r. 32. Secondly, a judgment dismissing the action has the same effect as a judgment for the defendant; it is a bar to any subsequent action for the same cause.

Joseph Walton replied.

Lord ESHER, M.R.—In this case the plaintiff, after his employment by the defendant had terminated, sued to recover the £300 deposited by him with the defendant. The defendant admitted the receipt of the £300, but alleged misbehaviour by the plaintiff, which caused damage to the defendant exceeding the amount of the deposit. The plaintiff's *primâ facie* case was admitted in the defence. If the action had been tried, the burden of proof would have been upon the defendant. As the plaintiff did not appear, the learned judge gave judgment for the defendant.

It was first argued that rule 32 did not empower the judge to enter any judgment at all in favour of the defendant, inasmuch as the burden of proof was upon the defendant, and the defendant gave no evidence in support of his case. The words of rule 32 are clear. The rule says that if the plaintiff does not appear, and the defendant appears, the defendant shall be entitled to judgment. The judge acted rightly in not inquiring as to the burden of proof on the pleadings; his duty was simply to give judgment.

It was then said that the judgment was wrong in point of form; that the judgment ought to have been one simply dismissing the action; and that a judgment for the defendant was not authorized by rule 32. The plaintiff alleged that the judgment as now entered would imply that the charges against him were proved. Now the schedule to the rules does not contain any form of judgment dismissing an action. As far as I know there was no such judgment known to the common law. In the old Court of Chancery there seems to have been a form of judgment which recited that the cause came on to be heard in the presence of counsel for the defendant, no one attending for the plaintiff, and concluded by ordering that the plaintiff's bill stand dismissed out of court (see Seton on Decrees, 3rd ed., p. 1133). By ord. 23, r. 13, of the Chancery Consolidated Orders such dismissal, unless the court otherwise directed, was equivalent to a dismissal on the merits, and might be pleaded in bar to another suit for the same matter. Those Chancery Orders have been repealed by the Judicature Rules, and ord. 36, r. 19, of the Rules of 1875 was framed for both divisions, and there appears to be a form of order in the Chancery Division, following the old form in use in the Court of Chancery, reciting the appearance of the defendant and the non-appearance of the plaintiff, and ordering the action to be dismissed out of court. Ord. 36, r. 32, of the Rules of 1883, which is a re-enactment of ord. 36, r. 19, is now applicable to both divisions, and one would have expected a form of judgment to be given in the schedule to the rules. No such form is given, and it is therefore advisable to adopt a new form applicable to this new kind of judgment. The form will follow the words of rule 32 by stating that, on the trial being called on, the defendant appeared and the plaintiff did not appear, and ordering that the action be dismissed. The effect of a judgment in that form is the same as the effect of the former judgment in the Court of Chancery dismissing the bill; it has the same effect as if it were a judgment on the merits for the defendant, and that will give the defendant the general costs and the costs of all the issues.

The plaintiff has therefore failed in this appeal. Subject to this alteration in the judgment the appeal must be dismissed.

LOPES and KAY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Hamlin, Grammer, & Hamlin*, for *Cartwright & Son*, Liverpool.

Solicitors for the defendant, *Cunliffe & Davenport*, for *W. H. Churton*, Chester.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

From Q. B. Div. April 27.

SALAMAN v. WARNER AND OTHERS. (a.)

Practice—Appeal—Final or interlocutory order—Order dismissing action on point of law raised on pleadings —R. S. C., 1883, *ord.* 25, *rr.* 2, 3; *ord.* 58, *rr.* 3, 15.

An order is not "final" unless it is made upon an application which must, whatever the result, determine the action.

Hence, an order made under ord. 25, *r.* 3, *dismissing an action upon a point of law raised on the pleadings and argued before the trial is an interlocutory order, and a four days' notice of appeal is sufficient.*

Appeal from the Queen's Bench Division upon a point of law raised upon the pleadings.

The defendants having in their defence raised the point of law that the statement of claim showed no cause of action, it was ordered that this point should be argued before the trial under ord. 25, r. 2. Upon the argument the Divisional Court (Day and Lawrance, JJ.) held that the statement of claim disclosed no cause of action, and accordingly dismissed the action under ord. 25, r. 3. The plaintiff appealed, giving a four days' notice of appeal.

Sir Edward Clarke, S.G., and *Cock, Q.C.* (*A. T. Lawrence* with them), for one of the defendants, took the preliminary objection that the order of the Divisional Court was a final order, and that fourteen days' notice was necessary under ord. 58, r. 3.

They referred to *International Financial Society* v. *Moscow Gas Co.*, 26 W. R. 272, 7 Ch. D. 241; *Trowell* v. *Shenton*, 26 W. R. 837, 8 Ch. D. 318; *Whistler* v. *Hancock*, 26 W. R. 211, 3 Q. B. D. 83.

Sir R. E. Webster, A.G., Sir C. Russell, Q.C., H. Sutton, C. F. Gill, and *F. M. Abrahams*, for the other defendants.

Moulton, Q.C., and *T. W. Chitty* (*Finlay, Q.C.*, and *R. McKenna* with them) for the plaintiff.—An order is not final unless a decision upon the application out of which it arises, given in favour of either party, will determine the matter; *per* Brett, L.J., in *Standard Discount Co.* v. *La Grange*, 26 W. R. 25, 3 C. P. D. 67. Here, if the point taken in the defence had been overruled, the action would have gone on.

They referred to *Collins* v. *Vestry of Paddington*, 28 W. R. 588, 5 Q. B. D. 368.

Sir Edward Clarke, S.G., in reply, referred to *Hughes* v. *Little*, 35 W. R. 36, 18 Q. B. D. 32.

Lord ESHER, M.R.—I am of opinion that the true test for ascertaining whether an order is final or interlocutory is that suggested by me in *Standard Discount Co.* v. *La Grange*. I there said that no order in an action would be found to be final unless a decision upon the application out of which it arose, given in favour of either party, would determine the matter in dispute. If the decision would only determine the matter when given in favour of one of the parties, then the order is not final, but interlocutory. That seems to me to be a test of easy application to each case that arises, and to be free from any difficulties. If the Divisional Court in the present case had decided the other way, the action must have proceeded in the usual course. If this order were taken to be a final order, then the defendants would have a year in which to appeal, and numerous complications might arise in such a case. The order, therefore, is interlocutory, and the notice of appeal is good.

FRY, L.J.—I am of the same opinion. Rules 3 and 15 of order 58 use the term "interlocutory order," of which no definition is given in the rules. The courts have frequently experienced a difficulty in applying the term to particular cases. The intention of the framers of the rules in drawing a distinction between interlocutory and final orders was to allow a shorter time for appealing in the former case where the action might, in one event, proceed in its ordinary course. An order seems to me to be final which arises out of an application the result of which must be to determine the action. In the present case it is clear that the result of the application would not necessarily determine the action. If the order had been in favour of the plaintiff the action would have proceeded.

LOPES, L.J., concurred.

Solicitors for the plaintiff, *McKenna & Co.*

Solicitors for the defendants, *Harries, Wilkinson, & Raikes; Michael Abraham, Sons, & Co.; Foss & Ledsam.*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

From Q. B. Div. Jan. 23.

TURNER v. GOLDSMITH. (a.)

Contract—Agreement to employ for a term certain—Employer's place of business destroyed by fire—Condition of continued existence of place of business, whether implied—Foundation of contract.

The defendant, a manufacturer, entered into a written contract with the plaintiff to employ him as agent, canvasser, and traveller for a term of five years certain, determinable at the end thereof by three months' notice in writing on either side, the plaintiff on his part agreeing to "do his utmost to obtain orders for and sell the various goods manufactured or sold" by the defendant, as should "be from time to time forwarded, or submitted by sample or pattern" to the plaintiff, who was to be remunerated by a commission at a specified rate on all goods sold by him for the defendant. The defendant's manufactory having been burnt down when there were still nearly three years of the five unexpired, he made no attempt to resume his business or carry it on elsewhere, or to afford the plaintiff any further employment.

Held, that a condition that the defendant's manufactory should continue to exist could not be implied in the contract, which was such that the destruction of the manufactory did not render it impossible of performance, and that the plaintiff was entitled to substantial damages.

Rhodes *v.* Forwood, 24 *W. R.* 1078, 1 *App. Cas.* 256, *distinguished.*

Taylor *v.* Caldwell, 11 *W. R.* 726, 3 *B. & S.* 826, *explained.*

Decision of Grantham, J., *reversed.*

Appeal from Grantham, J.

This was an application by the plaintiff to set aside a judgment entered for the defendant at the trial before Grantham, J., with a jury in Middlesex.

On the 31st of January, 1887, Mr. Goldsmith, the defendant, who was a shirt, collar, and cuff manufacturer, entered into a contract in writing with A. S. Turner, the plaintiff.

By the contract, which purported to be between Goldsmith "and any partner he may hereafter take into business, carrying on business as shirt, collar, and cuff manufacturer, under the style of the 'Priory Manufacturing Co.,' and hereafter called the said company, of the one part," and A. S. Turner, of

(a.) Reported by R. H. DEANE, Esq., Barrister-at-Law.

the other part, the said company agreed to employ Turner as their agent, canvasser, and traveller, upon the terms and subject to the stipulations and conditions therein contained, and Turner on his part agreed with the company to serve them diligently, faithfully, and honestly, as their agent, canvasser, and traveller, upon the terms, and subject to the stipulations and conditions therein contained. Those terms, conditions, and stipulations, so far as material, were as follows:—"(1) The agency shall be deemed to have commenced on the 31st day of January, 1887, and shall be determinable either by the company or the said A. S. Turner at the end of five years from the date hereof upon three calendar months' notice in writing being given by the party desiring to determine the said agency to the other or others of them." "(2) The said A. S. Turner shall do his utmost to obtain orders for and sell the various goods manufactured or sold by the said company as shall be from time to time forwarded, or submitted by sample or pattern to him, at list price to good and substantial customers, and shall in no case sell any goods at lower price than may be authorized in writing by the said company." "(5) The said A. S. Turner shall not, either by himself, partner, agent, or other persons whatsoever, sell or offer for sale any shirts, collars, cuffs, fronts, or any goods of the description manufactured or sold by the said company." "(8) The said company shall pay to the said A. S. Turner the sum of 3¾ per cent. commission on all goods sold by him for them. The commission as aforesaid shall be paid on the 20th days of March, June, September, and December, on all goods sold and delivered by the said company through the agency of the said A. S. Turner, and which may have been then actually paid for; but the said company shall not be liable to pay commission on any sums not actually received by them."

The defendant's manufacturing premises were destroyed by fire in March, 1889, and he made no attempt to resume business there or elsewhere, or to furnish employment to Turner, who consequently commenced this action for damages for breach of contract on the 31st day of May in the same year. The damages were assessed by the jury at £125, but the question whether there had been a breach of contract was reserved, and having been afterwards argued before Grantham, J., that judge held that, as there was no express agreement to supply goods, there had been no breach of contract, and accordingly ordered judgment to be entered for the defendant.

The plaintiff appealed.

Winch, Q.C., and *H. Kisch*, for the appellant.—There has been a breach of the contract to employ the plaintiff for five years, which entitles him to damages, the defendant having no right, in view of that contract, to discontinue the business as he has done: *Macintyre* v. *Belcher*, 11 W. R. 889, 14 C. B. N. S. 654. The defendant has discontinued the business wilfully. He made no effort after the fire to find a new place of business; and besides, even if he could not help the discontinuance of the manufacturing, there was nothing to prevent his buying and selling, which would have been just the same to the plaintiff. There was nothing in the contract to limit it to goods manufactured at that particular place which was burnt down. The point taken by the learned judge was that there was no express agreement to supply goods. But it is impossible to give effect to these covenants without reading in an implied covenant to supply goods. [LOPES, L.J.—That implies a covenant to carry on business for the benefit of the agent.] Yes. [KAY, L.J.—If a man sells the future crops of an apple-tree, he cannot cut down the tree.] The defendant has shown no ground for being excused from performing his contract.

E. Bullen, for the respondent.—The agreement was merely that the plaintiff should procure orders for any goods or samples sent him. There was no express agreement by the defendant to send any such goods or samples. The remuneration agreed upon was a mere commission, not a salary. There is, therefore, no implied agreement to continue the business: *Rhodes* v. *Forwood*, 24 W. R. 1078, 1 App. Cas. 256; *In re English and Scottish Marine Insurance Co., Ex parte Maclure*, 18 W. R. 1122, L. R. 5 Ch. App. 737. [LOPES, L.J.—The last case on the point is *Reid* v. *The Explosives Co.*, 35 W. R. 509, 19 Q. B. D. 264.] The contract here was subject to an implied condition that the defendant's place of business should continue to exist: *Taylor* v. *Caldwell*, 11 W. R. 726, 3 B. & S. 826. It would be absurd to contend that when the premises were burnt down the defendant should have to rush about to find new premises immediately, merely in order to enable him to pay the plaintiff 3¾ per cent. on his sales. [LOPES, L.J., referred to *In re The Patent Floor Cloth Co.*, 41 L. J. Ch. 476, 20 W. R. Ch. Dig. 42, and asked how the defendant got rid of the contract to employ the plaintiff for five years.] It has been made impossible of fulfilment by an event over which the defendant had no control. The contract was merely to employ the plaintiff as agent during the continued existence of that house or business, and if rendered impossible it comes under the rule in 3 Com. Dig., "Condition," p. 125: "So the non-performance of a condition shall be excused by impossibility, or the act of God, if there be no default in the party." [KAY, L.J., referred to *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy*, L. R. 3 Ind. App. Cas. 200. LOPES, L.J.—Is not the covenant to employ here a "positive" covenant?: see *Taylor* v. *Caldwell*.] No. *Taylor* v. *Caldwell* is in our favour, and has been followed by *Appleby* v. *Myers*, L. R. 2 C. P. 651, 15 W. R. C. L. Dig. 128.

Winch, Q.C., in reply.—The only defence put forward is that the carrying out of the contract became impossible. To make that out the defendant has to say that the contract was to employ the plaintiff to sell goods manufactured in a particular spot. Whereabouts in the contract does he find that? There are three years of the term yet to run, which gives ample time to obtain new premises. There is an implied contract to carry on the business in order to employ the plaintiff: *Whittle* v. *Frankland*, 31 L. J. M. C. 81, 10 W. R. C. L. Dig. 54. The agreement does not say the goods are to be manufactured in a particular house in Taunton. In *Taylor* v. *Caldwell* the contract was to let a particular music hall, but it was burnt down six days before the first of the days for which it was let; and it therefore became impossible to carry out the contract. The impossibility must be a physical one: *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115, at p. 121. [LINDLEY, L.J., intimated that the court thought the damages as assessed by the jury too high, but that if the plaintiff agreed to accept the reduced amount at which they should be assessed by the Court of Appeal, there need not be a new trial. The suggestion of the court was assented to.]

LINDLEY, L.J.—In this action, brought by Mr. A. S. Turner for breach of contract by the defendant in not continuing to employ the plaintiff for a period of five years, the controversy depends entirely upon the true construction of the contract. The facts are these. The plaintiff was desirous of being employed as agent and traveller to the defendant, and the defendant wished to employ him as such. A contract was accordingly entered into between the defendant of the

one part and the plaintiff of the other part, and there was this recital: "Whereas, in consideration of the agreement of the said A. S. Turner, the said company" (that is, Mr. Goldsmith and any partner he might have) "agree to employ the said A. S. Turner as their agent, canvasser, and traveller upon the terms and subject to the stipulations and conditions hereinafter contained; and in consideration of the premises the said A. S. Turner hereby agrees with the said company that he, the said A. S. Turner, shall and will diligently, faithfully, and honestly serve the said company as their agent, canvasser, and traveller upon the terms and subject to the stipulations and conditions hereinafter contained." There there is a clear agreement by the defendant to employ Turner, and by the plaintiff to serve the defendant, on these conditions:—(1) The agency was to be deemed to have commenced as from January 31, 1887, and was to be determinable either by the company or the plaintiff at the end of five years from the date of the agreement upon the notice therein mentioned. (2) "The said A. S. Turner shall do his utmost to obtain orders for and sell the various goods manufactured or sold by the said company as shall be from time to time forwarded or submitted by sample or pattern to him at list prices to good and substantial customers." The words "manufactured or sold by the said company" are repeated in clause 5, which is not otherwise material. Then follow other clauses, which I need not refer to, and then comes clause (8), which deals with the plaintiff's remuneration, and provides that it shall be by a commission on the goods sold by him for the company.

Now the first question upon this;—it is said, and said truly, by the defendant that there is no express agreement here to send any goods, samples, or patterns to Turner, and that there is no agreement, therefore, to give him any employment at all so as to enable him to earn any commission. This becomes material when we consider the question, How can the defendant employ Turner unless he supplies him to a reasonable extent with goods and samples to enable him to earn a commission? There is no answer to that question as far as I can see. Then it is said there is no undertaking by the company to go on manufacturing. Certainly there is no express, nor, in my opinion, any implied, agreement to manufacture a single shirt; but the company might buy the articles to be supplied to the plaintiff. Well, what happened was this. The defendant's place of business was burnt down, and he has given up the business and made no attempt to procure another place of business in order to supply Turner. The latter then says he is entitled to damages or compensation of some kind for the breach of agreement to employ him for five years. The defendant puts his case in this way. He says the continued existence of the business was an implied condition of the agreement. But there is certainly no implied condition of its continued existence at this particular place. However, it was contended that that proposition was covered by authority, and reliance was placed upon *Rhodes* v. *Forwood*, *Taylor* v. *Caldwell*, and the Indian case before the Privy Council. In the first of those cases it was held that an action of a similar kind to the present one could not be maintained, on the ground that there was no express contract to employ, and that such a contract ought not to be implied; that was the *ratio decidendi*. In the present case, however, there is an express and positive contract to employ Turner. In *Cowasjee Jinabhoy* v. *Lallbhoy Vullubhoy*, a partnership deed contained a contract that one of the partners should be employed as sole agent during his life to effect purchases and sales for the partnership, and should be paid by a commission upon such sales. The partnership having been dissolved by decree of the High Court of Bombay on the ground that the business could not be carried on at a profit, it was held that the partnership having come to an end, the contract for employment to sell on behalf of it had come to an end too, and that no compensation could be claimed by the agent, because it was impossible that a contract to continue the partnership under all circumstances during his life could be implied. The third case mentioned, *Taylor* v. *Caldwell*, 11 W. R. 726, 3 B. & S. 826, seems to be very much in point here. Blackburn, J., at p. 833, says: "There seems no doubt that where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible. . . . But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied, and there are authorities which we think establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled, unless, when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done, then in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing without default of the contractor." The whole substance of that is centred in the principle that the rule that the contract is to be treated as subject to an implied condition that it is to be in force only so long as a certain state of things continues, is to be confined to those cases where the parties must have contemplated the continuing of that state of things as the foundation of what was to be done. In the present case, however, it certainly cannot be said that the parties contemplated the continued existence of the defendant's manufactory as the foundation of what was to be done; because, as I have already pointed out, there is nothing in the contract to limit the employment of the plaintiff to goods manufactured by the defendant. The result of the application of these principles, therefore, to the present case is that the plaintiff is entitled to damages, and I do not think those damages should be merely nominal. The plaintiff's counsel has agreed that the amount of these damages shall be assessed by this court, rather than there should be a new trial of the case. We think that £125 is too much, and we fix the amount at £50, for which judgment must accordingly be entered for the plaintiff.

KAY, L.J.—Lopes, L.J., has desired me to say that he concurs in the conclusion at which we have arrived. For myself, I wish to guard my judgment by saying that if in this case it had been shown that not only the manufactory but the business of the defendant had been destroyed by *vis major*, without any default of the defendant, I do not think the plaintiff could have recovered damages; but in fact there is an utter absence of any proof to that effect. There was no evidence that it was quite impossible after the fire for the defendant to carry on his business. The contract was a peculiar one. It was a contract to employ the plaintiff for a term of five years certain, determinable at the end of that term by three months' notice on either side. There has, therefore, been a breach by the defendant of a positive contract. The defendant

contends that a condition of the continued existence of the manufactory must be implied. It is not the plaintiff who is asking that a condition may be implied in order to support his case. It is the defendant who says: "In order to justify me in putting an end to the contract, I ask the court to import a condition that the business must be carried on in this particular place." If it had been proved that, in consequence of some event over which he had no control, it had become impossible for the defendant to carry out the contract, I should have had no difficulty in holding that there had been no breach. But here it has not become impossible, and this case from that point of view is, therefore, no exception from the well-settled rule that the court will refuse to enforce a contract which it considers was made subject to an implied condition of the continued existence of something which constitutes the foundation of what is to be done, where that has ceased to exist.

For these reasons I entirely concur in the judgment of Lindley, L.J., and I concur also as to the amount of the damages.

Appeal allowed.

Solicitors, *Alfred Slater; W. H. E. Stone*, for *S. B. Cresswell*, Taunton.

High Court of Justice.

Chan. Div. North, J. — May 27, 28.

In re AMOS.
CARRIER *v.* PRICE. (*a.*)

Trade union—Effect of bequest and devise to—"Benevolent Fund"—Mortmain—Perpetuity—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *s.* 7—*Meaning of "purchase" in.*

A testator devised and bequeathed certain freehold and leasehold properties for lives, with a condition that each devisee and legatee should keep the property held by him in repair and pay an annual sum to go to the Benevolent Fund of a registered trade union, for the benefit of distressed members of the society and widows and children of deceased members.

Held, that, the annual sum being a charge connected with land and the nature of the Benevolent Fund being charitable, the gift to it was void as offending against the Statutes of Mortmain.

The word "purchase" in section 7 of the Trade Union Act, 1871, *has not the technical meaning of "take otherwise than by descent," and does not include taking by devise.*

There is nothing repugnant to the law in an estate being given to a man for the combined periods of his own life and the life of the person who may be his heir.

Adjourned summons.

This was an originating summons taken out by the plaintiffs, who were executors and trustees under the will of the testator in the action, asking (*inter alia*) that the effect of certain devises and bequests contained in the will in favour of a trade union might be determined.

The testator, James Amos, who died on the 15th of November, 1888, by his will, after appointing the plaintiffs to be his executors, and directing payment of his debts and funeral and testamentary expenses, devised and bequeathed as follows:—"I give, devise, and bequeath unto Thomas Price the property known as 27, Bath-terrace, New Swindon, in the county of Wilts, at present occupied by the said Thomas Price, the conditions to be as follows:—That the property be left to him for his life, and for the life of his heir, after which it becomes the property of the Boiler Makers and Iron Ship Builders' Society. And to Henry Poole the property known as 41, Regent-street, New Swindon, in the county of Wilts, at present occupied by me (James Amos), the conditions to be as follows:—" (the same as in the case of 27, Bath-terrace). "And to Thomas Henry Williams the property known as 40, Regent-street, in the county of Wilts, at present occupied by Henry Poole, the conditions to be as follows:—" (the same as in the cases of 27, Bath-terrace, and 41, Regent-street). "That each of the above keep the property held by them in good repair, and shall pay to the trustees the sum of four shillings per week until the whole mortgage be paid. And that the further sum of three pounds, six shillings, and eightpence each per annum be paid by them to be disposed of as follows:—viz., Five pounds per annum to the Boiler Makers' Benevolent Fund, and five pounds per annum to the executors. Should either of the parties refuse or fail to comply with the foregoing conditions, they shall forfeit all rights to the property, and the executors shall cause the same to be handed over to the Boiler Makers' Society forthwith."

The will did not contain any residuary gift.

The property, 27, Bath-terrace, was leasehold, the other two properties were freehold.

The Boiler Makers and Iron Ship Builders' Society was instituted in 1834, and was subsequently registered as a trade union pursuant to the Trade Union Act, 1871. By its rules it was provided (rule 1) that the objects of the society were "the establishment of a fund for the relief of its members in sickness, with medical and surgical aid, assistance to members out of employment, protection of trade or disputes connected therewith, accidents, old age, for the interment of its deceased members and their wives, and for regulating the relations between workmen and masters"; (rule 2) that the society should be governed by an executive council; (rule 12) that all moneys subscribed by members should be held by the executive council as general trustees "in trust for the members generally"; (rule 20) that no person should be admitted a member who was not "a legal boiler maker or iron ship builder—namely, an angle iron smith, plater, riveter, caulker, and holder-up."

Rule 39 dealt with the Benevolent Fund, and provided (section 1) that "sixpence in the pound, paid per annum, as contributions, should be taken for benevolent purposes, which should be under the control of the executive council"; (section 2) that "the widow of any deceased member who was in need of, and applied for, assistance to the branch of which her deceased husband was a member, within twelve months of his death, the officers of the branch (*sic*) should send the application to the executive council, with a recommendation or otherwise, when the executive council should have power to grant £5 to the widow and £1 to each child under thirteen years of age, or withhold the same, as they might decide"; (section 4) that "when children were left without any parents at the death of the father, they should (with the approval of the executive council) receive the £5 which the mother would have been entitled to if she had been living, in addition to their own grant," and that "the cases of any other distressed members might be sent to the executive council . . . when they should have power to

(*a.*) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

grant any sums the cases might deserve, if there were funds to meet it."

Section 7 of the Trade Union Act, 1871, provides that "it shall be lawful for any trade union registered under this Act to purchase or take upon lease in the names of the trustees for the time being of such union any land not exceeding one acre, and to sell, exchange, mortgage, or let the same, and no purchaser, assignee, mortgagee, or tenant shall be bound to inquire whether the trustees have authority for any sale, exchange, mortgage, or letting, and the receipt of the trustees shall be a discharge for the money arising therefrom."

The summons asked that a proper construction might be put upon the devises, bequests, and directions in the said will contained of and concerning the properties at New Swindon—viz., No. 27, Bath-terrace, No. 40, Regent-street, and No. 41, Regent-street—and that the rights of the parties interested therein might be ascertained and declared, and that the effect of the gift of £5 per annum to the defendants the Boiler Makers' Benevolent Fund might be determined.

Robertson-Macdonald, for the summons.

Church, for Thomas Price and Thomas Henry Williams.—The gift to the devisee "for his life and the life of his heir" gives him, besides his own life estate, an estate *pur autre vie* (that of his heir) after his death. Similarly in the case of the leasehold the legatee takes an interest for his own life, and in addition another for the life of his personal representative. The gift of £5 a year to the Benevolent Fund is a rent-charge out of land for a charity, and therefore bad: *Pease* v. *Pattinson*, 34 W. R. 361, 32 Ch. D. 154. The Boiler Makers' Society cannot take the properties in remainder, for they cannot hold land at all except so far as they are allowed by section 7 of the Act of 1871—that is, by purchase or lease.

J. C. Gordon, for Henry Poole, with similar interests.—The Benevolent Fund and the Association were separated in the mind of the testator. The gift of £5 a year is a rent-charge, and is void.

Hood, for the testator's heiress-at-law and one of his next of kin.—An estate to a man for his life, followed by another to him during the life of an unascertained person, is a thing unknown to the law. The remainder to the boiler makers subject to the life interests is an offence against the rule of perpetuities. This association, again, can only take land strictly in accordance with the terms of the Act under which it is registered.

Upjohn, for the Boiler Makers' Society and the Benevolent Fund.—(1) This association is not a corporation. (2) Nor is it a charity, as is clear from section 16 of the Trade Union Act Amendment Act, 1876. [NORTH, J.—Is not the Benevolent Fund charitable?] I can hardly contend that it is not. But the association is not charitable: *In re Clark's Trust*, 24 W. R. 233, 1 Ch. D. 497; it is merely a kind of mutual insurance society; no rule except the Benevolent Fund rule requires a member to be in distress. [NORTH, J.—You do not distinguish *Pease* v. *Pattinson*, in which there were rules similar to those you are commenting upon, and there the association was held to be a charity.] That case was not very well considered. In *Spiller* v. *Maude*, 32 Ch. D. 158, n. (2), Jessel, M.R., held a society charitable, but on the ground that poverty was a necessary element to entitle a member to the benefits of it; but in *In re Clark's Trust* poverty was not a necessary element, and the society was held not to be charitable, and here poverty is not a condition, and that case covers the present. (3) The purposes of the Boiler Makers' Society do not involve a perpetuity, they have power to sell under section 7 of the Act of 1871, and so there is no perpetuity: *Carne* v. *Long*, 8 W. R. 570, 2 De G. F. & J. 75. That section also gives them the power to "purchase" land, and the word there has its technical meaning of "taking otherwise than by descent," and so includes taking by devise. If the words are to be construed strictly the society may only acquire for valuable consideration, and are precluded from taking a voluntary conveyance from a member or under his will. The person in whom the legal estate is vested is to be called upon to convey to the trustees of the society. The gift of £5 a year to the Benevolent Fund is good; it is not an interest in land, but a mere personal payment out of the pockets of the tenants for life; there is no power to distrain for it nor claim of any kind against the land for it: *In re Thompson, Bedford* v. *Teal*, *ante*, p. 50, 45 Ch. D. 161.

NORTH, J.—The only question is between the heir-at-law and next of kin of the testator on the one hand, and the devisees and legatee of the three properties given by the will on the other. A great deal of time has been taken up in the case, and the total amount in question is very small. The testator by his will appoints two executors, the plaintiffs, and after directing payment of his debts and funeral and testamentary expenses, devises and bequeaths as follows:—[His lordship stated the parts in question of the will as set out above, and proceeded:—] Now what is the effect of the gift of the three properties in remainder to the Boiler Makers and Iron Ship Builders' Society? and what the effect of the gift of £5 per annum to the Boiler Makers' Benevolent Fund, which is merely a fund administered by the Boiler Makers and Iron Ship Builders' Society under rule 39 of the society, so that it is simply a gift to the society for the purposes of the fund? Now the society exists for the purposes of the Act under which it is registered, and, in my opinion, a bequest to it is one which cannot take effect, inasmuch as it is one which tends to a perpetuity on the authority of *Carne* v. *Long* and *In re Clark's Trust*.

Again, this society could not take land at all except under section 7 of the Act. [His lordship read the material part of the section.] It is argued that "purchase" in this section has the technical meaning of taking otherwise than by descent or escheat, and that, accordingly, it includes taking by devise. That, undoubtedly, is the meaning of the word sometimes, but, in my opinion, it is not its meaning here. If it were the succeeding words "or take upon lease" would be so much tautology. I think, however, it might include the purchasing of a lease not taken directly from the landlord. Moreover, the words of the section are "to purchase or take upon lease in the names of the trustees for the time being": how could a devise be a purchase in the names of trustees? Besides, the quantity of land which is allowed to be taken, and which is not to exceed one acre, seems to point rather to the acquisition of a site, for an office for instance, than to the taking of land for general purposes.

I hold, then, that the gifts in remainder of the three properties in question to the Boiler Makers and Iron Ship Builders' Society are void for the reasons I have already given. As to the gift of £5 per annum to the Benevolent Fund, that, in my opinion, is a gift connected with land, and void as an offence against the Statutes of Mortmain.

It remains to say what are the interests of the tenants for life in the three properties. In my opinion there is a gift to each for his own life, which is a good

gift, and then there is a further gift, also good, to him for the life of his heir; so that each takes for the combined period of his own life and that of the person who shall be his heir, the life of the heir being superadded to his own. At the end of that period the properties go, the freeholds to the testator's heir-at-law and the leasehold to his legal personal representative.

This may not be what the testator himself intended, but it is the construction I put upon what he has said.

Costs of all parties to come out of the estate, and, as to the plaintiffs, between solicitor and client.

Solicitors, *Prior, Church, & Adams*, for *A. E. Withy*, New Swindon; *C. L. Kingdon; Darley & Cumberland*, for *Clifton, Carter, & Co.*, Bristol; *Woodcock, Ryland, & Parker.*

Chan. Div. } North, J. } Feb. 20.

AYLWARD v. LEWIS. (a.)

Mortgage—Foreclosure—Death of mortgagor insolvent and without a personal representative before the time limited for redemption—Representative for purposes of action.

An order for foreclosure was obtained in a foreclosure action, but the defendant mortgagor died insolvent before the expiration of the period limited for redemption of the mortgaged property. There was no personal representative of his estate, and an order was made appointing one of his next of kin to represent his estate for the purposes of the action.

Held, on a motion for foreclosure absolute, that no order would be made in the absence of a properly-constituted representative of the mortgagor's estate.

Motion.

The question for decision was whether an order for foreclosure absolute ought to be made in a foreclosure action in respect of the estate of a mortgagor who had died insolvent and without a legal personal representative after the date of the chief clerk's certificate, but before the time limited for redemption had expired.

The action was brought for foreclosure of certain mortgages of leaseholds made to the plaintiff by the defendant, and a receiver of the rents of the mortgaged property was appointed.

On the 15th of February, 1890, judgment for foreclosure was obtained, the defendant having made default in pleading; and by the judgment the period during which the defendant was entitled to redeem was limited to six months from the date of the chief clerk's certificate.

The 22nd of May, 1890, was the date on which the certificate was made, and the period for redemption expired on the 22nd of November, 1890; but in the interval the defendant died insolvent and there was no legal personal representative.

On the 14th of November, 1890, upon the application of the plaintiff, an order was made in chambers, under ord. 16, r. 46, appointing the defendant's brother, who was one of his next of kin, to represent the defendant's estate for the purposes of the action; and it was ordered that the plaintiff should, on or before the 19th of November, 1890, serve the defendant's brother with this order, and that, on such service being duly effected and on default of payment by the defendant's brother on or before the 24th of November, 1890, of the sum found due to the plaintiff by the chief clerk's certificate, the brother, as representing the defendant's estate, should be absolutely foreclosed.

The order was duly served on the defendant's brother within the prescribed period.

There was in the hands of the receiver a small balance of money received by him, which balance had not been included in the chief clerk's certificate.

This was a motion by the plaintiff that the receiver might be ordered to pay the balance to the plaintiff; that the receiver might then be discharged; that the period of redemption might be enlarged to the 27th of February, 1891, and that unless the brother, as representing the defendant's estate, should on that day pay the sum found due to the plaintiff by the chief clerk's certificate, less the balance in the hands of the receiver, the brother, as representing the defendant's estate, should be absolutely foreclosed.

Vernon Smith, for the motion.—The order asked for is the proper order under the circumstances of the case: *Jenner Fust* v. *Needham*, 34 W. R. 709, 32 Ch. D. 582. [NORTH, J.—I am not satisfied that the order I made in chambers was right, and that there is a proper representative of the mortgagor's estate before the court.] The order appointing the defendant's brother to represent his estate was right: ord. 16, r. 46; *Peat* v. *Gott*, W. N., 1885, p. 46; *Neal* v. *Barrett*, W. N., 1887, p. 88.

NORTH, J.—I am not satisfied that the order I made in chambers was right; but if it was properly made, it does not follow that the estate can now be foreclosed. I have not got the mortgagor's estate here in any way, except in so far that a person has been appointed to represent it who may have no interest in it. I am not satisfied with the order appointing him, which may be a right order as a step in the right direction. I have decided following a decision of the Court of Appeal that an insolvent trustee is not a sufficient party to a suit so that the *cestui que trust* may be bound. I am not satisfied that a person who has not got the estate of the mortgagor with which to pay, properly represents that estate in a foreclosure action. In fact I think he does not. I decline to make an order for foreclosure in the absence of a properly-constituted representative of the mortgagor.

Solicitors, *Bell, Brodrick, & Gray.*

Chan. Div. } Romer, J. } April 24, 25, 27; May 29.

CARTER v. SILBER.
CARTER v. HASLUCK. (a.)

Infant—Marriage settlement—Confirmation or repudiation—Election—Compensation—Forfeiture—Infants' Relief Act, 1874 (37 & 38 *Vict.* c. 62), *s.* 2—*Infants' Marriage Settlements Act*, 1855 (18 & 19 *Vict.* c. 43).

A marriage settlement, dated the 16th of October, 1883, was made on the occasion of the marriage of two infants. The settlement was confirmed by the court on behalf of the wife, but not on behalf of the husband. By the settlement the husband's father covenanted with the trustees to pay £1,500 a year during the life of the wife and such further period as there should be any child or grandchild of the intended marriage, to be payable by equal quarterly instalments, such sum to be paid by them to the husband until he should assign, charge, or affect so to do, in which event

(a.) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

(a.) Reported by J. W. GREIG, Esq., Barrister-at-Law.

there was a discretionary trust over. The settlement also contained a covenant by the husband that if, during the continuance of the annuity, he became entitled, under certain other settlements executed by his father, or under the will of either his father or his mother, to any property, he would assign the same to the trustees of his marriage settlement, in reduction of the amount of capital necessary to be set apart to meet the annuity.

The father, by his will dated the 22nd of November, 1878, *gave the residue of his property equally between his two sons, one of whom was the husband in question. The testator died on the 14th of May,* 1887. *The husband attained his majority on the 19th of November,* 1883, *and received three instalments of the annuity, and paid over to the trustees of the settlement a sum received by him under one of the earlier settlements made by his father, but without prejudice to his right to repudiate the settlement. On the 31st of July,* 1888, *formal notice of repudiation by the husband, of the settlement of the 16th of October,* 1883, *was given to the trustees.*

The trustees brought an action to have it declared that the husband could not repudiate, and that, if he could repudiate, compensation ought to be made by him out of any moneys payable to him under the settlement and out of the property which would have been comprised in his covenant if he had not repudiated.

Held, that the husband was entitled to repudiate the settlement, and had done so within a reasonable time of coming of age and acquiring a knowledge of his rights.

Held, that, as he had repudiated, he must make compensation out of his interests under the settlement and out of the property coming to him under his father's will.

Held, also, that such compensation, coming out of moneys payable to the husband under the settlement, operated as a forfeiture of his right to the annuity thereunder, and that the discretionary trust over took effect.

Codrington *v.* Codrington, 24 *W. R.* 648, *L. R.* 7 *H. L.* 854, *followed.*

Trial of action.

This was an action commenced on the 17th of June, 1889, by Robert Brudenell Carter and the Right Honourable Arthur Henry George, Earl of Lisburne, the trustees of the settlement, dated the 16th of October, 1883, made on the marriage of the defendants Martin Albert Silber and Lady Lucy Silber (then Lady Lucy Vaughan), against the beneficiaries under the settlement, and certain incumbrancers on the interest of Martin Albert Silber, and originally claimed to have the rights of all parties under the settlement declared and the trusts thereof administered by the court. Subsequently the pleadings were amended, and raised substantially the question whether, under the circumstances hereinafter stated, the defendant, M. A. Silber, having been an infant at the date when the settlement was made, could repudiate it after coming of age, and, if so, whether he was bound in consequence, to compensate the persons disappointed by his repudiation, out of certain property given to him by his father's will, or out of an annuity settled on him by the deed in question.

The settlement in question was dated the 16th of October, 1883, and was made between Albert Marcius Silber of the first part, Martin Albert Silber, then an infant of the age of twenty years and upwards, son of Albert Marcius Silber, of the second part, Lady Lucy Silber (then Lady Lucy Vaughan), an infant of the age of eighteen years, of the third part, the plaintiff R. B. Carter and the plaintiff the Earl of Lisburne (then Lord Vaughan), of the fourth part; it contained recitals, that an insurance on the life of the said Martin Albert Silber to the amount of £20,000 had been effected by the said Albert Marcius Silber payable on the said Martin Albert Silber attaining the age of sixty years or on his death under that age, and that it had been agreed that the said Albert Marcius Silber should enter into the covenant thereinafter contained for the payment during the life of the said Lady Lucy Vaughan, and for such further period (if any) as there should be living any child or grandchild of the said intended marriage, of the yearly sum of £1,500, and that such yearly sum should be paid or applied in manner thereinafter provided; and by the operative part the said A. M. Silber, the father, covenanted with the plaintiffs that in case the said intended marriage should take place, he, the said A. M. Silber, his heirs, executors, or administrators, would pay to the trustees of the said indenture of settlement the yearly sum of £1,500 during the life of the said Lady Lucy Silber, and during such further period (if any) as there should be living any child or grandchild of the said intended marriage, such sum of £1,500 to be payable by equal quarterly payments, payable in advance every three months, the first of such payments to be made on the day of the marriage, but to be deemed to accrue from day to day so as to be apportionable according to law at the commencement or termination thereof. And it was agreed and declared that the said trustees should pay the said yearly sum of £1,500 as and when the growing payments thereof should be received by them to the said M. A. Silber, the intended husband, during his life, or until he should become a bankrupt or should assign or charge, or affect to assign or charge, the said yearly sum, or some part thereof, or until some other event should happen whereby the said yearly sum or some part thereof, if belonging absolutely to him, would become vested in or payable to some other persons or person; and in the event of failure or determination during the life of the said husband of the trust thereinbefore declared in his favour, should during the remainder of his life, if the said Lady Lucy Silber or any child or grandchild of the said intended marriage should so long live, pay or apply all or any part of the said yearly sum unto or for the personal support or benefit of the said husband and his wife and issue (if any); and subject to such discretionary trust or power should hold the said yearly sum upon the trusts upon which the same would for the time being be held if the said husband were then dead. And after the death of the said husband the trustees were directed to pay the said yearly sum to the wife during her life. And it was agreed and declared that the interest of the said husband and wife respectively in the said trust premises should be subject to, and charged with, the obligation of providing out of the said yearly sum a suitable residence and maintenance for the said wife (as to the life interest of the said husband), and such of the children and grandchildren of the said intended marriage as, being male, should for the time being be under the age of twenty-one years and unmarried, or, being female, should be unmarried, in priority (unless the trustees or trustee should otherwise determine) to any other fund applicable for that purpose, but without liability to account so long as the said husband and wife, as the case might be, should duly provide such residence and maintenance. And after the death of the said husband and wife the trustees were directed to stand possessed of the said yearly sum of £1,500 upon the trusts declared concerning the moneys assured by the said policy—viz., for such child or children of the said intended marriage as the said husband and wife should by any deeds jointly appoint. And in default of such appointment then as the survivor of them should by any deed or deeds or will appoint, and in default of appointment in trust for all children of the said intended marriage who, being sons, should attain the age of twenty- one years, or,

being daughters, should attain that age or marry under that age, and if more than one in equal shares. And it was agreed and declared that if during the continuance of the annuity the father or the husband should transfer any stock to the trustees in satisfaction *pro tanto* of the said yearly sum for the time being payable, at the rate of four per cent. per annum, so that the said yearly sum should thenceforth be reduced by one twenty-fifth part of the value of the stock so transferred, then that the trustees should hold the same upon the trust declared of the policy moneys. And it was further agreed and declared that if the said husband then was, or if he or the trustees should become, entitled to any property whatsoever under any settlement executed or to be executed by the said father, or under any appointment made or to be made in exercise of any power in any such settlement contained or to be contained, or under or by virtue of the will of the said father, unless such settlement or appointment or will should otherwise direct, such property, if not thereby given to the said trustees, should be vested in them upon the trusts thereinbefore declared with respect to the moneys assured by or to become payable under the said policy, or such of the same trusts as should be then subsisting and capable of taking effect; and the amount or value of all such property so acquired by the trustees should be applicable by way of satisfaction *pro tanto* at the rate aforesaid of the yearly sum covenanted to be paid by the father.

The settlement was approved by the Chancery Division of the High Court of Justice on behalf of Lady Lucy Silber, but not on behalf of the defendant Martin Albert Silber. It was duly executed by all the said parties thereto, including Martin Albert Silber. The marriage took place, and there were two children born of it, the defendants V. E. M. Silber and E. E. E. A. Silber.

Martin Albert Silber, the husband, attained the age of twenty-one years on the 19th of November, 1883.

A. M. Silber, the father, had, previously to the settlement in question, made three settlements dated respectively the 2nd of June, 1865, the 31st of December, 1870, and the 22nd of March, 1875, the trusts of which were nearly identical, and to the effect that his wife, the defendant Amelia Silber, should have the income of the funds thereby respectively settled for life, with remainder to such of the settlor's children as he should by will or deed appoint. By his will, dated the 22nd of November, 1878, A. M. Silber, the father, confirmed the settlements last mentioned, and in exercise of the powers in them contained, he directed that, after the determination of the trusts for his wife, the trust estates should be held upon trust to raise thereout certain sums for his daughters, and on further trust to divide and pay or transfer the residue of the same premises to or between such of his sons as should attain the age of twenty-one years, and, if more than one, in equal shares. And after certain specific and pecuniary bequests, he devised and bequeathed all his residuary real and personal property upon trust for such of his sons as should attain twenty-one, or, if there should be but one such son, the whole to be in trust for him.

A. M. Silber, the father, died on the 14th of May, 1887. On his father's death the question whether Martin Albert Silber, the husband, was entitled to repudiate the covenants on his part contained in the settlement of the 16th of October, 1883, was raised, and on the 16th of January, 1888, his solicitors wrote to the trustees to the effect that, without in any way admitting that the husband was bound by the covenant to settle his after-acquired property, and without prejudice to his right to repudiate the same should he be so advised, he consented to his share under the settlement of the 31st of December, 1870, which amounted to about £2,448 18s. 1d., and had fallen in, being paid to the plaintiffs as trustees under the settlement of the 16th of October, 1883. The husband, after his father's death, also received the quarterly instalments of the annuity on the 17th of January, 1888, the 17th of April, and the 17th of July, 1888.

On the 31st of July, 1888, formal notice was given by the husband that he declined to be bound by the settlement of the 16th of October, 1883, on the ground that he was under age at the time when the deed was executed by him, and the deed had not been approved by the court on his behalf.

The other defendants to the present action were Henry Arthur White, John Edward and Henry Isaacs, R. Coulson, John Lee Booker, John A. Morris, Benjamin Blaiberg, and Bertha Hamerton, incumbrancers upon the share of the husband in his father's estate, and H. A. White also claimed to be assignee of the instalments of the annuity of £1,500 accruing on the 17th of October, 1888, the 17th of January, 1889, and the 17th of July, 1889.

On the 28th of November, 1889, M. A. Silber assigned to J. E. and H. Isaacs all his interest under the settlement of October 16, 1883, but expressly excluded any interest which by assignment or attempted assignment was liable to forfeiture.

Neville, Q.C., and *Maidlow*, for the plaintiffs.—M. A. Silber must be assumed to know the provisions of the settlement he executed. He allowed his father to live and die believing that the settlement was binding, and after his death he went on accepting benefits under it. He has by his acts affirmed the settlement, and cannot now repudiate it. Even though the execution of it did not bind him, he at least is affected by notice of its contents: *Watts* v. *Cresswell*, 9 Viner's Abridgment, 415. The settlement was not void, but only voidable: *Duncan* v. *Dixon*, 38 W. R. 700, 44 Ch. D. 211; *Esron* v. *Nicholas*, 1 De G. & Sm. 118. If M. A. Silber can repudiate he must compensate the plaintiffs, and they are entitled to a lien on his interest under his father's will to the extent of the benefits which he has received under it: *Codrington* v. *Codrington*, 24 W. R. 648, L. R. 7 H. L. 860.

Chadwyck Healey, Q.C., and *F. Thompson*, for Amelia Silber.—M. A. Silber must have known everything about the settlement and has confirmed it: *Whittingham* v. *Murdy*, 60 L. T. 956, 37 W. R. Dig. 91. The settlement of an infant is not void, but voidable, and that within a reasonable time: *Cornwall* v. *Hawkins*, 20 W. R. 653. The same principle is applicable to a contract by an infant to take shares in a company. A voidable contract by an infant is sufficient to sever a joint tenancy: *Burnaby* v. *Equitable Reversionary Interest Society*, 33 W. R. 639, 28 Ch. D. 416.

Sir Horace Davey, Q.C., and *Hornell*, for H. A. White.—M. A. Silber repudiated the settlement, and had a perfect right to do so. The acts relied on as confirmation were done by him when he had no information as to his rights; he repudiated within a reasonable time, and there is no occasion for putting him to election: *Codrington* v. *Lindsay*, 21 W. R. 182, L. R. 8 Ch. App. 578; *Wilson* v. *Thornbury*, 23 W. R. 329, L. R. 10 Ch. App. 239. For a case of election there must be (1) distinct knowledge of the elector's position; (2) distinct intention—*i.e.*, determination to elect. Until M. A. Silber knew what the value of the property was which he took, how could he elect? and he did not know his rights until after his father's death. He never did any act with the intention or knowledge that it should be construed as

an election. The payments of the annuity made cannot be regained; there could only (if at all) be a right of retainer as to accruing payments. In *Codrington* v. *Lindsay* the repayments were made by consent of all parties out of another fund. As to section 2 of the Infants' Relief Act of 1874, if the contract of an infant is void, it cannot be ratified; if voidable, it can. Kekewich, J., in *Duncan* v. *Dixon*, if he meant that section 2 did not apply to voidable contracts, must have been wrong. It was most improbable that M. A. Silber really knew the contents of his settlement. *Ex parte Jones*, 29 W. R. 747, 18 Ch. D. 109, has some valuable remarks on the Act of 1874 by Jessel, M.R.

Haldane, Q.C., and *J. G. Butcher*, for M. A. Silber.—We urge three points—(1) there is no evidence of ratification; (2) if there has been ratification, the Infants' Relief Act comes in; (3) election and compensation do not apply. M. A. Silber clearly did not know his rights until 1888. As to (2), in *Duncan* v. *Dixon* the case of ratification did not arise, it turned on section 1. *Coxhead* v. *Mullis*, 27 W. R. 136, 3 C. P. D. 442, is a clear decision in our favour. This action itself is founded on ratification.

ROMER, J.—Can I do more in the present state of the pleadings than direct the trustees to bring an action on the covenant? I can decide the rights if the plaintiffs amend by claiming—(1) that M. A. Silber is bound by the settlement; (2) and if not bound, then alternative relief by compensation. If this is done there will be liberty for all parties to amend.

After further argument ROMER, J., directed the pleadings to be amended.

The pleadings having been amended, the case again came on for argument on the 24th of April. As amended the 16th paragraph of the claim was as follows: "The plaintiffs claim that the said M. A. Silber was and is bound by the said settlement of the 16th of October, 1883, and that his attempted repudiation of it was inoperative. The said M. A. Silber was from the first aware of the purport and effect of the settlement of the 16th of October, 1883. He took a personal part in the negotiations for it, and it was duly read over to him before he executed it. He knew that it was the intention of his father that any property to which he might become entitled under any settlement executed by his father, or under any appointment in exercise of any power in any such settlement contained, or under or by virtue of his father's will or any codicil thereto, should be settled upon the trusts of the said settlement so as to diminish *pro tanto* the liability of his father under his covenant in respect of the annuity, and by his silence during his father's life he implied that he would give effect to such intention, and the father confirmed his will by the codicil of the 28th day of June, 1886, and in particular left the share of his residuary estate to the said M. A. Silber instead of formally settling it upon the trusts of the settlement in the belief that such intention would be carried out by the said M. A. Silber, and the said M. A. Silber is bound by a trust in respect thereof. Further, it was not competent for the said M. A. Silber to repudiate the said settlement, except within a reasonable time after he attained the age of twenty-one years, and under the circumstances such reasonable time had at all events elapsed at the time of his father's death. Moreover, it was not competent for him to repudiate the said settlement after his receipt in manner hereinbefore mentioned of the said annuity payable thereunder."

The statement of claim further set forth that by a scheme of arrangement for the affairs of the defendant M. A. Silber approved by his creditors on the 27th of October, 1890, and subsequently approved by the Court of Bankruptcy, it was provided that the scheme should not affect the interest of the debtor in the annuity in pleadings mentioned, but that all other property of the debtor, including his share in his father's residuary estate and all other interests which he was or might become entitled to by his repudiation of the said settlement of the 16th of October, 1883, should vest in Laurence Hasluck, as trustee, to be administered by him as though the debtor had been adjudicated bankrupt, and Hasluck was made a party to the action.

Lady Lucy Silber and her infant children were also made defendants to the amended statement of claim, and put in several defences.

Neville, Q.C., and *Maidlow*, for the plaintiffs.—The relief claimed by the amended statement of claim is partly founded on *Codrington* v. *Lindsay*, which was afterwards taken to the House of Lords and decided in *Codrington* v. *Codrington*, 24 W. R. 648, L. R. 7 H. L. 854. The judgment was a considered judgment on the point as to whether there should be compensation or not, and out of what fund. M. A. Silber, though under twenty-one years of age, was affected with notice of the contents of the settlement. The result of the evidence given is that the only thing in that document which he did not understand was the covenant to settle his after-acquired property. He acted as go-between between his father and Lord Lisburne in the negotiations. Either he did know, or was bound to know, of the existence of this covenant. His father knew of the obligations his son had contracted under the settlement, and acted on that footing up to the time of his death, continuing to pay the annuity, and made his will in the belief the son would perform his covenant. It would be inequitable against the father that the son should be permitted to repudiate his covenant. Even if he can repudiate the plaintiffs are entitled to a lien on his interests under his father's will.

Haldane, Q.C., and *J. G. Butcher*, for M. A. Silber.—(1) This action is incompetent, as it is an action to charge him on a ratification; (2) there is no fund out of which compensation can be made. As to the first point there never was ratification. M. A. Silber repudiated the settlement as soon as he acquired a knowledge of his rights. But even if the allegations in paragraph 16 bind M. A. Silber, the Infants' Relief Act, 1874, applies, and prevents him ratifying. Section 1 of that Act refers to specified contracts, which do not comprise a marriage settlement; but section 2 refers to ratification of all contracts. This is clear on the words, and the following cases make this even clearer: *Coxhead* v. *Mullis*; *Ditcham* v. *Worrall*, 5 C. P. D. 410. In the latter case Lindley, L.J., does not express dissent from *Coxhead* v. *Mullis*. It is true that in *Duncan* v. *Dixon* Kekewich, J., doubted *Coxhead* v. *Mullis*. There being no ratification, the question of the 2nd section does not arise. The 2nd section was meant to deal with ratification, and is, in fact, quite distinct from section 1. Then it is urged that compensation ought to be made. It cannot be made out of the annuity, as it is inalienable. Election may be rebutted by a particular intention—*i.e.*, an intention may be found in the instrument rebutting the presumption that every part of the instrument shall take effect, which is the principle on which the doctrine of election depends. The principle of the doctrine is clearly laid down in *Codrington* v. *Lindsay*. "Restraint on anticipation" is a contrary intention: *In re Vardon's Trusts*, 34 W. R. 185, 31 Ch. D. 275. In *Willoughby* v. *Middleton*, 10 W. R. 460, 2 J. & H. 344, it was

decided that a married woman restrained from anticipation could be put to election. The case was commented on in *Smith* v. *Lucas*, 30 W. R. 451, 18 Ch. D. 531. [ROMER, J.—Do you say that a man who forfeits on alienation is in the same position as a woman restrained from anticipation?] Yes; restraint upon alienation, as upon anticipation, is an indication of intention that the whole instrument need not necessarily take effect: *In re Vardon's Trusts*. The annuity is vested in M. A. Silber; if he had to make compensation out of it it would become vested in someone else and go over. There is a particular intention that M. A. Silber should not alienate the annuity; if he makes compensation out of it he does, in fact, alienate: *Smith* v. *Lucas*. *McCarogher* v. *Whieldon*, L. R. 3 Eq. 236, 15 W. R. Ch. Dig. 32, distinctly shows that the doctrine of election cannot apply. The covenant to settle is voidable, and independent of the other provisions of the settlement. He disaffirms the covenant, but he is not bound to approbate or reprobate the settlement as a whole, and he has no fund out of which compensation can be made. The effect of the determination of the life interest would be to benefit Lady Lucy Silber, and the people really entitled to compensation would get nothing.

Chitty, for Lady Lucy Silber.—My case is based on the principle that there are certain contracts which are binding until repudiated, and the repudiation must be express and within a reasonable time. They are contracts dealing with permanent property: *Zouch* v. *Parsons*, 3 Burr. 1794; *Burnaby* v. *Equitable Reversionary Interest Society*. A voidable contract is either (1) binding until repudiated, or (2) not valid until confirmed. Under the first head comes a covenant in a marriage settlement: *Smith* v. *Lucas*. This principle applies to all the contracts of an infant that are continuing, all that deal with property of a permanent nature, all the deeds of an infant. There was no repudiation here within a reasonable time: *London and North-Western Railway Co.* v. *McMichael*, 5 Ex. 114. There is no distinction between a deed of an infant in which there is a covenant, and a deed in which there is a conveyance. The decisions all depend on fact that there is a deed: *Cornwall* v. *Hawkins*. As to the reasonable time within which repudiation must be made, a person bound by a voidable contract ought not to be allowed to repudiate after any of the persons interested have changed their position by reason of the non-repudiation. In this case the father lived and died under the impression that the son would fulfil his covenant: *Jones* v. *Badley*, 16 W. R. 713, 3 Ch. App. 362; *In re Tussaud's Estate, Tussaud* v. *Tussaud*, 26 W. R. 874, 9 Ch. D. 376. *McCarogher* v. *Whieldon* is cited in nine subsequent cases without disapproval, and must therefore be taken to be good law.

Methold, for the two infant defendants V. E. M. Silber and E. E. E. A. Silber.—The father cannot have intended the son to have £1,500 in any event. This is the particular intention which is set up to bring the case within *In re Vardon's Trusts*. The covenants to pay the annuity and to settle after-acquired property are interdependent, and the whole settlement hangs together.

Horton Smith, Q.C., and *Ingpen*, for the defendant J. E. H. Isaacs.

Franks, for Hasluck.

Waggett, for B. Hamerton.

Neville, Q.C., in reply.—M. A. Silber received three instalments after the letter of December 4, 1887, and therefore ratified, and did not repudiate within a reasonable time. We do not expressly raise the question of forfeiture of annuity if he has to compensate, but it is impliedly raised in the claim of the statement of claim, and it is raised by the infants.

Cur. adv. vult.

On May 29 judgment was delivered.

ROMER, J.—In this case there is no dispute as to facts apart from the question as to the actual knowledge of the defendant Martin Albert Silber, during his father's lifetime, of the effect of the settlement, as pleaded in paragraph 16 of the re-amended statement of claim. This question is one distinct from that of the legal effect of his execution of the settlement, which I will consider hereafter. On the evidence before me I am satisfied that the defendant, the son, was not, in fact, aware, during his father's lifetime, that the settlement purported to bind any property he might acquire under his father's will, and that the allegation in paragraph 16, as to the son being aware of his father's intention, there referred to, and by his silence encouraging his father to make or confirm the disposition by will of his father's property, under the belief that the son would not repudiate his execution of the settlement, are unfounded.

Now, the son having executed the settlement while a minor, and not under the authority of the court, it is clear, I think, that the settlement was voidable by him, and that he could avoid it in a reasonable time after he attained twenty-one. In the cases where a minor executes a voidable deed the numerous authorities cited before me show, and I think the true effect of these authorities amounts to this, that what is a reasonable time for the infant to repudiate after he attains twenty-one depends on the circumstances of each case fairly considered.

The first question, therefore, I have to consider is whether, under the circumstances of this case, the son was bound by his not having repudiated the deed during his father's lifetime. I think he was not. During this period he was not called upon by any person to re-execute or to further consider the deed, and I think there was, on his part, no unfair dealing or misleading of his father or of any other party. Moreover, in any case, during this period, whether the deed bound the son or not, it bound the father, and the son was entitled to receive the moneys which were paid to him under the deed. Until the father's death, and until it became known that the son was entitled under the will to a share in the father's estate, no question actually arose as to the effect of the deed on any property coming to the son, and the right of the trustees to withhold payments under the deed to the son to compensate those injured by the son's refusal to allow his property to be bound by the deed only first arose on the death of the father.

For these reasons I think the son was not bound during his father's lifetime, notwithstanding the receipt during that period of the annuity payable under the deed by the father.

The next point I have to consider is whether the son's formal repudiation on the 31st of July, 1888 (the father having died on the 14th of May, 1887), came too late, bearing in mind that in the meantime the son had received three quarterly instalments of the reduced annuity. I have come to the conclusion that it did not, for I think that the son was entitled to a reasonable time after the father's death to ascertain what his rights were, and what his father's residuary estate would probably amount to, and to be advised before he finally elected, and that the time taken was not, under the circumstances of the case, unreasonable. This, however, must be subject to the son's obligation of repaying the three instalments he received, which, in my judgment, he is bound to do.

For reasons already appearing I do not think this obligation extends to the sums he received during the father's lifetime.

The next point which arises is whether the trustees have an equity to be paid these three instalments out of the son's share in the father's residuary estate and other the property which would have been comprised in the covenant of the son in the deed of settlement if he had not repudiated the same, in priority to the claims of the son's mortgagees and of his trustee under the scheme of arrangement in bankruptcy. I have come to the conclusion that I cannot treat this question as an open one for me to decide. I consider myself bound by the decision in *Codrington* v. *Lindsay*, which cannot be distinguished on this point from the present case. It is true that in the reports of that case I find no mention of any arguments on the point in question. But the point was decided there, and not by consent. In the report of the case in L. R. 8 Ch. App. at p. 584 I find Lord Selborne saying that the equity in question did exist, and minutes of the decree given at page 594 are clear on the point, and were evidently most carefully considered. This decree was appealed from to the House of Lords, and the lords who decided the appeal evidently carefully considered, and in some respects altered, the form of the decree appealed from, and yet did not alter the decree on the point I am now considering. It follows that I must make a declaration in the present case of the existence of the equity in question to the extent I have indicated, and I will only add that I think it is inaccurate to describe this equity as a lien, as has been sometimes done.

I have now further to consider the effect of the repudiation on the moneys which, notwithstanding the repudiation, would still continue to be payable to the son according to the terms of the settlement. I think that those moneys must be retained by the trustees in order to make compensation, and until compensation has been thereby fully made, to the persons disappointed by the repudiation of the benefits under the settlement of which they have been, or will be, deprived by the repudiation. And this gives rise to the further question whether the right of retainer on the part of the trustees does not in itself determine the further payment of the annuity under the deed to the son, seeing that the annuity has thereby "become vested in, or payable to, some other person or persons" within the meaning of those words as used in the deed. I think this further question must be answered in the affirmative, and that consequently the trusts have arisen under the deed with regard to the annuity declared in the event of the failure or determination during the lifetime of the son of the previous trust declared in his favour. For these points there is to guide me the authority of *McCarogher* v. *Whieldon*, which was decided in 1867, and has never been questioned until now, and ought, I think, to be treated as binding on me. It is, however, said on behalf of the son that that case has in effect been overruled, and that the case before me is governed by *Vardon's Trusts*. But *Vardon's Trusts* appears to me quite distinguishable from the case now before me. In *Vardon's Trusts* the Court of Appeal held that the restraint on anticipation which fettered the settlement of income to the separate use of a married woman altogether prevented, and was intended by the parties to the settlement altogether to prevent, that income ceasing to be payable to the married woman by any act on her part, including any election by her against the settlement. But in the case before me I can find no indication that the parties to the settlement intended that the annuity should always continue to be payable to the son. On the contrary, they contemplated his assigning or charging it, and provided (*inter alia*) that if he did assign or charge it it should cease to be payable to him. And certainly I cannot gather that it was the intention of the parties to this settlement that the son should be at liberty to repudiate it so far as his obligations were concerned, and still continue to enjoy the annuity. I find here no declaration of a particular intention which is inconsistent with or excludes the doctrine of election.

The above decides all the points which I have been called upon to deal with in this case.

There must accordingly be a declaration to the following effect:—

1. That the son was entitled to repudiate, and has repudiated, the settlement.

2. That the moneys in respect of the said annuity which have been received by the son since the death of the father, and all subsequent moneys which would have been payable to him if he had not repudiated the settlement, and all other, if any, the interest to which, if he had not repudiated, he would have been entitled under the settlement, ought to be applied (subject to the following declaration No. 4) in making compensation to the persons disappointed by such repudiation for the benefits under the settlement of which they respectively have been or will be deprived by such repudiation, so far as the same shall extend, and until such compensation shall be fully made.

3. That in respect of the three instalments received by the son since the father's death, the plaintiffs, as trustees of the settlement, have the right to be repaid the same out of the share or interest of the son in his father's estate under the father's will and codicil, and that in priority to any claim thereto on the part of the son's incumbrancers or of his trustee, Laurence Hasluck, defendants to this action.

4. That the repudiation and acts of the son have caused a determination of his interest in the annuity as from the father's death.

As to the costs. The costs of the plaintiffs and of the defendants Lady Lucy Silber and the infant children must be taxed and raised and paid out of the funds subject to the trusts of the settlement. The defendant Amelia Silber will, of course, get her costs out of her late husband's estate, but I can make no order as to them in this action. The defendants Martin Albert Silber and Laurence Hasluck will bear their own costs, but this, of course, will not prejudice the defendant L. Hasluck's right to get his costs out of the funds, subject to the trusts of the scheme of arrangement. I make no order as to the costs of the other defendants, but, of course, such of them as have charges will be entitled to add their costs to their security.

There should be liberty to apply. The plaintiffs' junior counsel had better sign the minutes.

Neville, Q.C., pointed out that Mr. Silber had received other instalments since his father's death of the annuity than those actually mentioned in the pleading.

ROMER, J.—Those, too, are covered by my judgment, and must be accounted for.

Solicitors, *A. E. Phipps*, for *Roberts & Evans*, Aberystwith; *Simpson & Cullingford; G. R. Grant; Arnold & Henry White; The Official Solicitor; A. Hicks & Arnold; Geo. & Wm. Webb; H. P. Spottiswoode; G. C. Lea; W. A. Colyer.*

Q. B. Div. (A. L. Smith and Grantham, JJ.) April 9.

REG. v. GOVERNOR AND COMPANY OF THE BANK OF ENGLAND. (a.)

Bank of England—Unclaimed stock—List of holders—Right to inspection—Mandamus—*National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *ss.* 51, 52.

The National Debt Act, 1870 (*ss.* 51, 52), *provides for the transfer of unclaimed stock to the National Debt Commissioners and for the entry of the names in which the stock stood immediately before the transfer, with other particulars, in a list to be kept by the Bank of England, "which list shall be open for inspection at the usual hours of transfer."*

Held, that "open for inspection" meant "open for inspection by any person claiming an interest in the stock," and that a mandamus *to the bank to permit inspection of the list ought not to go upon the application of a person who did not* bonâ fide *claim such an interest.*

In this case a rule *nisi* had been obtained calling upon the Governor and Company of the Bank of England to show cause why a *mandamus* should not issue commanding them to permit the applicant, Gilbert Terrell, to inspect the list of holders of unclaimed stock kept by the bank in pursuance of section 52 of the National Debt Act, 1870.

The applicant, who traded as Adams & Co., published from time to time a book containing the names of persons who appeared to be entitled to unclaimed stock, with the object of obtaining fees from such persons for making inquiries on their behalf. For the purposes of this publication the applicant had requested the bank to allow him to inspect the list; he did not allege that he was himself entitled to any unclaimed stock, or was acting as agent for any person so entitled. The bank refused to allow him to inspect the list, and the applicant obtained this rule.

The National Debt Act, 1870, provides:—

Section 51. All stock, no dividend whereon is claimed for ten years before the last day on which a dividend thereon becomes payable (except where payment of dividend has been restrained by a court of equity), shall be transferred in the books of the Bank of England or of Ireland (as the case may be) to the National Debt Commissioners.

Section 52. Immediately after every such transfer the name in which the stock stood immediately before the transfer, the residence and description of the parties, the amount transferred, and the date of transfer shall be entered in a list to be kept for the purpose by the bank in whose books the stock stands, which list shall be open for inspection at the usual hours of transfer.

Sir R. E. Webster, A.G. (*Greene, Q.C.*, and *R. Bray* with him) for the bank, showed cause against the rule.—A person who applies for inspection, relying upon a statutory right, must show a reasonable ground for his demand: *The Queen* v. *London and St. Katherine Docks Co.*, 23 W. R. 136. [He was stopped by the court.]

A. B. P. Gaskell, for the applicant, in support of the rule.—This case is distinguishable, because here the list is "open for inspection," which means open for inspection by any member of the public. The statute is silent as to the *bona fides* of the applicant, and the bank has no right to ask for what purpose the inspection is required.

A. L. SMITH, J.—This is an application for a *mandamus* to compel the Bank of England to allow the applicant to inspect the list kept at the bank containing particulars as to stock the dividends upon which have not been claimed for ten years. The applicant bases his application on section 52 of the National Debt Act, 1870, and says that he is entitled to a prerogative writ of *mandamus*. It appears that the object of the publication for the purposes of which the inspection is required is to state the amount of stock due to persons who have not claimed, and to obtain fees for making searches and inquiries as to the persons entitled. There is no evidence before us that the applicant claims to have any personal interest in the dividends, but he says that section 52 gives him a right to this writ. [His lordship read sections 51 and 52.] The bank has complied with the requirements of the statute as to keeping the list. The question is, What do the words "open for inspection" mean? In my opinion they mean "open for inspection by any person who claims to be interested in the stock," and the applicant seems to me to be outside that meaning altogether. Down to the year 1843 it appears that a list of particulars of this unclaimed stock used to be published; it was found that that publication led to the making of false claims by fraudulent persons, and about that year it was stopped by an order of the Treasury. Since that date it has been the practice for the bank themselves to make inquiries as to the holders of the unclaimed stock, and to afford gratuitous assistance to persons applying to them in the belief that they are interested in such stock. Under the new practice it appears that there is less unclaimed dividend than was formerly the case. Now Mr. Terrell is not interested in any unclaimed stock either himself or on behalf of any other person. What, then, is the duty of the court? We have to use our discretion as to issuing this writ, and it may be refused, not only upon the merits, but for delay or other reasons personal to the applicant. On these grounds I think that we ought to refuse to issue the writ in this case, and the rule must, therefore, be discharged, with costs.

GRANTHAM, J.—I agree. The list which is published by the applicant eliminates anything which would enable the persons entitled to be identified. It is made for the benefit of the applicant in his business. The issue of this prerogative writ of *mandamus* is quite in the discretion of the court, and under these circumstances I think that we should do wrong in granting it.

Rule discharged.

Solicitor for the bank, *Freshfields.*

Solicitor for the applicant, *J. H. Lee.*

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

Q. B. Div. (Pollock, B., and Charles, J.) Feb. 5.

BOWERS v. HARDING. (a.)

Inland revenue—Income tax—Schedule E—Offices of master and mistress of national school—Money necessarily expended in performance of duties of office—Expense of keeping servant—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *s.* 51.

The respondent and his wife were the master and mistress of a national school, and received a joint salary for their services. An assessment to the income tax was

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

made upon the respondent under Schedule E. He claimed to deduct a sum in respect of expenses necessarily incurred by him in keeping a servant, in order that his wife might be able to perform her duties as schoolmistress.

Held, that such deduction could not be allowed.

Case stated by income tax commissioners under 43 & 44 Vict. c. 19, s. 59, on the application of a surveyor of taxes.

At a meeting of commissioners for the general purposes of the income tax for the division of Bath Forum, in the county of Somerset, the respondent, George Harding, appealed against an assessment to income tax under Schedule E. The assessment was made in respect of his office of national schoolmaster, and of the office of national schoolmistress held by his wife, for which they received a joint salary of £150 a year, and also of his office of choirmaster, for which he received £10 a year. From the total of £160 there was deducted £120, the statutory abatement on all incomes less than £400, and also £12, allowed for annual life insurance premium, leaving a balance of £28, on which duty was charged.

The respondent claimed a further deduction of £30, in respect of expenses necessarily incurred by him in keeping a servant, in order that his wife might be able to perform her duties as schoolmistress; and he further claimed total exemption from duty on the ground that the said expenses reduced his income from all sources below £150 per annum.

The commissioners allowed the claim, and discharged the assessment.

Sir Edward Clarke, S.G., and *Danckwerts*, for the surveyor of taxes, in support of the appeal.

Dicey, Q.C., and *Henry Lynn*, for the respondent.

POLLOCK, B.—It is clear to my mind that the salary of £150 paid to the respondent and his wife is a joint salary, and it would probably be impossible to do what Mr. Dicey suggests we might do—namely, discover how much is attributable to the services of the husband and how much to the services of the wife. It is also clear that it is a salary which is taxable under Schedule E, being derived from that which is a public office or employment within the meaning of section 51 of the Income Tax Act of 1853; for it is paid by persons whose position and duty to manage the school is recognized by Act of Parliament and Orders in Council, and it is paid out of sums of money principally contributed from the taxes. The other enactment to which we must refer is section 45 of the Income Tax Act of 1842: "The profits of any married woman living with her husband shall be deemed the profits of the husband, and the same shall be charged in the name of the husband, and not in her name, or of her trustee."

Now exemption is claimed under section 51 of the Act of 1853, by which it is provided that from the salary, fees, or emoluments of such office or employment certain expenses may be deducted, and the earlier part of the section gives a sort of analogy as to the class of expenditure which is intended to be included within the Act, that is, the expenses of travelling in the performance of the duties thereof, or of keeping or maintaining a horse to enable one to perform the same, or other money laid out and expended wholly, exclusively, and necessarily in the performance of the duties thereof. Can it be said that because the wife, who would otherwise possibly or probably be engaged in looking after the household affairs of her husband, is unable to look after those affairs by reason of her devoting her time to earning this salary in question, can it be said that because that state of things exists he or she is expending money wholly, exclusively, and necessarily in the performance of the duties of their office or employment? When we apply the spirit of the Act as well as the language of it, it seems to me that it would be wholly nullifying the intention of the Act if any such deduction were made. Whenever a man accepts an office there are certain detriments as well as profits, but the expenditure now in question is in no sense such an expenditure as the section allows to be deducted. It is merely that which is derogatory to their income, a disturbance of their income, a deprivation of a portion of their income in order that they may accept the office. If we were to go into these questions with great nicety, we should have to consider in each case the district in which the person lives, the price of meat, the clothing he requires, and the style in which he lives, before we could come to any conclusion. It seems to me unnecessary and foreign to the present question to go into any of these matters. It is enough to say that within the spirit and the language of the Act this is a deduction which cannot be made; and I have therefore come to the conclusion, though with some regret, that the decision of the commissioners was wrong, and that this is a taxable amount.

CHARLES, J., concurred.

Appeal allowed.

Solicitor for the appellant, *The Solicitor of Inland Revenue.*

Solicitors for the respondents, *Baker & Nairne.*

Prob. Div. & Adm. Div. / Admiralty. } March 3.

"THE KNUTSFORD." (a.)

Practice—Evidence—Admiralty action—Transcript of shorthand notes of evidence taken before examiner—Incorrect transcript—Application to take transcript off the file.

In an admiralty action the transcript of the shorthand notes of the evidence of witnesses directed to be examined before an examiner becomes, on being filed in the registry, evidence in the cause, and such transcript cannot be taken off the file without an order of the court.

Accordingly, in a case where the transcript of the shorthand notes of the evidence of a witness examined before an examiner was shown to be incorrect, the judge in court granted a motion ordering the transcript to be taken off the file and returned to the examiner for amendment.

This was a motion by the plaintiffs, the owners of *The Drumhendry*, in an action of damage instituted against the steamship *Knutsford*, that the judge might direct that the transcript of the evidence of Robert Williams, a witness on behalf of the defendants, examined before Mr. R. Stephens Jackson pursuant to the order of the court made therein, be taken off the file and returned to the said examiner for amendment so as to make it correspond to the evidence given by the said witness, and that the defendants should pay the costs of the application.

In support of the motion an affidavit of the examiner was read, in which he deposed that a shorthand writer

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

was engaged to attend for the purpose of taking a shorthand note of the evidence of the witnesses to be examined before the examiner; that the shorthand writer, previously to the examination of the said witnesses, was duly sworn to faithfully and correctly take down and transcribe the evidence to be given by the said witnesses, and that the examination proceeded, and the several witnesses were examined and cross-examined by counsel for the plaintiffs; that after the examination was completed the transcript of the evidence, including the transcript purporting to be the evidence of the said Robert Williams, was furnished to the examiner, and that such transcript, without the examiner perusing the same, was filed in the registry of the court; that subsequently the attention of the examiner was called to the fact that the evidence of Robert Williams, as filed and printed, did not contain a certain statement which had been made by the said Robert Williams upon cross-examination, as to the time when he saw the lights of *The Drumhendry*, and also omitted a portion of the re-examination which bore upon the point; that the examiner, therefore, sent for the original notes of the evidence and for the shorthand writer, and in the presence of the solicitors for the plaintiffs and the defendants requested the shorthand writer to read to him the said notes, and that the examiner then found that the transcript of the notes which the shorthand writer had forwarded was both incorrect and incomplete, and that some of the words in the transcript did not correspond with those in the original notes, and that other questions and answers had been entirely omitted.

Another affidavit in support of the motion, made by the plaintiffs' solicitors stated that they were advised that the errors and omissions in the transcript of Williams' evidence had most material bearing on the plaintiffs' case, and that justice would not be done unless the examiner's return, together with the transcript, should be taken off the file and returned to him for amendment.

On behalf of the defendants an affidavit was filed alleging that the defendants had consented to the transcript being taken off the file provided that the costs involved should be costs in the cause.

Butler Aspinall, for the plaintiffs, in support of the motion.—The transcript which we seek to have taken off the file is admittedly incorrect, and if it remains on the file there is no way in which it can be corrected, as in admiralty actions evidence taken before an examiner when once filed, is evidence for all parties in the cause, the practice in this respect having, no doubt, originated at the time when all evidence in admiralty actions was on paper, and a special statutory provision was necessary to enable witnesses to be examined orally in such actions. [BUTT, P.—It has always been said that evidence taken before an examiner in an admiralty action and returned into the registry is admissible evidence without being put in by any of the parties to the action.] Yes; and the practice of returning the transcript of the shorthand notes of the evidence into the registry has always prevailed, and is still in force. [He referred to Williams & Bruce, p. 427.] In these circumstances the court, as it clearly appears that the transcript is not correct, ought to grant the motion as of course.

Raikes, for the defendants.—The defendants have always been ready and willing that any errors in the transcript should be corrected. They only object to have the corrections made either wholly or partly at their expense.

BUTT, P.—The motion will be granted in the terms of the notice of motion, except that all questions of costs will be reserved.*

Solicitors for the plaintiffs, *Thomas Cooper & Co.*

Solicitors for the defendants, *Pritchard & Sons.*

Prob. Div. & Adm. Div. Probate. } March 24.

In the Goods of BARKER. (a.)

Probate—Will—Property requiring protection—Sole executor abroad—General power of attorney by executor—Grant to attorneys.

The sole executor of a will was abroad, with the intention of not returning for two years, and three or four months must elapse before communications could be had with him. The court had made a grant ad colligenda *to the widow of the testator, but this was found insufficient to protect the estate. The sole executor, before leaving England, had granted a general power of attorney to two persons, who applied for a grant of administration with the will annexed.*

Held, that, on the general terms used in the power of attorney, the court was justified in making the grant.

Motion for a grant of administration with the will annexed of the estate of George Richard Barker, deceased, to the attorneys of Bazett Michael Haggard, the sole executor under the will.

The testator died on the 5th of January, 1891, leaving a will duly executed on the 22nd of July, 1889, whereby he appointed Mr. Haggard sole executor. Mr. Haggard was appointed Her Majesty's Commissioner for Samoa, and left England for that place in November, 1890.

Before leaving—viz., on the 4th of November, 1890—he executed a power of attorney to Messrs. Fenwick & Lofthouse, the applicants, which contained the following passages:—

"And I also authorize my said attorney or attorneys to appear for me in any court of justice, in any actions or other proceedings which may be instituted against me or whereunto I shall be a party, to defend the same or to suffer judgment to be had or given against me in any such action or other proceeding by default or otherwise as my said attorney or attorneys shall be advised or think proper"; "or generally to do, execute, and perform any other act, matter, or thing whatsoever which ought to be done, executed, or performed, or which, in the opinion of my said attorney or attorneys, ought to be done, executed, or performed, about my concerns, engagements, or business of every nature and kind whatsoever as fully and effectually and to all intents and purposes as I myself could do if I were present."

The estate of the testator consisted of articles requiring protection. A grant *ad colligenda* with liberty to pay debts and testamentary expenses had been made to Mrs. Barker, the widow and residuary legatee, but this was found insufficient for the proper protection of the estate. Mr. Haggard was expected to be absent for two years, and three or four months must elapse before any communication could be had with him. The present application had been refused in the registry.

Bayford, Q.C., and *Pritchard*, in support of the

* On a subsequent day an order was made in court that the costs reserved by this order should be costs in the cause.

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

motion, urged that, although no authorities could be produced, the words of the power of attorney were large enough to include the right to make this application.

JEUNE, J.—Looking at the general powers given to these gentlemen in reference to proceedings in courts of justice, I think I am justified in granting this application.

Motion allowed.

Solicitors, *Field & Roscoe.*

House of Lords.

From C. A. (England). March 20.

SHARPE *v.* WAKEFIELD. (*a.*)

Licensing Acts — Renewal — Discretion of justices — Licensing Act, 1828 (9 *Geo.* 4, *c.* 61), *s.* 1—*Licensing Act*, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 42—*Licensing Act*, 1874 (37 *&* 38 *Vict. c.* 49), *s.* 26.

Licensing justices have an absolute judicial discretion to grant or refuse an application for the renewal of a licence under the Licensing Acts, 1828, 1872, *and* 1874.

This was an appeal from a decision of the Court of Appeal (Lord Esher, M.R., and Fry and Lopes, L.JJ.) (reported 37 W. R. 187, 22 Q. B. D. 239), affirming that of the Divisional Court (Field and Wills, JJ.) (reported 36 W. R. 634, 21 Q. B. D. 66).

In September, 1887, William Ridding duly applied to the licensing justices for a grant by way of renewal of a licence for the sale by him of all intoxicating liquors at the Low Bridge Inn at Kentmere, in the county of Westmoreland. The application was refused, on the grounds of the remoteness from police supervision and the character and necessities of the locality; and Susannah Sharpe, the owner of the inn and a person aggrieved by such refusal, appealed to the court of quarter sessions, who, after hearing evidence, upheld the order of the justices, and dismissed the appeal.

The Divisional Court, on a special case stated, held that the justices had an absolute judicial discretion to grant or to refuse the application, and this was affirmed by the Court of Appeal.

The owner appealed.

R. Henn Collins, Q.C., and *Candy, Q.C.* (*L. Sanderson* with them), for the appellant.—The objection to a renewal must, under the Licensing Acts, 1872 and 1874, be something personal to the applicant.

Reg. v. *Justices of Market Bosworth*, 35 W. R. 734; *Reg.* v. *Justices of Liverpool*, 32 W. R. 20, 11 Q. B. D. 638; *Claydon* v. *Green*, 16 W. R. 1126, L. R. 3 C. P. 511; *Day* v. *Luhke*, 16 W. R. 717, L. R. 5 Eq. 336; *Reg.* v. *Recorder of Dublin*, Ir. Rep. 11 C. L. 412, 26 W. R. Dig. 126; *Ex parte Martin*, 40 J. P. 133; and *Rex* v. *Young and Pitts*, 1 Burr. 556, were referred to.

Addison, Q.C., and *Poland, Q.C.* (*Paterson* with them), for the respondents, referred to *Reg.* v. *Justices of Lancashire*, 19 W. R. 204, L. R. 6 Q. B. 97; *Reg.* v. *Smith* or *Smith* v. *Justices of Herefordshire*, 48 L. J. M. C. 38, 27 W. R. Dig. 116; *Boodle* v. *Justices of Birmingham*, 45 J. P. 635; and *Griffiths* v. *Lancaster Justices*, 35 W. R. 732.

Henn Collins, in reply.

The House took time for consideration.

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

March 20.—Lord HALSBURY, L.C.—I do not think that at any period of the argument any of your lordships doubted but that this judgment must be affirmed. By the express language of the statute which is still the governing statute the grant of a licence is expressly within the discretion of the magistrates. For reasons to be stated presently, I am of opinion that no legislation has ever altered that provision; but if one were to argue *a priori*, what possible reason could there be for limiting the discretion of the justices to the first grant of the licence?

It is not denied that for the purpose of the original grant it is within the power and even the duty of the magistrates to consider the wants of the neighbourhood with reference both to its population, means of inspection by the proper authorities, and so forth. If this is the original jurisdiction, what sense or reason could there be in making these topics irrelevant in any future grant? It surely must have been in the contemplation of the Legislature that the circumstances of a neighbourhood might change; a population might diminish or increase. Would it be argued that, if the population had very much increased at some point where by reason of its previous want of population no such public accommodation had been hitherto granted, no licence should be granted because this additional grant might to some extent interfere with the practical monopoly enjoyed by the persons already licensed? This, of course, could not be argued, since it is the well-understood practice to do this very thing. But can anything be more unreasonable than the suggestion that the Legislature had given the discretion in one direction and withheld it in the other? In real truth a great deal of the argument on the part of the appellant has been addressed to us not upon the true construction of the Act of 1828 or the statutes which have followed it, but to some supposed injustice, which the argument assumed would be so great, if the matter were left to the discretion of the justices, that the Legislature never could have intended to intrust them with discretion so wide. I do not think, even if the injustice were so great as it is suggested by the argument, that that consideration could prevail over the plain language of the Legislature. But I am not able to assent to the motion that the injustice is so great. An extensive power is confided to the justices in their capacity as justices to be exercised judicially, and discretion means, when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not to private opinion: *Rooke's case*, 5 Rep. 100a; according to law, and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular, and it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself: *Wilson* v. *Rastall*, 4 T. R., at p. 757. So in *Reg.* v. *Boteler*, 12 W. R. 466, where justices thought proper not to enforce the law because they considered that the act in question was unjust in principle, the Court of Queen's Bench compelled them by a peremptory order to do the act which nevertheless the statute had said was in their discretion to do or to leave undone. So, again, where overseers who were required by 3 & 4 Vict. c. 61 to certify whether applicants for beer licences were real residents and ratepayers of the parish, it was held that they were not entitled to refuse the certificate on the ground that in their opinion there were already too many public-houses, or that the beershop was not required: *Reg.* v. *Withyham Overseers*, 2 C. L. Rep. 1657. So a discretion which empowered justices to grant licences to innkeepers, as in the exercise of their discretion they deemed proper, would not be

exercised by coming to a general resolution to refuse a licence to anybody who would not consent to take out an excise licence for the sale of spirits: *Reg.* v. *Sylvester*, 2 B. & S. 322, 10 W. R. C. L. Dig. 2. Again, where justices were authorized to alter the hours for the sale of intoxicating liquors in any particular district, it was held that, though this was a general discretion given to them, they had no right by virtue of a general resolution to alter the time in every case. They were required judicially to determine, although according to their discretion, what places in the honest exercise of their judgment required other hours for opening and closing than those specified. The question arose in the case to which I am referring (*Macbeth* v. *Ashley*, L. R. 2 Scotch App. 352, 22 W. R. Dig. 38), on the proviso to section 2 of the 16 & 17 Vict. c. 67, which was in these words:—"Provided always that in any particular locality within any county or district or burgh requiring other hours for opening and closing inns and hotels and public-houses than those specified in the forms of certificates in said schedule applicable thereto, it shall be lawful for such justices or magistrates respectively to insert in such certificates such other hours not being earlier than 6 o'clock or later than 8 o'clock in the morning for opening, or earlier than 9 o'clock or later than 11 o'clock in the evening for closing the same as they shall think fit." Eleven o'clock at night was accordingly the hour appointed for closing public-houses in Scotland, and the magistrates of Rothesay issued an order closing them at 10 o'clock instead of 11. Lord Selborne, in giving judgment in the House of Lords in that case, makes these observations:—"Without meaning to deny that it is confided to the discretion of the magistrates to determine what particular localities require other hours for opening and closing than those specified, it is obvious that such discretion as they have is not an arbitrary discretion to define any localities they please, but they must be such localities as they consider in the honest and *bonâ fide* exercise of their own judgment to require a difference to be made. The participle 'requiring' is connected with the substantive 'locality,' and therefore it must be a requirement arising out of the particular circumstances of the place. The magistrates must, in the exercise of an honest and *bonâ fide* judgment, be of opinion that the 'particular locality' which they except from the ordinary rule is one which, from its own special circumstances, requires that difference to be made."

I do not feel, therefore, though the language of the statute and the power given by that language is so great and so unqualified that the mischief or danger apprehended by the appellants is at all likely to arise. The Legislature has given credit to the magistrates for exercising a judicial discretion, that they will fairly decide the questions submitted to them, and not by evasion attempt to repeal the law which permits public-houses to exist, or evade it by avoiding a plain exposition of the reasons on which they act. I am very far indeed from saying that, assuming the complete discretion that I have indicated to exist, it would be likely that the persons exercising it would consider an original application in the same way as one which was applied for by the person who has already been licensed for one year. Of course, the justices would remember that a year before, a licence had been granted, and, presumably, unless some change during the year was proved, they start with the fact that the topics to which I have referred have already been considered, and one would not expect that those topics would be likely to be reopened unless, as I say, some change has been proved. This would be likely to limit the inquiry to the conduct of the house and the character of the licensee, and perhaps the condition of the house, but as matter of fact, and not as matter of law at all.

As to the question of law arising upon the language of all the statutes, it may, in my judgment, be very shortly disposed of. The first statute to which one need go back, it is admitted gives discretion. Does any Act passed since purport to withdraw it? Certainly not. On the contrary, the Acts referred to expressly retain it, subject to certain provisions which it cannot be pretended affect to exclude the topics, which it is argued are topics irrelevant to a renewal. Now I do not mean to say that a repeal or qualification may not sometimes be implied by subsequent statutes enacting something inconsistent with a previous Act, but in a matter so constantly before the Legislature as the licensing laws, I cannot but think that if it was intended to alter the law in this respect it would have been done in plain and unambiguous language. Now the Acts of 1872 and 1874, which are the Acts upon which reliance is placed, do not profess to limit the discretion, but enact certain new procedure, all of which procedure is perfectly consistent with the preservation intact of the discretion given to the magistrates. I do not think that it is necessary to go into details as to the alteration of procedure—it is merely procedure. It leaves the earlier Act absolutely untouched upon the subject now in debate, and I entirely approve of and adopt the decision of Cockburn, C.J., and Mellor, J., arrived at thirteen years ago (*Reg.* v. *Smith*, 48 L. J. M. C. 38, 27 W. R. Dig. 116).

I therefore think that this appeal ought to be dismissed, with costs.

Lord BRAMWELL.—I think this a very plain case, and that the judgment should be affirmed. Houses of public entertainment and the sale of drink have been in this country and in many others the subject of regulation for police purposes; not for what one may call economic purposes, like the fixing of the price of bread, or the wages of labour, but for the maintenance of order. And naturally the buildings themselves, their character, their number, and their neighbourhood have been considered as well as the persons who should be permitted to carry on the trade or business. That certainly has been the case in England; and it is undoubtedly so now, with respect to licences granted to sell drink on premises for the first time. This is so clear that the learned counsel for the appellants have not contended to the contrary. If an application is made for a licence to sell drink on premises not before licensed it is certain that the magistrates may refuse it, and may refuse for the reason and no other than that they think the neighbourhood does not need it; that none is needed, or none in addition to the houses already licensed. But it is said that this power or right in the magistrates does not exist where a licence has been granted, and the question is whether it should be renewed. I am not sure that this contention might not be met by this: the magistrates have a discretion to refuse, they are not bound to state their reason, and, therefore, their decision cannot be questioned. But I think it better to say that, in my judgment, if they had to state their reasons it would be a good one in point of law that they refused to renew on the ground of "the remoteness from police supervision and the character and necessities of the locality and neighbourhood in which the inn is situate." Of course, the finding of the facts by the sessions is conclusive.

Two objections are raised by the appellants. One is, that though by the Act 9 Geo. 4, c. 61, the above might be a good ground for a refusal of a licence applied for for the first time, it is not for a refusal of its renewal. Why I know not. I quite agree that

different considerations should operate on the minds of the justices, and I doubt not, do. The hardship of stopping the trade of a man who is getting an honest living in a lawful trade and has done so perhaps for years, with probably an expense at the outset, may well be taken into consideration; but it must be done so in conjunction with considerations the other way, and must be left to the discretion of the justices. The licence is a renewal. That word has been criticized. It may be misleading, but is, I think, correct. It is a "renewal"—*i.e.*, a new licence, as we talk of a new lease being a renewal, though parties and terms may be wholly different. And one cannot help seeing this, that if the discretion was to be limited, as contended, in the case of a renewal, the Legislature might have said so in terms, and has not. Whenever that is the case it seems to me that courts ought not to put a limit on general words without almost a necessity for doing so. The other objection is that subsequent legislation has shown that Parliament intended there should be a difference between the treatment of original applications for a licence and applications for renewals, and has shown that it intended the licence should be renewed except for objection to the licensee, at all events, that its renewal should not be refused for such a reason as is given in this case, and so the power to refuse on that ground has been taken away by the Legislature. I cannot find this. I do find, indeed, that the Legislature, in its subsequent Acts, contemplated that, as a rule, as a practice, licences would be renewed. But there is nothing to show that the discretion to refuse is taken away. The word "personal," so much relied on, means "individual," as distinguished from the class to which he belongs. And I must repeat my remark that it could have been so enacted, and there is nothing to justify implying such a repeal. Indeed, I think this argument presents a consideration unfavourable to the appellants. The Legislature has most clearly shown that it supposed, contemplated, that licences would usually be renewed; that the taking away of a man's livelihood would not be practised cruelly or wantonly. True, and because it showed that plainly it may have felt it safe to leave an absolute discretion with the justices, a discretion that would be discreetly exercised. And it has been. I do not say in this case, I know nothing about it, I mean by justices generally. That is shown by what was mentioned by Mr. Poland—namely, that at the sessions when there is an appeal against a refusal of a first licence the appellant begins; the burden of proof is on him, he has to make out that he ought to have a licence. Where, on the other hand, the appeal is against a refusal to renew a licence the respondents begin; the burden of proof is on them, they have to make out that the applicant ought not to have a licence; practically, that his licence should be taken from him. This, Mr. Poland says, is the practice throughout England. One may well suppose this to be known to the Legislature, and to be one cause why the justices are trusted with such extensive power. For these reasons I think the appeal should be dismissed, thinking, indeed, that the Legislature contemplated that ordinarily licences would be renewed, and have most strongly shown that, but thinking also that that does not help the appellants to show, and that they have not shown, that a renewal may not be refused for the reason given in his case.

Lord HERSCHELL.—The sole question for decision in this case is whether, where a licence is applied for by way of renewal, by one who already holds a licence for the sale of intoxicating liquors, the licensing authorities are entitled to take into consideration the wants of the neighbourhood and the remoteness of the premises from police supervision, or whether their inquiry must be limited to the character and conduct of the applicant, and they can only refuse the applicant on the ground of his personal unfitness. It was admitted by the learned counsel for the appellants that there was authority for the proposition that a complete discretion had been vested in the justices to grant or withhold any application for a new licence, though they somewhat faintly contended that upon the true construction of the 1st section of the 9 Geo. 4, c. 61 this discretion was confined to the question whether the applicant was a fit and proper person to hold the licence, and whether the premises in respect of which he made the application were suitable for the purpose. It is to my mind abundantly clear that this is not a correct view of the statute. Giving to the language used its natural interpretation, I think it impossible to do otherwise than hold that the discretion of the justices is not in any way fettered. When once this conclusion is arrived at, it seems to me to follow that the justices had under the statute of Geo. 4 the same discretion when the holder of a licence applied for another licence for the ensuing year. It is by virtue of the very same enactment that the justices are empowered to grant such a licence. The statute makes no distinction between this case and the original application. The word "renewal" is never mentioned, and it is expressly provided that every licence granted under the authority of the Act shall last for one year "and no longer."

But it was argued that the law had been modified by subsequent legislation, and this was the point mainly insisted upon on behalf of the appellant. The Licensing Act of 1872 has, it is true, by section 42, altered in some respects the procedure provided in relation to applications for licences by the statute of Geo. 4. But the alterations have reference to matters of procedure only. Under the earlier Act the applicant for a licence was required to attend in person unless hindered by sickness, infirmity, or other reasonable cause. The Act of 1872 provided that in case of an application for the renewal of a licence the applicant need not attend in person at the annual licensing meeting, unless required by the justices so to attend. It also contained enactments securing to the applicant for a renewal of his licence notice that objection was taken to such renewal, and prescribed that no evidence with respect thereto should by received by the justices that was not given on oath. These provisions would obviously have left the discretion of the justices just what it had been before, even if the statute had not gone on, as it does, to provide that subject thereto licences should be renewed, and the powers and discretion of justices relative to such renewal should be exercised as theretofore. But it was said that the amendment of section 42 of the Licensing Act. 1872, enacted in section 26 of the Licensing Act, 1874, had the effect of limiting the power of the justices and prohibiting them from refusing to grant a renewal of a licence save from some cause personal to the applicant. The enactment in question certainly does not in terms contain any such provision, and I do not think it is possible to infer from the language used that the Legislature intended thus to alter the law. The section, after reciting that it was enacted by section 42 of the Act of 1872 that an applicant for the renewal of his licence need not attend in person at the annual licensing meeting, unless required by the licensing justices so to attend, enacts "that such requisition shall not be made save for some special cause personal to the licensed person to whom such requisition is sent." I think the object of this provision is obvious. Under the earlier Act the justices at any sessions might (or at the very least it was open to contention

that they might) have required all applicants for a renewal to attend as before. The later Act prescribes that no such requisition is to be made except for some special cause personal to the recipient of the requisition. The cause, it will be observed, is to be a cause for requiring the individual to be present, and the fact that objection was taken to the renewal of his licence would be such a cause. The language of the statute has no reference to the causes which, when the applicant attends in pursuance to the requisition, may operate in the minds of the justices to determine whether his application shall be acceded to or not. For these reasons I think that the judgment of the court below was correct, and ought to be affirmed. There is one observation made by my noble and learned friend the Lord Chancellor to which I am not prepared to give my assent without qualification. I do not think that the fact that a licence had been granted for the previous year would be a sufficient ground for the justices presuming that the licensed house was then needed, and considering only whether the circumstances had changed in the interval. It might well be that the attention of the licensing justices had not on a former occasion been called to the condition and wants of the neighbourhood.

Lord MACNAGHTEN.—For the reasons which have been stated by my noble and learned friends, and which it is unnecessary for me to repeat, I also am of opinion that it is clear beyond the possibility of doubt or question that the Act of 1828 conferred upon the licensing justices the same discretion in the case of an application for what is now termed a renewal as in the case of a person applying for a licence for the first time, and that, although there has been an alteration in the procedure in favour of applicants for renewed licences, there is nothing in the subsequent legislation to do away with, or impair, or fetter that discretion.

Lord HANNEN.—I do not consider it necessary to occupy your lordships' time with observations on the Act 9 Geo. 4, c. 61. It was long ago decided, I think rightly decided, that the justices were under that Act entitled and bound to consider the needs of the neighbourhood on an application for a licence to a person seeking to keep a house for the sale of exciseable liquors (*Reg.* v. *Lancashire Justices*, 19 W. R. 204, L. R. 6 Q. B. 97), and that their discretion is equally wide in the case of a person already keeping such a house as in one where the application is by a person not before licensed: *Reg.* v. *Smith*. But it was contended that the general discretion given by the Act of Geo. 4 was restricted by the Act of 1872 (35 & 36 Vict. c. 94), and by the Act of 1874 (37 & 38 Vict. c. 49). By the first of these Acts the renewal of licences is dealt with, and by the 42nd section certain changes are made in the procedure where a renewal is asked for: (1) The applicant need not attend in person unless required by the justices to do so; (2) no objection to the renewal is to be entertained unless written notice of the intention to oppose, stating the general grounds of the opposition, has been served seven days before the meeting; and (3) evidence with respect to the renewal shall be given on oath. But the section concludes: "Subject, as aforesaid, licences shall be renewed, and the power and discretion of justices relative to such renewal shall be exercised as heretofore." This, therefore, clearly leaves the discretion of the justices unfettered where the provisions of the 42nd section have been complied with. The argument for the appellant was chiefly based on the qualification of the above-mentioned 42nd section of the Act of 1872, added by the first clause of the 26th section of the Licensing Act of 1874 (37 & 38 Vict. c. 49). That clause is as follows:—"Whereas by section 42 of the principal Act, it is enacted that a licensed person applying for the renewal of his licence need not attend in person at the general licensing meeting, unless he is required by the licensing justices so to attend: Be it enacted that such requisition shall not be made save for some special cause personal to the licensed person to whom such requisition is sent."

Rightly to understand this enactment it is necessary to revert to the earlier legislation on the subject of the personal attendance of applicants for licences. By the 12th section of the Act 9 Geo. 4 only those applicants were excused from personal attendance who could prove by sworn testimony that they were hindered by sickness or infirmity or by any other reasonable cause, in which case an authorized person might attend for them. The 42nd section of the Act of 1872 excused the applicant for a renewal of his licence from attendance unless required by the justices. This left it in the power of the justices to require the attendance of all applicants for renewed licences. This power might be exercised so as to cause inconvenience to applicants required to attend on grounds not having reference to their particular case. Instances have been brought before the superior courts where justices have expressed and acted upon a general intention with regard to all licences, whereas it is their duty to consider each individual case on its own special merits. The object of the 26th section of the Act of 1874 appears to be to enforce this duty, and to require the justices to particularize the special ground on which they considered the personal attendance of the applicant necessary. The word "personal" is fully satisfied by construing it as meaning "for a cause in which the applicant is personally interested, and not merely interested as one of the general body of licensed persons." For these reasons it appears to me that the judgment appealed from is correct and should be affirmed.

Judgment of the Court of Appeal affirmed. Appeal dismissed, with costs.

Solicitors for the appellant, *Peckham, Maitland, & Peckham*, for *F. W. Watson*, Kendal.

Solicitors for the respondents, *Nicol, Son, & Jones*, for *J. Bolton*, Kendal.

Court of Appeal

From Q. B. Div. June 3.

LONDON BANK OF MEXICO AND SOUTH AMERICA (*Appellants*).
APTHORPE (*Respondent*). (*a.*)

Revenue—Income tax—Company in the United Kingdom — Branch establishments abroad — Profits earned abroad not remitted to the United Kingdom—5 & 6 Vict. c. 35, s. 100 — 16 & 17 Vict. c. 34, s. 2, schedule D.

The appellants were a banking company registered under the Joint-Stock Companies Acts, having their head office in London and branches in Mexico. The directors in London exercised the general control and management of the business in London and abroad. The dividends were paid in London, where the directors and share-

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

lders met. A portion of the profits earned in Mexico t having been remitted to England,

Held (affirming the judgment of the Queen's Bench ivision), *that, as the business carried on by the appel- ats in London and Mexico was one business, income tax as payable upon the profits of the business though not tually received in England.*

Colquhoun *v.* Brooks, 38 *W. R.* 289, 14 *App. Cas.* 93, *distinguished.*

Appeal from the judgment of the Queen's Bench ivision, [1891] 1 Q. B. 383, upon a case stated by the ncome Tax Commissioners for the City of London nder 43 & 44 Vict. c. 19, s. 59, in an appeal against a assessment of £4,341 13s. 4d. made upon the ppellants under schedule D. of 16 & 17 Vict. c. 34 r the year ending April 5, 1889.

The appellants were a banking company registered nder the Joint-Stock Companies Acts having their gistered and head office in London, where the irectors and shareholders met, and from which the ffairs of the company were directed and managed. he company had branches in Mexico, and the details f the management of the branches were conducted y managers on the spot, general directions and nstructions for management being issued from the ead office. The seat of power was in London with he directors. The company carried on banking usiness in London (other than current banking ccounts), and transacted in London the London usiness of their branches. At their branches they arried on all usual banking business. By a law of he Republic of Mexico passed in 1884 the right of anks to issue notes was limited to such banks as had btained, or within a limited time should obtain, the uthorization of the Federal Executive. At the time of the passing of this law the company had not obtained, nor did they within the time limited obtain, that authorization. For the purpose of continuing the issue of notes the company on September 10, 1886, entered into an arrangement with "The Banco de Empleados," which held a concession to issue notes in Mexico, to transfer the concession to the company in consideration of the sum of £20,000, part of the consideration being the extinction of a debt due by the Mexican bank to the company, and the remainder being paid in cash. The amount of cash actually remitted to and received by the company in England was reduced by the deduction of the whole sum paid in Mexico to the Mexican bank. Such cash as was paid was paid out of the assets of the company in Mexico. From time to time an adjustment of balances was made between the head office and the branches, and the dividends were paid in London.

The company contended that in estimating the balance of profits and gains for the purpose of assessment to the income tax only the actual sums received as profits in Great Britain ought to be taken into computation. The Queen's Bench Division overruled this contention, and gave judgment for the respondent.

The company appealed.

Gainsford Bruce, Q.C., and *Tindal Atkinson*, for the appellants, contended that the profits made abroad were not assessable to the income tax until they were received in this country, and that the decision in *Colquhoun* v. *Brooks*, 38 W. R. 289, 14 App. Cas. 493, was applicable.

They also referred to *Sulley* v. *Attorney-General*, 8 W. R. 472, 5 H. & N. 711, and *Cesena Sulphur Co.* v. *Nicholson*, 25 W. R. 71, 1 Ex. D. 428.

Lumley Smith, Q.C., and *Danckwerts*, for the respondent, were not called upon.

Lord ESHER, M.R.—This case seems to me to come within the principle of the decision in *Colquhoun* v. *Brooks*. The ground of that decision was that a person, who carries on a business solely abroad, is not liable to pay income tax in England upon the profits of that business unless the profits are received in England. If a person carries on one business in England, and another distinct business abroad, the two businesses must be looked at as separate businesses, and the person can only be assessed upon the profits of the business carried on abroad which he receives in this country. In the present case the appellants do not carry on two distinct businesses, one in this country and another in Mexico. They carry on one business, and that business is carried on in England. No doubt a portion of the profits of that business is earned in Mexico by transactions carried out there. But those transactions are carried out under the direction of the directors in England. The profits of the business are arrived at by bringing into the account the profits of the transactions abroad and in England, setting against them the expenses abroad and in England, and determining in England the difference between those two sums. There is, therefore, no business carried on solely abroad. The business seems to me to be one business carried on in England, and there is no rule that in such a case the profits must be received here before the appellants can be assessed in respect of them. The judgment of the Divisional Court must, therefore, be affirmed.

LOPES, L.J.—I am of the same opinion. There are not two distinct businesses, one carried on in this country and the other carried on abroad. There is only one business carried on partly in this country and partly abroad. The case is, therefore, distinguishable from *Colquhoun* v. *Brooks*.

KAY, L.J.—I am of the same opinion. In *Colquhoun* v. *Brooks* there was a business carried on entirely abroad. That decision does not apply where the business is carried on in England, though some part of it is conducted by means of transactions abroad.

Appeal dismissed.

Solicitors for the appellants, *Flux, Son, & Co.*

Solicitor for the respondent, *Solicitor of Inland Revenue.*

From Chan. Div. April 25, 27.

In re THORLEY.

THORLEY *v.* MASSAM. (*a.*)

Inland revenue—Legacy duty—Will—Direction to carry on business—Annual sum to be paid to trustees and a beneficiary, if and so long as they carry on the business —Legacy Duty Act, 1845 (8 *&* 9 *Vict. c.* 76), *s.* 4.

A testator devised his business to his executors and trustees, upon trust to carry on the business in conjunction with a son of the testator, and directed that each of the executors and trustees whilst carrying on the business, and that the son whilst managing the business in conjunction with them, should receive specified annual sums out of the profits of the business.

Held, that these annual sums were legacies, and liable to legacy duty.

In re Pooley, 37 *W. R.* 17, 40 *Ch. D.* 1, *discussed.*

Decision of North, J. (ante, *p.* 233), *affirmed.*

Appeal from the decision of North, J., reported *ante*, p. 233.

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

Joseph Thorley by his will, made in 1873, devised to three persons (substituting three others by a codicil), whom he also appointed his executors, his business, on trust to "carry on the business in conjunction with" the testator's son, W. R. Thorley; and the testator declared "that whilst the said trustees or trustee shall be carrying on the said business, each of them the said trustees or trustee shall receive the annual sum of £250 out of the profits thereof; and that if in any one year the profits of the said business shall be twenty-five per cent. over the profits for the year ending the 30th of June next before my decease, then in every such year each such trustee or he the sole trustee for the time being shall receive the sum of £500 in lieu of the said sum of £250"; the will then contained a direction that if only two-thirds or only one-third of the business should, under the provisions in that behalf contained, be carried on by the trustees, then that the annual sums of £250 or £500, as the case might be, should be proportionately reduced; the testator further declared "that whilst my son W. R. Thorley shall be managing my said business in conjunction with the said trustees or trustee, he the said W. R. Thorley, shall be entitled to the said annual sum of £250 more, as also to £500 in the event of such increase of profit as is hereinbefore mentioned in that behalf."

Joseph Thorley died in 1876, and the three persons named as his trustees carried on the business, and the son, W. R. Thorley, managed the business in conjunction with the trustees until his death, which occurred in September, 1882. The three trustees of Joseph Thorley's will and W. R. Thorley until his death received the remuneration of £250 a year in accordance with the terms of the will.

The questions raised by the appeal were whether these sums received by the trustees of Joseph Thorley's will, and also by the son, W. R. Thorley, were or were not subject to payment of legacy duty.

Actions for administration of the estates of both Joseph Thorley and W. R. Thorley had been instituted.

To determine the questions of legacy duty a petition had been presented in both actions by the trustees of Joseph Thorley's will, and by the trustees and executors of W. R. Thorley's will. The Commissioners of Inland Revenue were made respondents. North, J., held that legacy duty was payable on the sums so received by the trustees of Joseph Thorley's will, and by W. R. Thorley.

The petitioners appealed.

Napier Higgins, Q.C., and *Charles Macnaghten*, for the appellants.—These annual sums paid to the trustees and to W. R. Thorley are not gifts, but merely remuneration to secure their services in the business, and they are payable, not out of the testator's estate, but out of the profits of the business, which would depend on the enterprize and exertions of the trustees and the son; such remuneration is not a legacy: Hanson, 3rd ed., p. 63; *Willis* v. *Kibble*, 1 Beav. 559. *In re Pooley*, 37 W. R. 17, 40 Ch. D. 1, turned on the construction of section 15 of the Wills Act (1 Vict. c. 26). But, at all events, the recipients of these sums are not liable to pay duty on the full amount of the annual sums received, but only on the difference between the value of the services rendered by them and the value the testator put on those services: *Attorney-General* v. *Hennniker*, 7 Ex. 331; *Sweeting* v. *Sweeting*, 1 W. R. 121, 1 Drew. 331.

They also referred to *Williamson* v. *Naylor*, 3 Y. & Col. 208; *Attorney-General* v. *Cavendish*, Wightwick, 82; 8 & 9 Vict. c. 76, s. 4; 36 Geo. 3, c. 52, ss. 6, 8, 9, 22.

Vaughan Hawkins, for the respondents, was not called on.

LINDLEY, L.J.—[His lordship read the clauses above set out in the will of Joseph Thorley, and continued:—] The only question raised is whether these sums of £250 can be properly regarded as subject to legacy duty. That depends, of course, on the construction of the Acts of Parliament which imposed legacy duty. Mr. Higgins and Mr. Macnaghten are quite right in saying that those Acts, like all other taxing Acts, are to be read strictly—that is to say, they are not to be extended so as to have the effect of imposing on the subject, a tax which Parliament has not clearly made him pay. That principle is perfectly familiar to us. The Acts in question are 55 Geo. 3, c. 184, to which I need not particularly refer, and 8 & 9 Vict. c. 76. Section 4 of the latter statute is that which applies to this case. It recites as follows: "Whereas under or by virtue of the said several recited Acts certain duties have been granted and are now payable . . . upon legacies, and doubts have been entertained whether certain gifts by will or testamentary instrument are legacies liable to the said duties, and it is expedient to remove such doubts." That shows, therefore, that there had been some construction put upon the previous Acts which did not give the term "legacy" so extensive a signification as Parliament thought it ought to have. Accordingly, this section extended the signification. It says: "Be it enacted, that from and after the passing of this Act every gift by any will or testamentary instrument of any person, which by virtue of any such will or testamentary instrument is or shall be payable, or shall have effect or be satisfied out of the personal or movable estate or effects of such person, or out of any personal or movable estate or effects which such person hath had or shall have had power to dispose of." Then it goes on further to enact that those gifts shall be legacies.

Those are very general terms, and the question we have to consider under that section is whether this provision, as I will call it, for the sake of using a neutral term, is or is not a "gift"; secondly, whether it is a gift by a will or testamentary instrument; and, thirdly, whether it is payable or has effect or is satisfied out of the personal estate of the testator.

Now, is it a "gift"? Let us take the case of the trustees first. The trustees and the executors, apart from the will, could not charge for their trouble in carrying on the business of the testator. It would be competent to them, if they did not like to carry on that business, to have nothing to do with it. They need not take office unless they like. But no implied right of remuneration would arise from the mere fact that they executed the trusts which they elected to perform. Nor could they, in point of law, frame a declaration based on any implied contract of payment, for the simple reason that they are the paymasters and payees; they are the persons to employ themselves: and they cannot get an implied obligation to pay, out of such a state of things. Therefore, if they are to obtain this £250 a year at all they must do so under the will. They cannot get it in any other way. Then is that, or is not that, a "gift" by the will within the meaning of this section? I cannot say that it is not. Of course, the argument is put in this way. It is said that there is a consideration for the money; that they are to give their services, their time, and their attention. That is perfectly true. But does that alter the question? If they could charge the estate of the testator for their services apart from the will it would alter the question very materially, but they cannot. They cannot get a shilling out of the estate, either at law or in

equity for their services, except under the will. That appears to me to bring this case so far, within the section. Nor do I think that we could possibly hold the contrary, without running counter to the reasoning of the court in the case of *In re Pooley*. It is very true that that case did not raise the question of legacy duty. But the decision in that case proceeded upon the principle which I have been endeavouring to explain. There a solicitor who was entitled to charge profit costs under a will, claimed a benefit under the will, and, therefore, was an interested witness, and, having attested the will, could not claim the benefit that the will gave him, which was simply remuneration for his services. I cannot see on principle any distinction between that case and the present.

With reference to the other cases which have been cited I will not say anything. I do not think that they are close enough to require any comment.

Upon the first part of this analysis of the section I am unable to differ from North, J., in holding that this is a gift by will. It is either that or nothing. If the trustees and the son take it at all, they take under the will. It is a gift on condition, it is true, that they attend to this business and make a profit out of it, because it is a gift to them out of the profits. It is not an absolute gift, still it is a gift on condition, which is just as much a taxable legacy as a legacy to an executor for his trouble in winding up the estate. That has always been taxed, and must be taxed, unless we are to depart from the language of the section which imposes the duty.

Now I pass on and consider the second point, whether this provision of £250 a year is payable, or has effect, or is satisfied out of the personal or movable estate or effects of the testator. The difficulty in answering that question is this: If it is not payable out of his estate, out of whose estate is it payable? It is payable out of somebody's. It is obvious that this is property which the testator had power to dispose of. It is quite true it would not exist if the business were not carried on profitably, more or less through the exertions of those who carry it on. But to say it is not payable out of the testator's personal estate or out of his effects, or is not to be satisfied out of his personal estate, appears to me to involve the proposition that the business, with the profits thereof, were not the testator's to dispose of. Therefore, when we come to consider it, it appears to me that the only answer to the question is, that these are legacies taxable under the statute to which I have referred. That was the view taken by North, J., and it appears to me to be right. The appeal must, therefore, be dismissed, with costs.

BOWEN, L.J.—I am of the same opinion. The first question is, whether this annuity is a "gift" of £250 a year, and I will take that question first. Well, if it is gratuitous, it is a "gift." If you part with a thing for valuable consideration it is not a "gift." Do the trustees, therefore, take the annuity as a gratuity from the testator or not? Mr. Higgins and Mr. Macnaghten say that it is not a gift of, let us say, £250 a year; it is a gift of some right under the will which may be capable of valuation, but it is not a gift of the annuity. Let us see, analyzing that proposition, whether it will stand.

What is the right which it is suggested is given? It is a right to claim money if some services are rendered. The money is to come out of the testator's estate, that is certain; but, it is said, only if the trustees render services. That expression is ambiguous. If they render services to whom? They can no longer render them to the testator. They render them to the estate or to those who represent the estate. That is to say, according to the argument, it is a gift of a right to money out of the estate if the trustees render services to the estate, services for which they could not charge except by the will. Now, is not that, when you analyze it and write it out at length, exactly equivalent to a right to the money out of the estate upon a condition that the legatees do something for the executors? That is what it is. It is not a gift for a valuable consideration; it is a gift upon a condition. Now a legacy is not the less a legacy because it is given on a condition. That is clearly established. The truth is, that this is a conditional gift of the money out of the testator's estate from the profits which the testator's estate will give the legatees. But the right to receive it depends on the fulfilment of two conditions subsequent—namely, that the estate shall bear the fruit which is necessary to satisfy the annuity, and that the services shall be rendered.

Well it is said that that is a condition which deprives the gift of the character of bounty and makes it not a gift, or, as Mr. Higgins put it clearly, that the payment will not come entirely out of the estate, but that the estate of the testator is swollen by the enterprize and services which are rendered. But it is not the less a gift because there is a condition. That is established law, and the truth is that the persons who are the legatees have a right to elect whether they will take the gift on the condition or not. If they think it will not pay them to take it, they need not take it. But if they take it, it follows that they take it as being the bounty of the testator, and therefore subject to legacy duty.

With regard to the son it is really the same thing over again. He claims under the will. He does not claim under any contract. The same argument and the same reasoning apply.

I ought to say that, with regard to *In re Pooley*, the view of Cotton, L.J., and the view of Lindley, L.J., in that case seem to me to be at variance with the argument addressed to us on behalf of the appellants here, and by that case I think we are morally, so to speak, bound.

KAY, L.J.—I agree with the other Lords Justices. It seems to me that the two questions in this case involve the same point, and I will take the second first. It is said that this annuity was not given out of the estate of the testator. There is a very simple mode of trying that. Suppose the testator had left the business to his trustees on trust to pay the profits to A. for his life, and afterwards to hand over the whole business to B., there can be no question whatever but that he could have made a gift of that kind. Therefore he had power to deal with the subsequent profits of his business for the benefit of a tenant for life. If so, he could give the subsequent profits of his business. If he could give the subsequent profits of his business, it follows as a matter of course that he could give an annuity out of the subsequent profits of his business. Therefore the subsequent profits of his business, out of which this annuity was to come, were, beyond all question, his personal estate, which he could deal with. They were, in truth, the fruit of the business which belonged to him. One might put many illustrations of the kind. Suppose this testator had been the possessor of a large orchard of trees, and that he had given all the fruit of those trees for ten years after his death to A. He could have done that. The fruit would not have been in existence during his lifetime, but, nevertheless, he would have had power to dispose of it. In that sense it would have been his, because it would have been the fruit of his estate, of which, at the time of his death, he could dispose of, giving a limited interest in it.

I think, therefore, this question is almost too clear for argument if you come to consider it. If the testator could give the profits of his business after his death, then the annuity out of the profits of that business was part of his estate which he could have disposed of.

That does not, of course, entirely solve the first question. I will take the case of the son, who is not one of the executors and trustees, but to whom, if the son chose to carry on the business in conjunction with the testator's executors and trustees, the testator gave out of the profits of that business a certain annuity. Now really it seems to me the simple mode of trying whether that annuity is subject to legacy duty or not, is to suppose that instead of an annuity the testator had given a lump sum of money. Suppose the testator had said, "I give to my son £10,000 out of my estate. I give him £10,000 as a legacy on condition that he shall assist my trustees for ten years (or during his life) to carry on my business." The son would have the power of choosing. If he said, "I do not think that, sufficient remuneration, therefore I will not assist," of course then he would not take the legacy. But if he accepted it, it would be quite unarguable to say that the legacy in that event would not be subject to duty. The son must be taken to know that it would be subject to duty. Therefore, if he accepted the legacy and upon the condition, accepting the condition that he was to have this remuneration for his services, he would know that the thing he was to get would be that sum minus the legacy duty which the law mposed upon him. It was his to take or refuse as he pleased. If he takes it, how could he turn round and say, "I will not pay the legacy duty."

The argument has been a very ingenious one, The argument, and I put it in what seems to me the most striking form in which it was adduced by Mr. Higgins and Mr. Macnaghten in favour of their view, was this: they say, Suppose this son had been a manager of the business up to the time of the testator's death, and had been in the habit of receiving £500 a year for managing the business, and the testator had said, "I give to my son £500 a year upon condition that he shall go on managing the business as he has done." They say it would be very hard to treat that as a legacy. But that it would be very hard, is not a eason why it should not be treated as a legacy, if it s a legacy. Is it a legacy or not? How does the on take it? How would he claim it? He would me to the trustees, supposing he accepted the posi- on, and say, "I will go on, and I will take this." He would come to the trustees and say, "By the will you are directed to pay me £500 a year." That is claiming under the will. A thing which is claimed under a will, being the gift of the testator, is a legacy. I cannot conceive, even in that case, how the son, if he accepted the gift by the will, could say, "I have accepted this. I have accepted the condition under which it is given. I claim it under the will; but I say it is not a legacy."

Then it was said, Suppose the gift were of £5,000, upon condition that the son released a debt of £2,000 which the testator owed him, surely the son would not have to pay the duty on the whole £5,000? I do not know how the Inland Revenue Office would deal with that, but it seems to me probable that he would not. Why? For this simple reason. In that case the residuary estate would be increased by the £2,000 which otherwise would have to be paid out of it. The residue would pay increased duty—namely, the duty payable on that sum of £2,000—so that if the legatee were made to pay the duty on the whole fund, the estate would have to pay the duty twice over. Now that does not apply here, therefore the analogy is imperfect. That does not apply to a gift of this kind, where the valuable consideration which is to be given to the testator's estate as a condition of the legacy is a thing which is not taxable, and is not taxed, and does not pay duty. Therefore there is that broad and plain distinction between those two cases.

I am unable to see the difference between a legacy of a lump sum to a man upon condition that he shall perform services to the testator's estate and a legacy of an annuity to a man upon the same conditions. Each seems to me to be distinctly and plainly a legacy, and I agree that there is really no hardship in the matter; because if the consideration—if you like to call it such—which the legatee has to give by performing the duties for the testator's estate, be too onerous, he is not bound to say he will accept the legacy. He may say, "I decline it on those terms." Unless we were to hold as we do, it would seem to me to follow inevitably that the ordinary case of a gift to executors of a legacy for their trouble in performing the trusts of the estate ought not to pay duty. It has always been held that such a legacy should pay duty; and certainly, so far as I know, in nine cases out of ten such a legacy is a very insufficient remuneration indeed for the trouble which executors have. Very often it is a mere complimentary legacy—nineteen guineas, or something of that kind. A man's time may be taken up for years and years, he may be exposed to the continuous litigation which trustees and executors frequently are exposed to, and all his remuneration is nineteen guineas, and yet that has now to pay duty. We should be overruling previous cases, it seems to me, if we were to say, in this case, the legacy was not subject to duty. I think that the decision of North, J., was perfectly right.

Solicitors, *Collyer-Bristow, Russell, & Hill; The Solicitor to the Inland Revenue.*

High Court of Justice.

Chan. Div. Chitty, J. } March 12, 14; June 3, 4, 9.

DEAN v. DEAN. (a.)

Will—Life estate—Contingent remainder—Executory devise—Children who attain twenty-one "before or after the death of the tenant for life"—Powers of maintenance and advancement—No estate in trustees.

Devise, subject to a life estate in E. D., to the use of such child or children of the said E. D. "as, either before or after the death of the said E. D.," should attain the age of twenty-one.

Held, an executory devise.

In re Lechmere and Lloyd, 18 *Ch. D.* 524, 30 *W. R. Dig.* 225, *and* Miles *v.* Jarvis, 24 *Ch. D.* 633, 32 *W. R. Dig.* 231, *followed.*

Brackenbury *v.* Gibbons, 2 *Ch. D.* 417, 24 *W. R. Dig.* 315, *not followed.*

The legal effect of powers of maintenance and advancement in cases where the trustees take no estate, explained.

By his will, dated the 24th of August, 1871, Edward Dean, after certain devises to his nephew Charles Matthews and his son Edward Dean upon the trusts therein mentioned, and other devises and bequests not material to this report, devised all and singular the

(a.) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

hereditaments whatsoever and wheresoever (not therein otherwise disposed of) of or to which he should be possessed or entitled at his decease, subject to an annuity, unto his sons Edward Dean and Robert Dean for their respective lives as tenants in common. And from and after the decease of his son Edward Dean the testator gave and devised one equal moiety of the said hereditaments and premises unto the use of such child or children of his son Edward Dean living at his decease and such issue then living of the child or children of his son Edward Dean then deceased as, either before or after the death of his son Edward Dean, should attain the age of twenty-one years, or die under that age and leave issue living at his, her, or their death or respective deaths as tenants in common if more than one, and the heirs and assigns of such child or children and issue respectively, but so that such issue should take only the share or shares respectively which the deceased parent or parents if living would have taken.

Then followed a similar devise of the other moiety on the death of Robert Dean to his children and issue.

But in case there should be no such child or issue of his son Edward Dean who should become entitled to the first mentioned moiety of the said hereditaments and premises, then and in that case the testator gave and devised the same from and after the decease of his son Edward Dean, unto and to the use of his son Robert Dean for his life, and from and after his decease the testator gave and devised the said moiety of the said hereditaments and premises unto and to the use of the child or children and issue of his son Robert Dean in like manner and under the same limitations as the moiety therein-before devised to them.

A similar cross-limitation of the second mentioned moiety followed in case of a similar failure of Robert Dean's issue, with a gift over on a similar failure of the issue of both Edward Dean and Robert Dean to the said Edward Dean and Robert Dean and their heirs upon the trusts therein declared in favour of the testators' daughters Ann Fairman and Mary Hall and their issue.

And the testator gave and bequeathed all the rest, residue, and remainder of the property and effects of or to which he might be possessed or entitled at his decease unto his said two sons Edward Dean and Robert Dean, their executors and administrators, as tenants in common.

And the testator empowered his trustees *to apply all or any part of the income arising from any minor's presumptive share in any part of his property* after the death of the preceding owner for life thereof (if any) for the maintenance and education of each such minor notwithstanding that a parent of such minor might be living and able to provide the same. And the testator directed his trustees *to invest and accumulate* the unapplied income in augmentation of the capital of such share, and also authorized his trustees to apply, but with the consent of the life owner for the time being (if any), any part not exceeding one-half of *the presumptive or vested share of any person* for his or her advancement in the world, and empowered his trustees for the purposes aforesaid to pay such income or the money so to be raised unto the parent or guardian for the time being of any such minor as aforesaid without being in any way answerable for the application thereof.

The will contained a power to appoint new trustees, and declared that the powers and discretions vested in the trustees named in the will should be exercisable by the trustees or trustee for the time being.

The said Charles Matthews and Edward Dean were appointed executors.

The testator died on the 12th of November, 1872. His will was proved by Edward Dean alone, Charles Matthews having renounced probate and disclaimed the trusts.

At the time of his death the testator was seised in fee simple of certain freeholds and copyholds.

The testator's son Robert Dean died on the 12th of February, 1885, intestate, leaving his widow, Mary Dean, and four children—viz., the defendant Edward Dean, his eldest son and heir-at-law, the defendant Robert Dean, his youngest son and customary heir of the copyholds, and two daughters. All the children were still infants.

The testator's son Edward Dean, who was illegitimate, died in June, 1889, unmarried and intestate.

The infant daughters, who were the plaintiffs by their next friend the said Mary Dean, claimed that the rights and interests of the plaintiffs in the freehold and copyhold hereditaments devised by the said will of the said testator in favour of his said sons Edward Dean and Robert Dean, and their respective children and issue, might be declared.

Byrne, Q.C., and *A. à B. Terrell*, for the plaintiffs.—There are two questions:—(1) Are the gifts to the children of Edward Dean and Robert Dean contingent remainders or executory devises? Robert Dean's children take if there is a contingent remainder properly supported or a valid executory devise. If the gift is construed as a contingent remainder it was supported by the estate in the trustees implied by the powers of maintenance and advancement. [They referred to *Andrew* v. *Andrew*, 24 W. R. 349, 1 Ch. D. 410; *Brackenbury* v. *Gibbons*, 2 Ch. D. 417, 24 W. R. Ch. Dig. 315, not followed in *In re Lechmere and Lloyd*, 18 Ch. D. 524, 30 W. R. Dig. 225, or in *Miles* v. *Jarvis*, 24 Ch. D. 633, 32 W. R. Dig. 231; *Sulley* v. *Barber*, 59 L. T. N. S. 824, 37 W. R. Dig. 200; *Festing* v. *Allen*, 12 M. & W. 279.] (2) What becomes of the income till the children attain twenty-one? See *Andrew* v. *Andrew* and *Muskett* v. *Eaton*, 24 W. R. 52, 1 Ch. D. 435.

Tanner, for the defendants Edward Dean and Robert Dean, referred to *Perceval* v. *Perceval*, L. R. 9 Eq. 386, 18 W. R. Ch. Dig. 151, and *In re Jobson*, 44 Ch. D. 154, 38 W. R. Dig. 220.

Daniel Jones, *Bramwell Davis*, and *Methold*, for the issue of Mary Hall and Ann Fairman, argued that the gift over in their favour had taken effect.

They cited *Rhodes* v. *Whitehead*, 13 W. R. 800, 2 Dr. & Sm. 532; *Cole* v. *Sewell*, 2 H. L. Cas. 186; *Blackman* v. *Fysh*, *ante*, p. 520; Fearne on Contingent Remainders, p. 18.

Ingle Joyce, for the Attorney-General, on behalf of the Crown.—My claim arises from the illegitimacy of Edward Dean. The Crown is not bound by a trust when it takes property by escheat: Chitty on Prerogative, 234; Lewin on Trusts, p. 30; 47 & 48 Vict. c. 71. *In re Lechmere and Lloyd* is wrong on the subsequent authorities.

Byrne, Q.C., replied.

CHITTY, J.—Apart from the clauses as to maintenance and advancement, this case is not distinguishable from *Brackenbury* v. *Gibbons* and *In re Lechmere and Lloyd*. The decisions in those cases are conflicting. In the former case, Hall, V.C., had present to his mind two rules of law; the first, as he stated it, "that every gift which can take effect as a remainder absolutely excludes its being treated as an executory devise," and, secondly, that a contingent remainder fails unless it is ready to take effect in possession immediately on the determination

of the particular freehold estate. He applied both rules. In the latter case, the Master of the Rolls (Sir G. Jessel) declined to apply the first rule, and held that the limitation was a valid executory devise. The distinction which he drew between a future limitation to all the children of a tenant for life who shall attain twenty-one and a future limitation to all the children of a tenant for life who, either during his life or afterwards, shall attain twenty-one seems at first sight subtle and over refined. So far as the testator's intention is concerned, the meaning of the limitations is the same; in both cases the testator intends that all the children who attain twenty-one, whether before or after the death of the tenant for life, shall take; and it would seem strange to anyone not acquainted with the niceties of the law relating to real property in this country that any different legal effect should be given to a mere difference in words which mean the same thing. But a difference in the mere form of words does in several cases make a difference in law. [His lordship mentioned some instances in illustration of this point.]

Now the reasoning upon which the decision in *In re Lechmere and Lloyd* is founded appears to be this: by the express words that those who attain twenty-one after the determination of the preceding estate are to take the testator shows that, in the event which he contemplates of all the children not attaining twenty-one in the lifetime of the tenant for life, there is to be a gap between the determination of the preceding estate and the future estate to the children. The testator has used such a form of gift as, on the face of it, is inapplicable to a remainder, and consequently the court is precluded from applying the rule that every gift which can take effect as a remainder must not be construed as an executory devise. The court cannot construe the gift as a remainder unless it strikes out part of the express limitation; and the rule referred to neither requires nor justifies such an alteration of the testator's language.

According to the judgment in *Festing* v. *Allen*, a contingent remainder to the children of the tenant for life who attain twenty-one vests absolutely in those children who at the death of the tenant for life have attained that age, to the exclusion of those who subsequently attain that age. But according to the reasoning now under consideration, where the limitation is to children who, either before or after the death of the tenant for life, attain the age of twenty-one, the testator expressly attaches the qualification of membership of the class to those children who attain the age after the tenant for life's death, and, in order to give effect to the express and lawful limitation in favour of such children, the court is bound to hold that the limitation, taken in its entirety, is an executory devise. This reasoning, subtle as it may appear to be, is not more subtle or artificial than the reasoning of a scholastic character which the common law judges of former times applied to cases of this kind; and I think that, having regard to the subject-matter, it may be accepted as correct. It has the merit of giving effect to a lawful intention expressed in clear terms.

But I am not under the necessity of choosing between these two conflicting authorities. In *Miles* v. *Jarvis*, Kay, L.J. (then Kay, J.), followed the decision of the late Master of the Rolls in preference to that of Hall, V.C.

The weight of modern authority is therefore in favour of my holding that the limitation in question before me is an executory devise, apart from the clauses as to maintenance and advancement.

These clauses appear to afford additional reasons for holding the limitation to be an executory devise. It was argued that the clauses do not apply to the devises where the devisees take directly the legal estate; that they apply only where, under the other gifts in the will, the legal estate passes to the trustees, and the beneficiaries take thereby equitable interests under the trusts declared. But this argument does not give proper effect to the words "all or any part of the income arising from any minor's presumptive share in any part of my property" in the maintenance clause, or the words "presumptive or vested share of any person under this my will" in the advancement clause. I am of opinion that these clauses apply not only where the trustees take the legal estate, but also where the beneficiaries take it directly. The question then arises, what is the legal operation and effect of these clauses? Where the legal estate in fee is vested in trustees the powers are equitable powers only. But where no legal estate is vested in the trustees, as is the case in reference to the questions raised in this action, it is necessary, in order to give effect to the clauses as they stand, to imply some legal right or estate in the trustees. Unless such an implication is made the trustees could not execute the power of "applying" the rents which is conferred upon them, nor could they accumulate the surplus rents according to the direction given to them, nor could they raise the money for advancement. Ought, then, a legal estate or merely legal powers to be implied? If the former, it would, I apprehend, regard being had to the maintenance clause, be arguable that it was at least a legal estate to arise on the determination of the preceding life estate, and to continue during the respective lives of the children presumptively entitled so long as they were under age, in their respective shares, and that such an estate would be a determinable estate of freehold *pur autre vie*, and sufficient to support the limitation to the minors respectively if construed as contingent remainders. But, in my opinion, to imply an estate in the trustees would be going beyond what is necessary, and would not be justifiable, having regard to the other parts of the will, where the estates are expressly devised to trustees. I think, then, the right construction is to imply a legal power in the trustees named in the will to enter upon the devised lands, and to take the profits sufficient to enable them to execute the express power of maintenance, and the direction or trust to accumulate the surplus rents; and also a legal power in the same trustees, by way of revocation of uses or otherwise, sufficient to enable them to raise the money required for advancement under the express power of advancement. These powers would pass to new trustees. The power to appoint new trustees expressly declares that the powers and discretions vested in the trustees named in the will shall be exercisable by the trustees or trustee for the time being of the will.

The manner in which the maintenance and advancement clauses support the construction that the limitations in favour of the children and issue of Edward and Robert are executory devises is that they contemplate and make express provision for the event of there being a gap between the determination of the preceding life estates and the vesting of the estate in the children or other issue.

The question then arises, what has become of the legal estate since the deaths of the tenants for life during the suspense period? It was claimed by the beneficiaries as having passed to the trustees named in the will by virtue of the limitations in case both the testator's sons Edward and Robert should die without leaving issue who should become entitled under the provisions of the will. But this claim cannot be maintained. The estate does not pass under this devise until after it has been ascertained that there is no issue entitled. I think it passed under

the residuary devise. Consequently, it vested in the two sons as tenants in common, and on the death of Robert, who died in 1885, his moiety passed as to the freeholds to Edward, his eldest son, as his heir-at-law, and as to the copyholds to Robert, his youngest son, as his heir, according to the custom of the manor. On the death, in 1889, of Edward, who was illegitimate, his moiety passed as to the freeholds to the Crown, and as to the copyholds to the lord of the manor. But the legal estate during this suspense period is subject to the implied powers already stated, apart from any question as to the prerogative of the Crown.

Solicitors for the plaintiffs and the defendants Edward and Robert Dean, *Finnis & Wylie.*

Solicitors for the Attorney-General, *Hare & Co.*

Solicitors for the remaining defendants, *Hillearys, Barnes, & Bernard; Nicol, Son, & Jones.*

Chan. Div. } Chitty, J. } March 13, 21.

In re DE PENNY.

DE PENNY *v.* CHRISTIE. (*a.*)

Practice—Service of writ out of jurisdiction—Concurrent remedy—R. S. C., 1883, *ord.* 11, *rr.* 1 (f), 2.

Under sub-section (f) *of rule* 1, *order* 11, *of R. S. C.,* 1883, *which enables the court to allow service out of the jurisdiction where "any injunction is sought as to anything to be done within the jurisdiction," the court has jurisdiction, on a motion supported by proper evidence, to grant a limited injunction as to acts to be done within the jurisdiction; but, in the exercise of its discretion, having regard to all the circumstances—especially to the fact that a Scotch court has partial seisin of the case, and proceedings are about to be taken in Scotland—the court may refuse to allow service out of the jurisdiction.*

A remedy which depends on the will and pleasure of another person is not a concurrent remedy within the meaning of R. S. C., 1883, *ord.* 11, *r.* 2.

Motion.

One De Penny, who was born in Scotland in 1831, from 1856 to the date of his death was chiefly resident in Bolivia. In 1882 he married the plaintiff, a Bolivian lady; in 1886 he returned to Scotland, where he bought an estate, and in 1888 he again returned to Bolivia, where he died in 1890, being then about to return to Scotland. The plaintiff procured from the Bolivian Court *ex parte* a declaration of the deceased's intestacy, and that she was entitled to his movable property, including the movable or personal property in England. The sisters of the intestate, who were his next of kin, obtained from the Scotch Court a confirmation of their title and a finding that the deceased died domiciled in Scotland, and they were "decerned" to be the "executrices dative" of the intestate. Pursuant to that decree they delivered an inventory of the personal estate of the intestate in England and Scotland in accordance with the Confirmation and Probate Act, 1858, and found security for the administration of the intestate's personal estate, the greater part of which was in England and consisted of £36,000 in the hands of the deceased's former agents, who held a power of attorney from the plaintiff to prosecute actions here. The personalty in Scotland was about £3,000 in value. The confirmation was sealed in the Probate Court in England notwithstanding a *caveat* entered on behalf of the plaintiff. The four sisters thereby became the legal personal representatives of the intestate in England. Proceedings were contemplated on behalf of the plaintiff for revocation in Scotland of the Scotch confirmation.

The plaintiff brought this action, claiming a declaration that the deceased died domiciled in Bolivia, administration, an injunction to restrain the agents from paying the funds in their hands to the "executrices dative," or otherwise parting with the funds, except to the plaintiff, an injunction to restrain the executrices from taking proceedings to recover, and from receiving, the deceased's personal estate, and for a receiver. The writ was served on the agents in London, and the plaintiff had obtained an order for service of the writ out of the jurisdiction on the executrices.

This was a motion to discharge the order for service out of the jurisdiction.

Rigby, Q.C., Birrell, and *A. E. Barker,* for the motion.

Sir H. Davey, Q.C., and *Sillem,* for the plaintiff.

The following cases were cited:—*British Marine Association* v. *McInnes,* 31 SOLICITORS' JOURNAL, 95; *Ewing* v. *Orr-Ewing,* 10 App. Cas. 453, 34 W. R. Dig. 89; *Société Générale de Paris* v. *Dreyfus Brothers,* 33 W. R. 823, 36 *Ibid.* 609, 29 Ch. D. 239, 37 *Ibid.* 215.

CHITTY, J. — Such recognition of the plaintiff's rights as has taken place in Bolivia is relied on merely for the purpose of showing that she has a *primâ facie* title. No objection was taken by the counsel for the sisters on the ground that she had not made an affidavit, nor as to the sufficiency of the evidence for the above limited purpose. Her case, then, is that she is absolutely entitled in equity to the fund which is now within the jurisdiction of this court; and she asks that the fund may be kept here until she has had an opportunity of establishing her title. She alleges that the sisters are in poor circumstances, and that they intend, if they receive the fund, to take it out of the jurisdiction of this court and to distribute it among themselves as the intestate's next of kin in prejudice of her right, and that if they remove the fund she will be without remedy, and unable to obtain restitution thereof. At the same time, her counsel disclaimed any imputation of bad faith or dishonesty on the part of the sisters.

The sisters' case is this:—They claim that at his death the intestate was domiciled in Scotland, the land of his birth; and they deny that the plaintiff is his widow. They allege that they are his next of kin, and as such entitled to his movables wheresoever found. They have accordingly applied to the proper tribunal in Scotland for a confirmation of this title, and have obtained there a finding that the deceased died domiciled in Scotland; and they have been decerned there to be "the executrices dative" of the intestate. They accordingly represent the intestate in Scotland, and are entitled to recover and receive his movables there. These proceedings in Scotland were also *ex parte,* and were conducted in the absence of the plaintiff, just as her proceedings in Bolivia were conducted in the absence of the defendants, the sisters. In neither case are the absent parties bound, subject only to the point to be presently mentioned turning on the effect of the Confirmation and Probate Act, 1858.

Having obtained this confirmation the sisters applied, pursuant to the above Act of 1858, to the Probate Division of the High Court in England to have the confirmation sealed in England. Here they were met by a *caveat* which had been entered on behalf of the plaintiff. On an appeal from the registrar

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Butt, J., ordered the confirmation to be sealed, but declined to stay contentious proceedings. The confirmation has accordingly been sealed. The result is that the sisters are the duly constituted legal personal representatives of the intestate in England, and as such entitled to sue for and recover in the English courts the personal estate of the intestate within their jurisdiction; consequently they can recover by action in England the debt or fund in the hands of the defendants Gibbs & Sons which those defendants admit to be due.

The 9th section of the Confirmation and Probate Act, 1858, makes the finding in Scotland that the deceased died domiciled there conclusive, but this section, as explained by the 17th section, makes the finding conclusive for the purposes of the Act only (see Sir Cresswell Creswell's decision in *Hawarden* v. *Dunlop*, 2 Sw. & Tr. 340), and Lord Selborne's statement of the effect of the Act in *Ewing* v. *Orr-Ewing*). I understand the reason why the sealing was ordered here, notwithstanding the *caveat* was that the finding in Scotland was conclusive on the question of sealing, and that, until such finding was duly reversed by the proper tribunal, the English court was bound to allow the sealing. [His lordship here read the plaintiff's writ, and continued:—] The defendants Messrs. Gibbs are friendly to the plaintiff—in fact, some members of that firm have received from the plaintiff a power of attorney from her, and it is upon instructions given by them, as such attorneys, that this action has been instituted in her name. So far as the action is concerned they are mere stakeholders.

In these circumstances it is plain that the plaintiff is claiming by an equitable title depending on the law of the alleged Bolivian domicil to be the sole beneficiary—at least of the funds within the jurisdiction of this court.

In the old Court of Chancery when, on the granting of letters of administration the Ecclesiastical Court had, by a definitive sentence in a contentious suit, determined the question which of the parties were next of kin, such sentence was held to be conclusive in a suit for the administration of the estate, and it was not permissible to reopen the question on the distribution of the estate (see *Barrs* v. *Jackson*, 1 Phil. C. C. 582). But where the administration had been granted by the Ecclesiastical Court in a non-contentious proceeding, the grant was not conclusive (see *Long* v. *Wakeling*, 1 Beav. 400).

I think, therefore, that the plaintiff was not precluded by the sealing of the confirmation from suing in this court. Indeed, this point was admitted by the sisters' counsel.

The effect of the sealing of the confirmation in this country, taken in connection with the *ex parte* finding of the domicil in Scotland, is to render the representation and administration here ancillary to the representation and administration in Scotland. But it has been the practice of the courts in all countries to retain assets within their jurisdiction for the purpose of insuring payment of the debts of creditors within the jurisdiction, and not to permit the assets to be taken away until such creditors are paid, and only after they are paid to allow the surplus assets to be remitted to the principal administrator in a foreign country.

In *The Société Générale de Paris* v. *Dreyfus Brothers* Pearson, J., held that the plaintiffs, foreigners out of the jurisdiction, were entitled to restrain the defendants, also foreigners out of the jurisdiction, from removing out of the jurisdiction funds to which the plaintiffs claimed to be entitled. His judgment was reversed on appeal, on the ground that the further evidence adduced showed that the matter was *res judicata* between the parties by reason of the judgment of the French courts having jurisdiction in the matter.

The exact point for decision in this case turns upon order 11 of the rules of 1883. This order contains the code of English law and procedure upon the question of service out of the jurisdiction. The only parts of the order on which the plaintiffs can rely are sub-sections (*f*) and (*g*) of rule 1. As to sub-section (*g*), the plaintiff's counsel did not argue that the case fell within it. I need therefore say no more about that sub-section than that I think it does not apply. Sub-section (*f*) enables the court to allow service out of the jurisdiction where any injunction is sought as to anything to be done within the jurisdiction.

For the sisters it was argued that the thing to be done must be something which could be done only or exclusively within the jurisdiction, and that inasmuch as the injunction asked was to restrain payment by the defendants Gibbs & Sons anywhere, and to restrain the sisters from suing or receiving anywhere, the case was not within the rule. But although the injunction asked for is in wider terms than it would be right to grant it, I think that on a motion supported by proper evidence the court would be justified in granting an injunction restraining the sisters from suing Messrs. Gibbs within the jurisdiction, and that such a limited injunction would be an injunction to restrain a thing being done within the jurisdiction, and consequently within the rule.

As the evidence stands at the present moment the sisters could sue the defendants Gibbs & Sons only within the jurisdiction, and consequently, as Gibbs & Sons are friendly to the plaintiff, and not willing to pay the sisters unless compelled so to do by action, such an injunction would be effectual. The case, then, is not within the principle of the decision in the *British Marine Association* v. *McInnes*, where Manisty, J., so far as appears from the short note of his judgment, thought that the injunction would not be effectual. I am of opinion, then, that the plaintiff is right on this point, and that the court has authority to order service out of the jurisdiction.

But there remains for consideration, first, the question arising on the 2nd rule of order 11, which requires that where leave is asked to serve a writ in Scotland, if it shall appear to the court that there may be a concurrent remedy in Scotland the court shall have regard to the comparative convenience of proceeding in England or in the place of residence of the defendants, and also, secondly, the question of the proper exercise of the judicial discretion in allowing service out of the jurisdiction: see the *Société Générale de Paris* v. *Dreyfus Bros.* These questions I will consider together.

Assuming that there is a concurrent remedy in Scotland, it will be unquestionably more convenient to the defendants, the sisters, who are resident in Scotland, that the proceedings should take place there, and inasmuch as the plaintiff resides in Bolivia it will make but little difference to her convenience whether the proceedings are, in England or in Scotland, although it would be slightly more convenient to her that the proceedings should be here, where her lay attorney and her present professional advisers are resident. But it is stated for her that the balance of convenience is in favour of suing in England because the fund is here.

Now I think this would be a strong ground in her favour if the defendants, the sisters, proposed to take the funds which are here, not merely out of the jurisdiction, but to some foreign country. But on the evidence as it stands the only case made for the plaintiff is that the sisters intend to take the fund to Scotland, but there is no reason for supposing

that they intend to fly from their native land with the money if they receive it.

Further, they have given security in Scotland for the due administration of the intestate's estate in pursuance of the Probate and Confirmation Act, 1858, a statute which applies to both England and Scotland. The main contest between the parties is as to the domicil. The intestate was a Scotchman by birth, and although there is no very precise evidence on the point, the probability is that several of the witnesses are in that country. Certainly the intestate's agent and factor, who has made an affidavit as to the Scotch domicil, and will be a material witness, resides in Scotland. Although I do not pretend to review the finding in Scotland that the domicil was Scotch, and I am aware the plaintiff has not as yet had a fair opportunity of giving evidence as to the domicil, and although it would be premature to express any definite opinion on the question, I may without impropriety go so far as to say that upon the letters of the intestate, written within a short time before his death, upon the fact of his having recently bought an estate in Scotland, and the other facts deposed to there is a fair *primâ facie* case shown for the Scotch domicil. But when I say this I must not be understood as meaning in any way to prejudice the plaintiff's case. My conclusion is that on the question of convenience the preponderance is in favour of Scotland.

But is there a concurrent remedy? The suggestion on behalf of the sisters is that the defendant Gibbs & Sons as the stakeholders may institute in Scotland an action of multiple poinding, an action analogous to interpleader in England, the result of which would be that the fund would be deposited in a bank there, and the litigation would proceed between the plaintiff and the sisters. But although the defendants Messrs. Gibbs may be willing to assist the plaintiff to some extent, they may not be willing, and they certainly are under no obligation to her, to incur the trouble and expense of instituting proceedings in their own names on their own behalf in Scotland. A remedy which depends on the will and pleasure of another person is not a concurrent remedy within the 2nd rule of order 11.

There remains, however, to be mentioned one fact which, in connection with the other circumstances of the case, is, I think, decisive on the question of the proper exercise of the judicial discretion. It is this: from the affidavit in support of the plaintiff's case it appears that it is intended to institute proceedings on her behalf in Scotland for the revocation of the Scotch confirmation. These proceedings will go to the root of the matter. If the plaintiff succeeds, the revocation of the sealing in England will follow, and the plaintiff will thus become the legal personal representative in Scotland and in England of the intestate. In any view of the case she must have recourse to the Scotch courts to establish her claim to the movables there. Considering, then, that she must take proceedings in Scotland; that there is no substantial risk of the English personal estate being lost to her if removed to Scotland, and that security has been given there for the due administration of the entire estate in both countries, and considering that the Scotch courts have, to the extent above stated, seisin of the case, I come to the conclusion that the service in Scotland ought not to stand. The Bolivian lady ought not to be allowed to draw the Scotch ladies across the border into the English courts, but must pursue them in the courts of their own country, which have jurisdiction to do her complete justice.

I therefore accede to the application, and discharge the order for service out of the jurisdiction, with costs to be paid by the plaintiff.

Solicitors, *Keeping & Gleaj; Budd, Johnson, & Jecks.*

Chan. Div. North, J. } May 14.

In re YATES.
BOSTOCK *v.* D'EYNCOURT. (*a.*)

Will—Construction—Joint tenants—Tenants in common—Words of distribution.

A testator who died in 1826 *by his will devised real estate to trustees upon certain trusts during the lives of his children and the survivor of them, and from and after the decease of the survivor, or during the life or lives of all or any, with their concurrence, upon trust to sell and stand possessed of the proceeds upon trust "for all and every my said sons and daughters who shall be then living, and the issue of any then dead (such issue standing* in loco parentis), *share and share alike. The testator left six children surviving him, the last survivor of whom died in* 1877. *The property was sold in* 1890. *Only two of testator's children had issue. Two of testator's grandchildren died before the sale.*

Held, that, as the words of distribution, "share and share alike," occurred only once, the issue of each child took as joint tenants inter se.

Adjourned summons.

This was a summons by two of the trustees of the will of the Rev. John Yates to determine how, and in what shares, certain moneys were divisible under the said will, the question being whether the grandchildren of the testator took as joint tenants or tenants in common.

By his will, dated October, 1826, the testator devised real estate to his trustees upon certain trusts during the lives of his sons and daughters and the survivors or survivor of them, and from and after the decease of the survivor or during the lives or life of all or any, with their concurrence, upon trust for sale, and to stand possessed of the proceeds upon trust "for all and every my said sons and daughters who shall be then living and the issue of any then dead (such issue standing *in loco parentis*) share and share alike." The testator died in 1826 leaving six children only him surviving, all of whom have since died, the last survivor in 1877. Two only, J. B. Yates and J. A. Yates, had issue. The sale of the property took place in 1890. Two of the grandchildren died previously.

Leonard Field, for the plaintiffs.

Cozens-Hardy, Q.C., and *Davenport*, for the legal personal representatives of Eliza M. Yates, one of the deceased grandchildren.—A tenancy in common was intended to be created by the will: *In re Quirke*, 37 W. R. 796; *Hodges* v. *Grant*, 15 W. R. 607, L. R. 4 Eq. 140; *In re Smith*, 58 L. J. Ch. 661, 38 W. R. Dig. 216; *Shepherdson* v. *Dale*, 12 Jur. N. S. 156, 14 W. R. Ch. Dig. 147.

Everitt, Q.C., and *Hume*, for the trustees of the marriage settlement of Mrs. Phillips, the other deceased grandchild.

Napier Higgins, Q.C., and *Ingpen*, for the surviving grandchildren: *Penny* v. *Clarke*, 8 W. R. 286, 1 De G. F. & J. 425; *Heasman* v. *Pearse*, 20 W. R. 271, L. R. 7 Ch. App. 275.

C. Williamson, for the executors.

NORTH, J.—In this case it is said that the primary intention is to sell after the death of the surviving sons and daughters, but there is a secondary intention to sell during their lifetime. I cannot draw any distinction between these. There is to be a sale after

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

the death, and it is to be earlier if they like, but not unless they like. Then we come to words of division, and the primary thing contemplated is that it is to be divided while the testator has one or more children still living to take, for the words are, "shall stand possessed of and interested in the moneys arising from such sale, upon trust for all and every my said sons and daughters who shall be then living, and the issue of any then dead." Although the clause does hit the case of all being dead before the time came for division, yet what the testator had in his mind was a case in which some of them would be living. Then what is the class among whom the property is to be divided? "All and every my sons and daughters who shall be then living," and "the issue of any then dead." This class, then, will take *per capita*, and as tenants in common or joint tenants, as the case may be. No words of distribution occur there, and under those circumstances I apprehend they would take as joint tenants. Then we have the words "such issue standing *in loco parentis*." In the place of a parent means in the place where a parent would have stood if the parent had been living. Therefore, we have a class consisting of sons and daughters then living plus the family, so to call it, of a deceased son or daughter, which family is to stand where the parent would have stood if alive. Then come the words "share and share alike." They, of course, create a tenancy in common instead of a joint tenancy. In what? In the class which is described in which there would have been a joint tenancy but for the fact that those words follow.

Now the families of the deceased sons and daughter each take a share. How are they to take it? There are no words whatever addressed to this particular case. There are, so to say, two classes to take. Firstly, the sons and daughters plus the family of a deceased son or daughter; secondly, the grandchildren. But the words of distribution occur only once, and the court has held time after time that in such cases the words apply to the first class only, and not to the second class, the issue, who take the share a deceased son or daughter would have taken. I cannot follow the case of *Shepherdson* v. *Dale*, as it is inconsistent with many other cases, such as *Penny* v. *Clarke* and *Heasman* v. *Pearse*, which is exactly in point. The cases of *In re Smith* and *Hodges* v. *Grant* are quite distinguishable, as there the words of distribution are repeated twice. The courts have drawn a distinction arising from the repetition of the words, and as here there are no words of distribution between the issue of the children, such issue must take as joint tenants. With regard to Mrs. Phillips' marriage settlement, I do not think it severs the joint tenancy. One moiety will therefore go to the children of J. B. Yates, and the other moiety to the children of J. A. Yates as joint tenants.

Solicitors, *Field, Roscoe, & Co.; Hopgood & Dowson; G. L. P. Eyre & Co.; Williamson, Hill, & Co.*

Chan. Div. North, J. — March 24.

In re ABSTAINERS' AND GENERAL INSURANCE CO. (*a*.)

Company—Reduction of capital—Preliminary expenses—"Lost capital" or "capital unrepresented by available assets"—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *ss.* 9, 11—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 3.

A company is not entitled to reduce its capital by the amount expended on preliminary expenses, as such expenditure is not "lost capital" or "capital unrepresented by available assets" within section 3 *of the Companies Act*, 1877.

Petition.

This was a petition for reduction of capital. The balance-sheet of the company for the year 1890 showed the expenditure of £15,452 17s. 7d. on preliminary, agency establishment, and extension expenses. The company proposed to write off £11,445, part of the said expenditure, by cancelling part of its capital.

Cozens-Hardy, Q.C., and *Wurtzburg*, for the petition.—Section 3 of the Companies Act, 1877, says that the power to reduce capital conferred by the Companies Act, 1867, shall include a power to cancel any lost capital or any capital unrepresented by available assets.

NORTH, J.—I cannot accede to this application. I cannot, simply on the statement contained in the petition, assume that the capital which was expended on preliminary expenses is now "unrepresented by available assets." The effect would be that every sum expended, properly, by a company in preliminary expenses may be provided out of capital, and the company might then, simply because the money has been so spent, at once reduce its capital by that sum. I do not think that this is the intention of the Act. I dismiss the petition.

Solicitors, *Sharpe, Parker, & Co.*, for *Coleman & Co.*, Birmingham.

Q. B. Div. (A. L. Smith and Grantham, JJ.) — April 21.

REG. v. POWELL AND OTHERS. (*a*.)

Licensing Acts—Change of occupier—New tenant's licence under section 14 *of* 9 *Geo.* 4, *c.* 61—*Second application—Jurisdiction.*

When a new tenant has applied for and obtained a special licence provided for by section 14 *of* 9 *Geo.* 4, *c.* 61, *there is no jurisdiction in justices to accede to a second application for a similar licence.*

Rule *nisi* for a *mandamus*.

On September 2, 1889, one Roberts took possession and entered into occupation of a certain beerhouse which had belonged to one John, who held a licence for it which would expire on October 10. The licence had to be renewed, and John had omitted to apply for a renewal on August 30. Roberts on September 27 applied for a new licence, which was refused, but on the same day he applied for and obtained a licence under section 14 of 9 Geo. 4, c. 61, which would expire on October 10. On January 3, 1890, Roberts applied for a second licence of the same kind to carry him on to October 10, 1890. This was refused, on the ground that Roberts, not being a "new tenant," the justices had no jurisdiction. Roberts thereupon obtained a rule *nisi* for a *mandamus*.

David Lewis showed cause.—Section 14 applies only to new tenants or occupiers, and it was impossible to consider the applicant a new tenant when he had already obtained a licence as an occupier. That is the true test as to limit of time.

(*a*.) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

(*a*.) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

Reg. v. *Justices of Liverpool*, 32 W. R. 20, 11 Q. B. D. 638, shows that the application need not be made during the currency of the outgoing tenant's licence, but there must be some limit or a man would never cease to be a new tenant, which is absurd. His proper course would have been to apply for a renewal to himself of John's licence at the general annual licensing meeting instead of at the special sessions for transfers under 9 Geo. 4, c. 61, or he might have waited till after October 10 before opening the house.

Poland, Q.C., and *James Paterson*, in support of the rule.—There is nothing in this section to prevent a second application. It is unreasonable to suppose that the Legislature intended a renewal for a very few days to preclude the applicant from obtaining a renewal for a whole year, and it is conceded that if the application on January 3, 1890, had been the first one, it would have been granted.

A. L. SMITH, J.—This is a motion to make absolute a rule for a *mandamus* to the justices of Swansea to hear and determine an application by one Roberts for the transfer to him of a licence to sell beer on premises which were formerly occupied by one John. The question whether the justices were right in refusing to entertain the application on the ground that they had no jurisdiction depends upon the proper construction of section 14 of the Licensing Act, 1828. It appears that on September 2, 1889, John, being the tenant of a beerhouse in which he was then duly licensed, gave up possession to Roberts, who entered into occupation on the same day. Under those circumstances, if Roberts had held his hand and had abstained from obtaining a licence in the interval between the date of occupation and January 3, 1890, the justices would have had jurisdiction to grant his application, for that is decided by *Reg.* v. *Justices of Liverpool*. But he was not content so to abstain, and on September 27, 1889, he applied for and obtained a licence under section 14 of the Licensing Act, 1828. He only enjoyed the benefit of that for thirteen days, as by the terms of the section the licence was bound to expire on October 10, 1889. On January 3, 1890, he makes an application for a similar licence which should last till October 10, 1890, but the justices held that, having already obtained a licence, he did not bring himself within the terms of the section. I think they were right. In my opinion only one licence can be granted to one and the same person under that section. The same person cannot twice bring himself within the description of a "new tenant." The section says "if any person so licensed shall remove from or yield up the possession of the house specified in the licence, it shall be lawful for the justices to grant to any new tenant or occupier of any house having, &c., become unoccupied." That must mean the immediate new tenant, not one who had already obtained a licence.

GRANTHAM, J.—The only question is, whether the justices had jurisdiction to grant a licence under section 14 when they had already granted a licence under that section to the same tenant. I think not. If they could, there would be nothing to prevent a man going on year after year renewing applications for such licences as a "new tenant" for the rest of his life.

Rule discharged.

Solicitor for the applicant, *R. White*, for *J. A. Thomas*, Swansea.

Solicitor for the justices, *R. White*, for *Jenkin Jones*, Swansea.

Prob. Div. & Adm. Div. } March 24.
Divorce. }

LEWIN *v.* LEWIN. (*a.*)

Divorce—Judicial separation—Matrimonial Causes Act, 1878 (41 & 42 *Vict. c.* 19), *s.* 4—24 & 25 *Vict. c.* 100, *s.* 43—*Aggravated assault—Order—Wife not bound to cohabit with husband—Appeal.*

A husband was convicted before justices of an aggravated assault on his wife under section 43 *of* 24 & 25 *Vict. c.* 100, *and they inflicted a fine of forty shillings. They also made an order under section* 4 *of the Matrimonial Causes Act,* 1878, *that the wife should be no longer bound to cohabit with her husband, and for maintenance. The husband appealed to this court.*

Held, that section 4 *of the Matrimonial Causes Act,* 1878, *gave no appeal from the conviction for the aggravated assault, but only from the order made under that section for separation and maintenance.*

Appeal from a decision of the justices sitting in petty sessions at East Harling in the county of Norfolk, convicting Charles Sutton Lewin, under section 43 of 24 & 25 Vict. c. 100, of an aggravated assault upon his wife, and making an order under section 4 of the Matrimonial Causes Act, 1878, that the wife should be no longer bound to cohabit with her husband, and ordering him to pay a weekly sum for maintenance. The justices inflicted a fine of 40s. and refused to state a case.

Poyser, for the appellant.—The conviction for the aggravated assault is bad on the face of it. Section 42 of 24 & 25 Vict. c. 100 gives the magistrates power to inflict a penalty of £5 or two months' imprisonment for an assault. Section 43 only applies "if the assault or battery is of such an aggravated nature that it cannot in their" (the magistrates) "opinion be sufficiently punished under the provisions hereinbefore contained." The fine of 40s. here inflicted comes within the provisions of section 42, as the magistrates have held that the fine which can be imposed by that section is sufficient, and by inflicting so small a penalty they have prevented the husband appealing to quarter sessions; the appeal is therefore to this court by the provisions of the Matrimonial Causes Act, 1878, which provides that all orders made under section 4 shall be subject to appeal to this court. The order is made under that part of the section which provides that "if a husband shall be convicted of an aggravated assault within the meaning of 24 & 25 Vict. c. 100, s. 43, upon his wife, the court or magistrate before whom he shall be so convicted may, if satisfied that the future safety of his wife is in peril, order that the wife be no longer bound to cohabit with her husband." Here the jurisdiction never arose, as there was no proper conviction under section 43. The evidence shows that there was no aggravated assault. In any event, I am entitled to go into the evidence to show that the magistrates were wrong in finding that the future safety of the wife was in peril. [He then referred to the facts.]

H. Browne, for the respondent.

JEUNE, J.—The only question in this case which I have to decide is whether the magistrates, on the evidence before them, were right in finding that the future safety of the wife was in peril. It has been suggested that a larger and more difficult question is involved—viz., whether the conviction for the aggravated assault was rightly made—but I do not think I have any right to entertain that question. In my view the

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Act of Parliament 41 & 42 Vict. c. 19, s. 4, means what it says. It gave an appeal to this tribunal from so much of the jurisdiction as the Act of Parliament conferred on the inferior court. It cannot be contended that I am not bound by the decision in *Woods* v. *Woods*, 33 W. R. 323, 10 P. D. 172, and *Powell* v. *Powell*, 14 P. D. 177, 38 W. R. Dig. 98, and those cases appear to me to cover all the ground in this case except the point I have stated. The conviction must, therefore, be taken to be good, although the fine imposed is not so large as required by section 43 of 24 & 25 Vict. c. 100. It is said that there ought to be an appeal because if the magistrates had fined in the full amount provided by that section there would have been an appeal, and therefore there must be an appeal here. All this, however, only goes to show good reason why there should be an appeal, but does not show that there is one. If there is any hardship it seems to me limited, because 41 & 42 Vict. c. 19 gives an appeal in every case where the provisions of that statute are acted upon. Assuming, then, that there is a good conviction for an aggravated assault, an examination of the evidence, if I have the right to examine, convinces me that the magistrates came to a very sensible conclusion, and that they had reasonable grounds for finding that the future safety of the wife was in peril. I dismiss the appeal with costs, but if necessary give leave to appeal.

Appeal dismissed with costs.

Solicitors for the appellant, *Storey & Cowland.*

Solicitors for the respondent, *F. A. R. Doyle*, for *Cluttock & Woods*, Norwich.

Prob. Div. & Adm. Div. Probate. } March 3, 10.

In the Goods of SIR J. E. BOEHM (*deceased*). (*a.*)

Probate—Will—Intention to give equally to two—Name of first legatee repeated—Execution in ignorance of mistake—Grant omitting name in second legacy.

A testator instructed his solicitor that he wished to give £10,000 to each of his daughters, G. and F., but by inadvertence G.'s name was inserted in the draft and in the will in both clauses, F.'s name being omitted from the second, where it ought to have been. The draft was brought to the testator, but not read over to him, an epitome, in which the names were correctly stated, being read instead. The will was executed by the testator without being read to or by him, and in ignorance of the mistake.

Held, that the court would, on motion, with the consent of all parties interested, grant probate of the will omitting the name of G. from the second of the two clauses.

Motion for grant of probate of the will of Sir J. E. Boehm, R.A., deceased, omitting in two places in the latter of two clauses of gift, the name "Georgiana."

The testator died on the 24th of December, 1890, leaving a will duly executed, bearing date the 12th of December, 1889. The testator's instructions to his solicitor were that two sums of £10,000 each should be set apart to be settled to the use and benefit of his two unmarried daughters, Miss Georgiana Boehm and Miss Florence Boehm, and their children, after the death of his wife.

By inadvertence the word "Georgiana" was inserted in both the clauses of the draft will, and the word "Florence" omitted altogether, so that there were two gifts of £10,000 to Miss Georgiana Boehm. The draft was taken to the testator, but only an epitome, which contained the name of "Florence," was read to him. The will, which was engrossed from the draft, and therefore contained the same mistake, was not read over to the testator at the time of its execution, and his attention was not drawn to the mistake, which was only discovered after his death.

March 3.—*Bayford, Q.C.*, and *Barnard*, for the executors,

R. M. Middleton, for Miss Georgiana Boehm,

B. Deane, for Miss Florence Boehm (now Mrs. Florence Kingscote), and

Crosse, for the other members of the family, all consented to the application.

Cur. adv. vult.

March 10.—JEUNE, J.—I am asked to grant probate of the will of Sir Joseph Edgar Boehm with the word "Georgiana" omitted in two places, in what, on the face of the will, professes to be a gift in her favour. I had some doubt about deciding this matter on motion, but as representatives of all existing interests agreed to its being so decided, and future interests will be protected rather than prejudiced by this mode of dealing with this question, I see no objection to adopting it.

It is clear from the evidence that the testator intended to give £20,000 in equal moieties to trustees for each of his daughters, Florence and Georgiana, and the instructions for the will correctly express this; but the draftsman, instead of inserting in the draft of the will a clause of gift in favour of Georgiana, and then a similar clause in favour of Florence, inserted the name of Georgiana in the second clause as well as in the first. It is proved that the testator did not read, or have read over to him, the will, but did read what professed to be an epitome of it, such epitome being in accordance with the instructions, and correctly representing the testator's intentions. In a sense, therefore, the word "Georgiana" was clearly inserted in the two places in question, in error, though the real and complete mistake was in not inserting Florence in place of Georgiana. In view of the case of *Morrell* v. *Morrell*, 30 W. R. 491, 7 P. D. 68, following *Fulton* v. *Andrew*, 23 W. R. 566, L. R. 7 E. & I. App. 448, and the earlier authority of *In the Goods of Duane*, 2 Sw. & Tr. 590, 10 W. R. Prob. Dig. 9, mistake is to be regarded as a question of fact depending on the circumstances of each case, and there is now no difficulty in circumstances such as those of the above cases in striking out a clause, or a single word, if shown to have been inserted by mistake. Indeed, in the present case no such difficulty occurs as arose in *Fulton* v. *Andrew*, in reference to the decisions in *Atter* v. *Atkinson*, L. R. 1 P. & D. 665, 17 W. R. Prob. Dig. 9, *Guardhouse* v. *Blackburn*, 14 W. R. 463, L. R. 1 P. & D. 109, and *Harter* v. *Harter*, 21 W. R. 341, L. R. 3 P. & D. 11, from a presumption of knowledge and approval arising from the reading of or the hearing of a will read, by a competent testator, because here the evidence is that the testator, relying on the epitome, never read the will or heard it read. My difficulty at the argument was that, in the above cases, to strike out the word or words inserted in error left the will what the testator intended it to be. Here, to strike out the word Georgiana and to leave a blank in its place does not leave the will what the testator intended it to be, and I am not aware that there is any exact authority

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

for striking a word out of a will under these circumstances. This case would seem to be the same as it would have been in *Morrell* v. *Morrell* if the jury had found that the mistake consisted not merely in having put in the word "forty," but in not having put in the proper number "four hundred" instead of "forty"—if the jury had, in fact, answered the second question put to them differently from the way in which they did. The cases of *In the Goods of Bushell*, 36 W. R. 128, 15 P. D. 7, and *In the Goods of Hudson*, 43 Law Times Rep. N. S. 255, refer, I think, only to the correction of clerical errors; and the language of the Judicial Committee of the Privy Council in *Linden* v. *Linden*, 30 W. R. 709, 7 App. Cas. 192, points to the difficulty of rejecting words where such rejection alters the sense of those which remain.

But I think that the application of the principle of striking out a word clearly inserted in mistake may be safely extended—if it be an extension—to a case where the effect of its rejection may be to render ambiguous or even insensible a clause of which it formed part. If a person by fraud obtained the substitution of his name for that of another in a will it would be strange if his name could not be struck out, although the rest of the clause in which it occurred became thereby meaningless. It may be that in the present case the effect of striking out the name in question will be on the construction of the will, as it will then read to carry out the testator's intentions completely. It is not for me to decide that. But even if to strike out a name inserted in error and leave a blank have not the effect of giving full effect to the testator's wishes, I do not see why we should not, so far as we can, though we may not completely, carry out his intentions. I am, therefore, willing to grant probate of this will as prayed with the omissions specified.

Solicitors for Mrs. Florence Kingscote, *Stevens, Bawtree, & Stevens.*

Solicitors for the executors and the other parties, *Withers, Lambert, & Bousfield.*

Court of Appeal.

From Chan. Div. July 1.

AVERY v. WOOD. (a.)

Copyright—Costs—Taxation—"Full costs"—Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 26.

The term "full costs" in section 26 of the Copyright Act, 1842, merely means ordinary costs as between party and party.

Irwine v. Reddish, 5 *B. & Ald.* 796, *and* Jamieson v. Trevelyan, 3 *W. R.* 172, 10 *Ex.* 748, *approved.*

Appeal from North, J.

The plaintiffs in this action had sued the defendants in respect of an alleged infringement of the plaintiffs' copyright in certain publications, and Romer, J., had made an order dismissing the action, and (following the words of section 26 of the Copyright Act, 1842 (5 & 6 Vict. c. 45)) had directed "the full costs" of the defendants to be taxed and to be paid by the plaintiffs. The taxing master taxed the defendants' costs in the usual way as between party and party. The defendants objected to the taxation, and claimed that their costs should be taxed as between solicitor and client, but the taxing master overruled the objection, stating as a reason therefor that it had been decided in *Irwine* v. *Reddish*, 5 B. & Ald. 796, and *Jamieson* v. *Trevelyan*, 3 W. R. 172, 10 Ex. 748, that "full costs" merely meant "ordinary costs as between party and party." The defendants took out a summons to review taxation, and North, J., sitting in chambers, made no order on the summons, but gave the defendants leave to appeal direct to the Court of Appeal.

Section 26 of the Copyright Act, 1842 (5 & 6 Vict. c. 45), following the words of section 8 of 8 Anne, c. 19 (the first Act dealing with copyright which was repealed), provides that the defendant in any action brought in pursuance of the Act may plead the general issue and give the special matter in evidence, "and if upon such action a verdict be given for the defendant, then the defendant shall have and recover his full costs, for which he shall have the same remedy as a defendant in any case by law hath."

Section 10 of the same Act (following substantially section 5 of 8 Anne, c. 19) imposes a penalty of £5 on every publisher of any book who neglects to deliver a copy of the same, when demanded, on behalf of certain public libraries, such penalty to be recovered by such librarian either by summary process or by action of debt, "in which action, if the plaintiff shall obtain a verdict, he shall recover his costs reasonably incurred, to be taxed as between attorney and client."

Section 2 of 5 & 6 Vict. c. 97 (passed in the same session as the Copyright Act, 1842) repeals so much of any clause or provision in any Act providing that either double or treble costs, or any other than the usual costs between party and party, shall be recovered: "provided always that instead of such costs the party heretofore entitled to such double or treble costs shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in or about any action as shall be taxed."

The defendants appealed.

A. Hopkinson, for the appellants.—*Jamieson* v. *Trevelyan* and *Irwine* v. *Reddish* were not cases under the Copyright Acts, but under Acts relating to proceedings on "Distress," and are, therefore, distinguishable. In *Doe d. Hyde* v. *Corporation of Manchester*, 12 C. B. 474, the words "full costs" were held to mean a complete indemnity as between attorney and client. [FRY, L.J.—But in that case the word "expenses" was used as well as full costs.] By the use of the word "full" qualifying the word "costs" in section 26 of the Copyright Act, 1842, the Legislature clearly intended something beyond the usual costs between party and party, and that brings the defendants within section 2 of 5 & 6 Vict. c. 97, and entitles them to receive full indemnity for all costs, charges, and expenses. Again, in section 10 of the Copyright Act, 1842, the words "to be taxed as between attorney and client" are used, and are substituted for the words "full costs" in the similar section (section 5) of the Act of Anne. Further, in all the other Acts granting a monopoly (*e.g.*, the Patent Acts and the Engravings Act) the policy of the Legislature has been to give extra or indemnity costs: see section 31 of the Patents Act, 1883.

Arthur H. Spokes, for the plaintiffs, the respondents, was not called on.

LINDLEY, L.J.—The question raised by this appeal is as to what is meant by the expression "full costs" as used in section 26 of the Copyright Act, 1842 (5 & 6 Vict. c. 45). If the matter were *res nova*, there would no doubt be a good deal in Mr. Hopkinson's

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

argument that the expression "full costs" must mean something more than ordinary party and party costs. But the term had been frequently used in Acts of Parliament prior to the Copyright Act, 1842, and it must have been well known to the Legislature in 1842 to have been often interpreted by the courts of common law as meaning merely "ordinary costs as between party and party." In *Irwine* v. *Reddish*, decided in 1822, it was held that there was no distinction known in law between costs and "full costs," and in point of practice no difference in the mode of taxation; and *Jamieson* v. *Trevelyan* is to the same effect. There has been no decision to the contrary, and the expression "full costs" has been used in all the Copyright Acts from the time of Anne. It is true that in section 10 of the Copyright Act, 1842, which replaced section 5 of the Act of Anne, the expression "costs reasonably incurred to be taxed as between attorney and client" is used instead of the expression "full costs" used in section 5 of the Act of Anne; but I think that only shows that that is the meaning to be put on those words in that particular section, which relates to actions brought by librarians of public libraries against publishers for not delivering a copy of their publications, and cannot be construed as a general interpretation of the term "full costs" in other sections of the Act. I think the point is *res judicata* and that the taxing master was right.

FRY, L.J.—I am of the same opinion. I think that *Irwine* v. *Reddish*, decided in 1822, was a judicial determination of this point, and showed that "full costs" meant merely ordinary costs as between party and party, and that there was in practice no difference in the mode of taxation. The Legislature in 1842 must be taken to have used the expression "full costs" in the sense in which it had then been already judicially interpreted. As to Mr. Hopkinson's argument founded on section 2 of 5 & 6 Vict. c. 97, it assumes that "full costs" are costs "other than the usual costs between party and party," whereas it has been determined long ago that "full costs" are the same thing as "ordinary costs between party and party."

Appeal dismissed.

Solicitors for the appellants, *Morten, Cutler, & Co.*

Solicitors for the respondents, *Radford & Frankland.*

From Chan. Div. March 13, 14, 26.

In re SLEVIN.

SLEVIN *v.* HEPBURN. (*a.*)

Will—Charitable gift—Failure of particular charity after testator's death, but before payment of legacy—Lapse—Cy-près.

A testator bequeathed a legacy to a charitable institution, which was an orphanage voluntarily maintained by a lady at her own expense. This institution was in existence at the date of the testator's death, but it came to an end shortly afterwards, and before the legacy was paid.

Held (*reversing* Stirling, J., ante, *p.* 284, [1891] 1 *Ch.* 373), *that the legacy had not lapsed, but had become the property of the orphanage; and that, as the orphanage had ceased to exist, the legacy became applicable by the Crown for charitable purposes* cy-près.

Clark *v.* Taylor, 1 *W. R.* 476, 1 *Drew.* 642, *and* Hayter *v.* Trego, 5 *Russ.* 113, *considered.*

Appeal from the decision of Stirling, J., reported *ante*, p. 284, [1891] 1 Ch. 373, where the facts are fully stated.

Ingle Joyce, for the Attorney-General, the appellant.—The judge below considered himself bound by *Clark* v. *Taylor*, 1 W. R. 476, 1 Drew. 642. That case, if correctly reported, is not in accordance with *Hayter* v. *Trego*, 5 Russ. 113, which was not cited in *Clark* v. *Taylor*.

He also cited *Attorney-General* v. *Fraunces*, W. N., 1866, p. 280.

Welby King, for the respondents, the residuary legatees.—The "orphanage at St. Dominic's, Newcastle," was really a private charitable institution, and in the case of failure of a private charitable institution a gift to it fails altogether; it is otherwise in the case of a public charity which fails, for there the gift will no doubt be applied *cy-près*, as in *Hayter* v. *Trego*.

He cited *Clark* v. *Taylor* and *Russell* v. *Kellett*, 3 Sm. & Gif. 264, 4 W. R. Dig. 131.

R. F. Norton, for the executors.

Ingle Joyce, in reply, cited *Attorney-General* v. *Ironmongers' Co.*, 2 Beav. 313, 2 My. & K. 576, 10 Cl. & F. 908; *In re Prison Charities*, L. R. 16 Eq. 129, 21 W. R. Dig. 47; *Attorney-General* v. *Hankey*, L. R. 16 Eq. 140 n; Tyssen on Charitable Bequests, p. 440.

March 20.—The judgment of the COURT (LINDLEY, BOWEN, and KAY, L.JJ.) was delivered by

KAY, L.J.—This case raises a question which seems only to have occurred in two instances in the books—namely, whether a charitable bequest to an institution which comes to an end after the death of the testator, but before the legacy is paid over, fails for the benefit of the residuary legatee, as in the case of a lapse.

Properly speaking, a lapse can only occur by failure of the object in the lifetime of the testator. But it is possible that a will might be so framed as that a subsequent failure of the object of the charitable gift might occasion a resulting trust for the benefit of the testator's estate. We have not been referred to any such case, nor have we found any.

A surplus of charity funds arising from decay of the particular charity, or from increase in the value of the charity property beyond the requirements of the special object, has been treated as charity property to be administered *cy-près*. Lord Eldon in *Attorney-General* v. *Mayor of Bristol*, 2 J. & W. 313, states expressly that this is a settled rule in case of a surplus arising from an increase of the fund. *Attorney-General* v. *Ironmongers' Co.* decides the same point where the object fails after the bequest has taken effect, and see *Attorney-General* v. *Craven*, 4 W. R. 340, 21 Beav. 392; *Chamberlayne* v. *Brockett*, 21 W. R. 299, L. R. 8 Ch. App. 206; and *Mayor of Lyons* v. *Advocate-General of Bengal*, 24 W. R. 679, 1 App. Cas. 91.

In *Attorney-General* v. *Wilson*, 3 M. & K. 362, a difference is suggested where the will shows an intention to create a resulting trust, as where the charitable purposes do not exhaust the whole income of the fund which is dealt with at the time of the disposition, but something is left undisposed of from the first.

This is not a case of that kind. It is a simple legacy of a sum of "£200 for the Orphanage of St. Dominic's, Newcastle-on-Tyne." If it had been received the whole might have been expended at once, and even if not received the amount might have been anticipated by borrowing from a banker or otherwise and charging the legacy with the amount so borrowed. Bowen, L.J., has some doubt as to the effect of the evi-

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

nce, but Lindley, L.J., and I, think the case must be eated as the learned judge has done—that, upon the idence, "the orphanage, though about to be discon-nued at the beginning of the year 1883, had not ceased exist at the time of the testator's death" (see *ante*, p. 5, [1891] 1 Ch. 377). The orphanage did come to end, however, before the legacy was paid over. the case of a legacy to an individual, if he survived e testator it could not be argued that the legacy ould fall into the residue. Even if the legatee died testate and without next of kin, still the money was s, and the residuary legatee would have no right hatever against the Crown. So, if the legatee were corporation which was dissolved after the testator's ath, the residuary legatee would have no claim.

Obviously it can make no difference that the legatee ased to exist immediately after the death of the stator. The same law must be applicable whether was a day, a month, a year, or, as might well ppen, ten years after, the legacy not having been aid either from delay occasioned by the administra-on of the estate or owing to part of the estate not aving been got in. The legacy became the property f the legatee upon the death of the testator, though e might not for some reason obtain the receipt of it ill long after. When once it became the absolute roperty of the legatee, that is equivalent to saying hat it must be provided for, and the residue is only hat remains after making such provision. It does ot for all purposes cease to be part of the testator's state until the executors admit assets, and appro-riate or pay it over; but that is merely for their onvenience and that of the estate. The rights, as etween the particular legatee and the residuary egatee, are fixed at the testator's death.

These propositions are so obvious that it would eem impossible to dispute them without some uthority to the contrary. Is there any such autho-ity? In the case of *Hayter* v. *Trego* Sir John Leach ad this very case to deal with. A testator gave a egacy of £500 to a voluntary society called the Plymouth and Devon Asylum for the Reception of Female Penitents. He died in June, 1821, at which ime the asylum was still in existence, but, on the 9th of May, 1822, before the legacy was paid, the ociety was dissolved. We have examined the record; t is plain from it that the contest was between the ext of kin (there being no residuary gift) and the Attorney-General; and Sir John Leach decided the ase in the only way which, on principle, seems to us o be possible—viz., that the fund must be applied or charitable purposes resembling that which had ailed.

It is said, and perhaps with truth, that there was in hat case a sufficient indication of a general charitable ntention to justify the decision, even if there had been o such institution in existence at the testator's death, nd reliance is placed on the more recent decision of Kindersley, V.C., in *Clark* v. *Taylor*. According to he report in Drewry, the bequest was £50 to a emale orphan school in Greenwich, patronized by Mrs. Enderby. The testator died in October, 1846 which is in the report incorrectly printed 1840), and he school was discontinued in November of the ame year. In the WEEKLY REPORTER it is stated hat the school was discontinued about the same time hat the testator died. Neither in the arguments nor n the judgment was reliance placed upon the cir-umstance that the institution was actually in exist-nce at the testator's death. In the judgment it was eated as a clear case of lapse—that is, as though here was no such institution at the testator's death, nd the only matter dealt with by the Vice-Chan-ellor was the question whether on that supposition here was such a general intention of charity as to justify an administration *cy-près*. The Vice-Chancellor decided that there was not, and that the residuary legatees were entitled. *Hayter* v. *Trego* was not referred to. The only cases cited were *Cherry* v. *Mott*, 1 My. & Cr. 123, and *Loscombe* v. *Wintringham*, 13 Beav. 87, in one of which the failures of the charity occurred in the testator's lifetime, and in the other—what is equivalent—the legatee declined the bequest.

It was upon the authority of this decision of Kindersley, V.C., that the learned judge in the court below chiefly rested his judgment, rather, as we gather from his language, against his own opinion. We cannot treat *Clark* v. *Taylor* as a decision which supports the view he has taken. It seems to us that all the Vice-Chancellor intended to decide was that, assuming the institution to have failed in the testator's lifetime, there was no such general purpose of charity as would warrant the distribution *cy-près*. We have not found any case in which the supposed view of the Vice-Chancellor in *Clark* v. *Taylor* has been followed. In the text-books, Tudor's Charitable Trusts, 3rd ed., p. 41; Jarman on Wills, pp. 246, 247 (doubtfully); and Theobald, p. 277; and also by Lord Hatherley in *Fisk* v. *Attorney-General*, 15 W. R. 1200, L. R. 4 Eq. 523, and Stuart, V.C., in *Coldwell* v. *Holme*, 2 W. R. 150, 2 Sm. & G. 34, the case is treated as a lapse, on the ground that the institution had come to an end in the testator's lifetime. If it decided that failure of the institution after the testator's death occasioned a lapse, or on any other ground entitled the residuary legatee to the legacy, we are of opinion that the decision should be overruled, but we do not believe that anything of the kind was intended.

In the present case we think that the Attorney-General must succeed, not on the ground that there is such a general charitable intention that the fund should be administered *cy-près*, even if the charity had failed in the testator's lifetime, but because, as the charity existed at the testator's death, this legacy became the property of that charity, and on its ceasing to exist its property falls to be administered by the Crown, who will apply it according to custom for some analogous purpose of charity, as in *Attorney-General* v. *Ironmongers' Co.*, *Wilson* v. *Barnes*, 38 Ch. D. 507, and the other cases collected in Tyssen on Charity, at p. 440.

The appeal will, therefore, be allowed.

Solicitors, *Hare & Co.; Grundy, Izod, & Grundy*, for *W. Webb*, Morpeth; *Pattison, Wigg, & Co.*, for *H. E. Richardson*, Newcastle-upon-Tyne.

App. Bankruptcy. May 29.

Ex parte WARD.
In re GAMGEE. (*a*.)

Bankruptcy—Petition—Petitioning creditor—Trustee as to part of debt—Beneficially interested as to remainder—Joinder of cestui que trust.

A petition in bankruptcy may be presented by a creditor who is beneficially interested in part of a debt and trustee as to the other part without adding the cestuis que trustent *as co-petitioners.*

The rule laid down in Ex parte Dearle, In re Hastings, 33 *W. R.* 440, 14 *Q. B. D.* 184, *only applies to a bare trustee having no beneficial interest.*

Appeal from a receiving order made by Mr. Registrar Linklater.

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

In March, 1888, W. H. Davis obtained a judgment against J. Gamgee, the debtor, for £1,500. In March, 1890, Davis, having obtained payment of £200 on account, assigned the balance of the judgment debt to R. J. Ward, the petitioning creditor, in consideration of the payment of £900.

The sum of £250 was advanced to Ward by Lord Egmont, and Ward agreed, in consideration thereof, that Lord Egmont should share with him the benefit of the judgment debt—viz., to the extent of five-eighteenths.

Two further sums of £125 each were advanced to Ward by two other persons for a like consideration.

Declarations of trust in favour of Lord Egmont and the two other persons were made by Ward.

A bankruptcy petition was presented by Ward alone, who claimed to prove for the whole debt.

The registrar made a receiving order.

F. Cooper Willis, for the debtor.—The petition has been irregularly brought. Ward, being a trustee, is not entitled to present a petition alone; the *cestuis que trustent* ought to have been joined as co-petitioners, or at least their consent should have been obtained to the bringing of the petition: *Ex parte Dearle, In re Hastings*, 33 W. R. 440, 14 Q. B. D. 184.

Cautley, for the petitioning creditor.

The COURT (Lord ESHER, M.R., and LOPES and KAY, L.JJ.) dismissed the appeal, holding that it was not necessary to join the *cestuis que trustent* as petitioners. The rule laid down in *Ex parte Dearle, In re Hastings*, only applied to the case of a bare trustee having no beneficial interest.

Appeal dismissed.

Solicitor for the debtor, *R. Chapman.*

Solicitor for the petitioning creditor, *O. C. Kent.*

From Q. B. Div. July 1.

Ex parte SCHOFIELD. (*a.*)

Practice—Appeal—"Criminal cause or matter"—Jurisdiction of Court of Appeal — Order of justices to abate a nuisance—Mandamus *to state a case—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 91, 96—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47.

An order having been made by a magistrate under sections 91 *and* 96 *of the Public Health Act*, 1875, *for the abatement of a nuisance arising from a factory chimney sending forth black smoke, the Queen's Bench Division refused to grant a rule* nisi *for a* mandamus *to compel the magistrate to state a case for the opinion of the court.*

Held, that the decision of the Queen's Bench Division was a decision in a "criminal cause or matter" within section 47 *of the Judicature Act*, 1873, *and that no appeal lay.*

Application by way of appeal from the Queen's Bench Division for a rule *nisi* for a *mandamus* to the stipendiary magistrate of Manchester to state a case for the opinion of the court under 42 & 43 Vict. c. 49.

The applicant was summoned for a nuisance arising from a chimney in his chemical factory sending forth black smoke contrary to section 91, sub-section 7, of the Public Health Act, 1875, and the magistrate made an order for the abatement of the nuisance under section 96. The magistrate held that the second proviso to section 91 did not apply, and, consequently, refused to hear evidence to show that the furnace was constructed in such a manner as to consume, as far as practicable having regard to the nature of the manufacture or trade, all smoke arising therefrom. The magistrate having refused to state a case, the Divisional Court refused to grant a rule *nisi* for a *mandamus* to direct him to do so.

Sir Horace Davey, Q.C. (*J. Walton* with him), moved by way of appeal for a rule *nisi* for a *mandamus* as above.—[Lord ESHER, M.R.—Is not this an appeal from a decision in a criminal cause or matter within section 47 of the Judicature Act, 1873? If so, no appeal lies.] This is a civil proceeding arising out of a criminal matter. After *Ex parte Whitchurch*, 29 W. R. 922, 7 Q. B. D. 534, it must be admitted that the proceedings before the magistrate were proceedings in a criminal cause or matter. But the application for a *mandamus* is a proceeding arising, not in the criminal cause or matter, but out of it. It has its origin in a criminal matter, but it is not itself a proceeding in the criminal matter.

He also referred to *Reg.* v. *Holl*, 7 Q. B. D. 575, 29 W. R. Dig. 81; *Ex parte Woodhall*, 36 W. R. 65, 20 Q. B. D. 832; *Bell-Cox* v. *Hakes*, *ante*, p. 145, 15 App. Cas. 506.

Lord ESHER, M.R.—We must stand by what we said in *Ex parte Woodhall*. This is an application for a *mandamus* to a magistrate to state a case in respect of a decision of his under section 91 of the Public Health Act, 1875. The objection has been taken by the court that it has no jurisdiction to entertain the appeal. The decision of the magistrate, it is admitted, was a decision in a criminal cause or matter. It is said, however, that the application for a *mandamus* is not a proceeding in a criminal cause or matter inasmuch as the *mandamus* is only to require the magistrate to state a case, and cannot of itself affect the question whether the magistrate's decision in the criminal cause or matter was right or wrong. It comes to this: the magistrate was asked to take a step in a criminal matter, which he refused to do, and the *mandamus* is applied for to compel him to take that step.

In *Ex parte Woodhall* we did not rest our decision upon the facts of the particular case. The court deliberately undertook to determine when, as a rule of general application, it had jurisdiction. I said: "The result of all the decided cases is to show that the words 'criminal cause or matter' in section 47 should receive the widest possible interpretation. The intention was that no appeal should lie in any 'criminal matter' in the widest sense of the term, this court being constituted for the hearing of appeals in civil causes and matters." And later on I said: "I think that the clause of section 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject-matter of which is criminal, at whatever stage of the proceedings the question arises." The appeal in the present case is against the decision of the Divisional Court refusing an application for a *mandamus* to the magistrate to state a case. This seems to me to come directly within the language I have quoted. The decision of the Divisional Court was a decision by way of judicial determination of a question raised in or with regard to proceedings, the subject-matter of which is criminal. In *Ex parte Whitchurch* the Queen's Bench Division made absolute an order for a *certiorari* to quash an order of justices directing the defendant to fill up an ashpit so as to be no longer a nuisance, on the ground that the order was not warranted by sections 94 and 96 of the Public Health Act, 1875, and it was held that no appeal lay from the

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

ecision of the Queen's Bench Division. That was an pplication for a *certiorari* to bring up an order of ustices for the purpose of having it determined hether the justices had gone wrong in law, and this ourt refused to entertain an appeal. In the present ase the application is for a *mandamus*, but the *andamus* is for the purpose of bringing the matter efore the court upon a case stated to enable it to etermine whether the magistrate acted rightly or rongly in point of law. There seems to me to be o distinction between the two cases. The court, herefore, has no jurisdiction to entertain the appeal.

BOWEN, L.J.—I am of the same opinion. It not disputed that the proceedings before the agistrate were proceedings in a criminal matter, nd indeed *Ex parte Whitchurch* puts the matter eyond the reach of controversy. There remains he question whether an appeal lies from the deision of the Divisional Court upon an application or a *mandamus* to compel the magistrate to state a ase. It seems to me that if we entertained this ppeal we should be going contrary to all the cases rom *Reg.* v. *Fletcher*, 25 W. R. 149, 2 Q. B. D. 43, nd *Reg.* v. *Steel* 25 W. R. 34, 2 Q. B. D. 37, down to *x parte Woodhall*. The intention of the Judicature ct was that the Court of Appeal should not interfere ith the criminal procedure of the country, and we hould be interfering if we were to entertain an ppeal with respect to an application for a *mandamus* to compel a magistrate to take a step in a riminal proceeding. The decision of the Queen's ench Division is, therefore, a decision in a criminal ause or matter, and no appeal lies.

KAY, L.J., concurred.

Application refused.

Solicitors, *Collis & Mallam*, for *Cobbett, Wheeler, & obbett*, Manchester.

From Q. B. Div. [and Q. B. Div.] April 7, 8, 17; May 27.

GUARDIANS OF THE POOR OF THE PARISH OF BRIGHTON (*Appellants*) *v.* GUARDIANS OF THE POOR OF THE STRAND UNION (*Respondents*). (*a.*)

oor law—Pauper—Settlement by residence—Removal before 1876—*Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 36.

Section 34 *of the Poor Law Amendment Act*, 1876, *ives a settlement in a parish by three years' continuous esidence therein; and section* 36 *provides that "the provisions relating to settlement shall not apply to any auper removed under any order of removal . . . efore the passing of this Act."*

Held, that these words in section 36, *"any pauper moved," apply only to a person who was a pauper at e time the Act was passed and so long as he remained pauper; and that, therefore, they do not operate to prive of the benefit of section* 34 *a person who had been moved under an order of removal in* 1866, *but who was t a pauper at the time the Act was passed, and who had sided continuously in one parish from* 1870 *to* 1881.

Case stated by order of Pollock, B., in an appeal gainst an order for the removal of a pauper named atilda Corbett, from the Strand Union, in the county London, to the parish of Brighton, in the borough Brighton, made by two justices of the peace for e County of London, and dated the 22nd day of July, 1890, whereby it was adjudged that the place of the last legal settlement of Matilda Corbett, a pauper chargeable to the respondents' union, was in the appellants' parish of Brighton.

The appellants appealed against this order of removal.

The pauper is the lawful daughter of G. and M. Corbett, and was born in the parish of Hove in March, 1862.

By an order of removal, dated the 13th of July, 1866, made by the stipendiary magistrate for the borough of Brighton, it was adjudged that the place of the last legal settlement of the mother of the pauper and of the pauper herself, then being an infant aged about four years, was in the parish of Blockley in the Shipston-on-Stour Union.

The mother of the pauper died about the month of October, 1866, and under the above-mentioned order of the 13th of July, 1866, the pauper was duly removed to the Shipston-on-Stour Union on the 8th of November, 1866.

In June, 1873, the pauper, who had previously been residing in service in the appellants' parish of Brighton since the year 1870, entered into another service in the same parish, where she remained for three years. She then left this service, and after residing for two or three days at the house of a friend in the same parish, went direct into another service in the parish, where she remained and resided for about two years. On leaving this service she again resided with her friend for two or three weeks in the same place as before, and she then went into another service in the parish, where she remained and resided for about twelve months. She then returned to her friend in the same parish, and remined with her until she went into another service in the same parish, where she remained for about a month, namely, until about the month of April, 1881, when she went to Paris to reside.

During the whole period between 1870 and the early part of the year 1881 the pauper did not reside or sleep at any place other than those abovementioned, namely, in the parish of Brighton, nor did she at any time during that period receive poor relief, and she has not since acquired a fresh settlement.

The grounds on which the order of removal now appealed against was made were that the pauper last resided for upwards of three years continuously up to the year 1881 in the parish of Brighton, and acquired a settlement by such residences, in accordance with the provisions of the statute 39 & 40 Vict. c. 61, s. 34.

The appellants' grounds of appeal were—

(1) That the pauper was not at the time of the making of the said order, and never had been, legally settled in the parish of Brighton; and

(2) That the said order of removal and the grounds of removal relating thereto were defective and bad, because the pauper, having been removed from the parish of Brighton to the parish of Blockley in the Shipston Union under the order of removal dated the 13th of July, 1866, and before the passing of the statute 39 & 40 Vict. c. 61, could not acquire a settlement under that Act, owing to the provisions of the 36th section thereof.

The respondents contended that the pauper acquired a settlement by three years' continuous residence in the parish of Brighton, under and by virtue of the provisions of section 34 of 39 & 40 Vict. c. 61, notwithstanding the provisions of the 36th section of that statute.

The question for the opinion of the court was—

Whether the pauper, by reason of the facts beforementioned, acquired a settlement by residence, and was now settled in the parish of Brighton, under and

(a.) Reported by Sir SHERSTON BAKER and A. P. PERCEVAL KEEP, Esq., Barristers-at-Law.

by virtue of the provisions of the said statute, 39 & 40 Vict. c. 61, and whether an order of removal to Brighton could be validly made under the statute or otherwise.

Section 34 of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), provides:—"Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or the court think sufficient."

Section 36 provides:—"The provisions relating to settlement shall not apply to any pauper removed under any order of removal, or without such order under the provision in that behalf contained in the Union Chargeability Act, 1865, before the passing of this Act, or in receipt of non-resident relief lawfully given, or in respect of whom any order of removal shall be pending at the passing of this Act."

Lumley Smith, Q.C., and *F. C. Gore*, for the appellants.

Poland, Q.C., and *A. Glen*, for the respondents.

Cur. adv. vult.

April 17.—A. L. SMITH, J., read the following judgment:—By order of removal, dated the 13th of July, 1866, Matilda Corbett, an infant of about four years of age, and a pauper, was removed with her mother from Brighton to the parish of Blockley, in the Shipston-on-Stour Union, such then being her place of legal settlement.

Four years after, namely, in the year 1870, she returned to Brighton, and from that year till April in 1881 she continuously resided there, and thus attained the privilege of irremovability therefrom. In April, 1881, she broke her residence in Brighton and went to Paris, and ultimately, in the year 1890, she became chargeable to the Strand Union.

The question is, under these circumstances, to what place is she now to be removed—to Brighton or to Blockley. The justices decided to Brighton, and hence the present appeal.

Apart from the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), she would be removable to Blockley, such being her last place of legal settlement. She had only acquired the privilege of irremovabilility from Brighton whilst she continued to reside there, and this privilege she lost when she broke her residence there and went to Paris in 1881. But it is said by the respondents that section 34 of the Divided Parishes Act, 1876, gave her a settlement in Brighton by reason of three years' residence there. The material parts of section 34 of the Act of 1876 are as follows:—[His lordship read section 34.] This Act came into operation on the 15th of August, 1876. At that date the pauper had resided in Brighton for six years, and she continued to reside there for four more years before she broke her residence, under circumstances which gave her unquestionably a settlement in Brighton under this section, whether the three years' residence is to be computed before or after the passing of the Act. This is clear.

But it is said that section 34 does not apply to the pauper at all, because of section 36, and it is upon the true construction of this section that this case hinges. [His lordship read section 36.] This section comprises four cases to which section 34 is not to apply. The first case to which it shall not apply is, "To any pauper removed by order of removal before the passing of the Act"; the second case is, "To any pauper removed by consent before the passing of the Act"; the third case is, "To any pauper in receipt of non-resident relief"; the fourth case is, "To any pauper in respect of whom any order of removal shall be pending at the time of the passing of the Act." It will be noticed that section 36 changes the phraseology of the party dealt with in sections 34 and 35 from "person" to "pauper," and also that cases one and two deal with matters that had occurred before the passing of the Act and not after; that case three apparently deals with matters at any time occurring, whether before or after the passing of the Act; and case four to matters occurring at the time of the passing of the Act. Therefore in this section there are different ways in which the word "pauper" may be read. In cases one and two the word may mean any person being a pauper before or at the time of the passing of the Act; it cannot mean being a pauper after the passing of the Act. In case three it may mean being a pauper before, at the time, or after the passing of the Act. In case four it must mean being a pauper at the time of the passing of the Act. Then what is the true reading of the word "pauper" when applied to the present case? Is it to be read so as to take away the settlement unquestionably given by section 34 if the section stood alone?—"Any person being a pauper at any time before the passing of the Act"—or is it to be read so as to leave her with the settlement conferred by section 34—that is, "any person being a pauper at the time of the passing of the Act"? It is the last reading which I prefer and apply to this case. It may well be that the Legislature, by cases one and two in section 36, intended to prevent the settlement of one who was a pauper when the Act passed, and whose legal settlement had been then determined, either by adjudication or consent, from being ripped up and the new settlement given by section 34 placed in its stead, and, indeed, this appears to me to have been the intention of the Legislature, and that it did not intend that a person—as in this case—removed when an infant, should never thereafter obtain the benefit of the new settlement by residence conferred by section 34, which is the point contended for by the appellants. I am aware that there are decisions upon the Act which have said that, in some instances, at any rate, the Act is not retrospective, but, for the reasons above, I have come to the conclusion that the word "pauper" in section 36, in cases one and two, is to be read as "pauper at the time the Act was passed," and in my opinion the judgment of the justices was correct, and that the appeal must be dismissed, with costs.

GRANTHAM, J., read a written judgment to the same effect.

May 27.—The guardians of the parish of Brighton appealed.

Lumley Smith, Q.C., and *F. C. Gore*, for the appellants.—The effect of section 36 of the Poor Law Amendment Act, 1876, is that a person who was once removed before the passing of the Act cannot ever acquire a settlement by virtue of that Act.

They cited *Reg.* v. *Guardians of Ipswich*, 25 W. R. 511, 2 Q. B. D. 269; *Guardians of Sunderland* v. *Clerk of the Peace for Sussex*, 30 W. R. 337, 8 Q. B. D. 99; *Guardians of Westbury-on-Severn* v. *Guardians of Barrow-in-Furness*, 26 W. R. 372, 3 Ex. D. 88.

Poland, Q.C., and *Alexander Glen*, for the respond-

ents.—Section 36 is only a saving clause, and was not meant to affect any persons who were not paupers at the time the Act was passed.

Lord ESHER, M.R.—The question in this case turns on the construction of section 36 of the Divided Parishes Act, 1876. No doubt we must avoid breaking any of the ordinary canons of construction, and where the grammatical interpretation of the words is perfectly clear we have no right to depart from it unless there is something, either in the subject-matter of the Act or in the context, which both enables and compels us to do so. It has been argued before us that we ought to add certain words to the section in order to make it intelligible. I do not think that we have any right to do so, and therefore if section 36 had referred to "any person" and not to "any pauper" I should have thought that it was impossible for us not to construe the section in the manner for which the appellant union contends. But while sections 34 and 35 refer to "any person," when we come to section 36 we find the words are changed, and the language used is "any pauper." It is an ordinary rule of construction that when different words are used in the same Act, and dealing with the same subject-matter, the alteration in language has *primâ facie* been made with an intent and for some purpose. Let us, therefore, see whether "pauper" in section 36 is the same as "person" in the two previous sections. In my opinion the word "pauper" in section 36 is used to denote a difference from "person" in the earlier sections. It is meant to apply only to a person who is a pauper at the passing of the Act, and so long as he remains a pauper, but it does not apply in my opinion to a person who was not a pauper at the time of the passing of the Act. That really determines this case for it is admitted that Matilda Corbett was not a pauper at the time the Act was passed, and therefore section 36 has no application to her.

The great difficulty that I have felt in the case has been that it was argued that the result of this construction would be to apply the section to a person who, though a pauper at the time of the passing of the Act, subsequently ceased to be a pauper. I do not, however, think that that is so. As I read the section it applies to a pauper who is a pauper at the time of the passing of the Act, and so long as he remains a pauper, but no longer. Directly he ceases to be a pauper he becomes capable of acquiring a settlement under section 34, and the provisions of section 35 apply to him. I think that in the construction I put on the section I add nothing to it. I only expand and explain the word "pauper" as differing from the word "person" in the other sections.

I agree, therefore, with the decision of the Divisional Court, and think that this appeal must be dismissed.

LOPES, L.J.—It is perfectly clear that Matilda Corbett had acquired, under section 34, a settlement in the parish of Brighton, unless, under the provisions of section 36, she was prevented from doing so. The Act is one of considerable difficulty, and its language is far from clear, but, in my opinion, while sections 34 and 35 introduced great and material alterations into the law, section 36 was intended as a kind of saving clause of existing or pending proceedings. I entirely agree with the construction put upon the section by the Master of the Rolls. It applies to a person who at the time of the passing of the Act was a pauper and had been removed at that time, or who was under a consent order for removal under the Union Chargeability Act, 1865, or who, by receiving non-resident relief, admitted his chargeability, or against whom an order for removal had been made which was under appeal; and it applied to him, as the Master of the Rolls has said, only so long as he was a pauper.

It is clear that Matilda Corbett did not come under any of those categories at the time of the passing of the Act, and therefore she was capable of acquiring, and has acquired, a settlement in Brighton.

KAY, L.J.—I am of the same opinion, and feel no difficulty whatever about the case. If persons are described in any Act of Parliament by a particular *status, primâ facie* that means that the persons referred to have that *status* at the time of the passing of the Act. Section 36 refers to any pauper, and therefore it must mean any person who at the time of the passing of the Act was a pauper. The contention of the appellants would oblige us to alter the language of the Act in a manner which we have no authority to do, and which would, in my opinion, be contrary to the intention of the Act.

For those simple reasons I agree that the appeal must be dismissed.

On the question whether a person who was a pauper when the Act passed can afterwards acquire a settlement I desire to say nothing.

Appeal dismissed.

Solicitors for the appellants, *Clarke & Calkin*, for *Somers Clarke*, Brighton.

Solicitors for the respondents, *J. C. Button & Co.*

From Q. B. Div. [and Q. B. Div.] — Jan. 19, 20; April 17; May 5.

JOYNER v. WEEKS. (a.)

Landlord and tenant—Covenant to deliver up premises in repair—Measure of damages.

Unless something has taken place during a tenancy with regard to the property demised which alters the relationship of landlord and tenant, the measure of damages for breach of a covenant to leave premises in repair is the amount required to put the premises into such repair as was originally contemplated by the covenant.

Motion to set aside a judgment of an official referee.

The facts of the case and the arguments appear sufficiently in the judgment of the Divisional Court.

Lumley Smith, Q.C., and *C. M. Chapman*, for the plaintiff.

Jelf, Q.C., and *W. H. Clay*, for the defendant.

Cur. adv. vult.

April 17.—The following judgment of the COURT (WILLS and WRIGHT, JJ.), was delivered by

WRIGHT, J.—This was an action for damages for breach of covenant by the lessee of a house to keep it in repair and deliver it up in repair. The cause was referred for trial before an official referee, who was to direct judgment to be entered and otherwise deal with the whole action pursuant to order 36. He gave judgment for the plaintiff for one farthing, and ordered him to pay to the defendant the whole costs of the action.

The facts are thus stated by the official referee:—"This is an action by the survivor of three lessors of a house, No. 10, Holborn-bars, against the

(a.) Reported by F. G. RUCKER and A. P. PERCEVAL KEEP, Esqs., Barristers-at-Law.

lessee for damages for breach of a covenant to surrender the premises at the expiration of his lease (which was dated the 10th of November, 1868, and expired on the 25th of March, 1889) well and sufficiently repaired in accordance with the terms of the lease. The cost of making good the dilapidations was proved before me to be £70. Plaintiff's counsel claimed as damages the whole amount of this cost. The defendant without admitting liability had paid into court £45, but his counsel contended that under the circumstances which I am about to state I ought to give nominal damages only. On the 20th of May, 1887, the plaintiff, together with several other persons beneficially interested in the reversion, executed a lease of the house No. 10 to Samuel Lewis, who was the tenant of Nos. 9 and 11, which were subject to the same trusts as No. 10. This lease was for a term of twenty-one years, to commence on the 25th of March, 1889, when the defendant's lease of No. 10 would expire. The rent was £300, and Lewis covenanted to lay out £200 in making alterations to No. 10, and the adjoining houses Nos. 9 and 11 for the purpose of establishing communication between them. He also covenanted to keep the premises in repair. The defendant had carried on a millinery business at No. 10, and Lewis a draper's business at Nos. 9 and 11, and the object was to throw the three ground floors into one shop for Lewis's business. Immediately after the expiration of defendant's lease Lewis made the alterations, and in the course of them demolished some parts of No. 10 which were out of repair, and the cost of putting them into repair would have been £45. Lewis had made no claim to be reimbursed the cost to which he was put in repairing, and on the terms of his lease it was clear that he had no right to make any such claim. For the defendant it was urged that the plaintiff had suffered no loss by the breach of the covenant, and therefore ought not to have more than nominal damages. As a matter of fact, the plaintiff had suffered no loss, and never could have suffered any loss except in the possible contingency of a failure by Lewis to perform the covenants in his lease, and a consequent determination thereof. Nothing of this kind in fact happened, and it was not suggested that even if Lewis had to be evicted there would be found still remaining any of the dilapidations which the defendants had left."

The first question which arises on the judgment of the learned referee is whether he was right in awarding one farthing as damages on the ground that the plaintiff had sustained no loss. We do not understand the finding to be to the effect that the house was at the end of the term substantially as valuable to occupy, sell, or let in its then actual state as it would have been if the covenant had been duly performed. What the effect of such a finding would have been must be considered later on. The finding appears to be at least consistent with the view that the house was substantially less valuable to occupy, sell, or let by reason of the non-repair; and in substance to amount to no more than this, that the plaintiff had before the end of the defendant's tenancy happened to find another tenant who for reasons of his own was content to give as much for the house as he would have given if it had been properly repaired. If this is the correct view of the judgment, we think that the finding that the plaintiff has sustained no loss is based upon an erroneous view of the law. The breach of contract and a consequent diminution of the value of the plaintiff's interest in the house—apart from any special circumstances connected with the new lease—being supposed, the suggested kind of ademption of loss appears to us to be too remote, uncertain, and accidental to be properly made the ground of decision.

Many cases may be put in which it is plainly immaterial that at the commencement of an action for a breach of contract the plaintiff is in fact no worse off than he would have been if the contract had been performed. Charity, insurance, an alteration of market values, may have recouped or nullified his loss. Or it may be proved that the plaintiff, if he acted as a prudent man, in his own interest would at the end of the defendant's term have pulled down the house, even though duly repaired, and built a different kind of structure, so that the repairs, if done, would have been of no value, but he chooses to re-let the house in its existing state. In such a case it could hardly be contended that he might not recover substantial damages. The person whose breach of contract has caused damage is not the less liable because the damage has been made good, or its effect compensated by an extraneous event of such a kind that if it had operated the other way it would not have increased his legal liability. Nor does it seem to us that the relation between the plaintiff and the defendant is directly, if at all, affected by the terms of an agreement made by the plaintiff with a third person before the expiration of the defendant's term. That agreement might be rescinded or might never be performed. When it was made the parties to it could not foresee, and did not contract on the basis that there would, at the end of the defendant's term, be any breach of the contract to deliver up in repair. It must be not the making, but the performance of the new agreement to which the supposed effect would be attributable. But, if so, then at the moment of the termination of the defendant's tenancy, and before the new agreement was performed, a cause of action vested in the plaintiff against the defendant, and this could not be taken away or affected by the subsequent *res inter alios acta*.

Such authorities as are to be found appear to be consistent with this view. *Colley* v. *Streeton* (1823), 2 B. & C. 273; *Oldershaw* v. *Holt* (1840), 12 A. & E. 590; and *Davies* v. *Underwood* (1857), 6 W. R. 105, 2 H. & N. 570, may be referred to, but they throw little, if any, light on the matter. In *Rawlings* v. *Morgan* (1865), 13 W. R. 746, 18 C. B. N. S. 776, the point came near to being, but was not, decided. There, before the end of a lessee's term, his lessor had verbally agreed to give a building lease to a new tenant, who, in fact, entered on the expiration of the first term and pulled down the premises, and afterwards (but apparently before the action) obtained a building lease in conformity with the verbal agreement. The dilapidations were £22, but the terms of the building lease were not affected by the existence of the dilapidations. The lessor sued the first lessee for the £22, and was allowed to recover the full amount. The argument was the same as in the present case, that the plaintiff had, in fact, sustained no loss. Erle, C.J., and Keating, J., declined to say what their opinion would have been if, during the defendant's term, the plaintiff had made a binding agreement with the new tenant. Byles, J., relied exclusively on the fact that before any binding agreement had been made with a new tenant, a cause of action for the £22 had accrued. Montague Smith, J., doubted whether such a binding agreement would have in any way affected the plaintiff's right as against the defendant. In *Inderwick* v. *Leech* (1884), as reported in the *Times Law Reports* (Vol. 1), at pp. 95 and 485, the lessor, at the end of the term and before action, pulled down the house, but Lopes, J., at *Nisi Prius*, and Lord Coleridge, C.J., and Cave, J., in the Divisional Court, held him entitled to recover the sum which would have been the cost of repair. Lastly, in *Morgan* v. *Hardy* (1886), 35 W. R. 254, 17 Q. B. D. 770 (reversed on appeal on another point, but

not appealed on this point), Denman, J., came to a similar conclusion, although it appeared that, owing to a change in the character of the neighbourhood, the house was as valuable at the end of the term without some of the repairs as it would have been if they had been done.

We think, therefore, that, both on principle and on the authorities, the ground on which the official referee limited the damages to a farthing is not tenable.

It does not, however, follow either that judgment can be entered for the £70, or that, on other grounds, the official referee could not properly have given nominal damages only, and it is necessary to endeavour to ascertain what is the proper rule for ascertaining the measure of damages in cases of this kind, extraneous agreements or matters being put aside. Considering the frequency with which this question must arise, the absence of clear and decisive authority is not a little remarkable.

Where a tenant covenants to repair during the term, and the action is brought during the term, the lessor, if he has reserved to himself a sufficient power of entry, and has done the repairs, may, of course, recover the cost. If he has not reserved such power, and if no measure of damages is fixed by his own liability to a superior lessor, Lord Holt is said to have held in *Vivian* v. *Champion* (1705), 2 Lord Raymond, 1125, 1 Salk. 141, that the lessor ought to recover the sum which the repairs would cost. Lord Cranworth, on the other hand (when Rolfe, B.), held, in *Marriott* v. *Cotton* (1848), 2 C. & K. 553, that the damages should be only nominal. *Marriott* v. *Cotton* is stated to have been reversed: see in *Bell* v. *Hayden*, 9 Ir. C. L. Rep. 301. Both these decisions have been repeatedly questioned so far as they might be regarded as laying down any general rule; and it seems to be now settled that in such cases the jury, on the one hand, are not bound to give the cost of repairing, and, on the other hand, are not limited to nominal damages, even where the length of the term unexpired is so great that no real damage can be proved, or the accumulated proceeds of investment of a nominal sum would, at the end of the term, provide more than a sufficient fund: *Doe* v. *Rowlands* (1841), 9 C. & P. 734; *Turner* v. *Lamb* (1845), 14 M. & W. 412; *Macnamara* v. *Vincent* (1852), 2 Ir. Ch. Rep. 481; *Smith* v. *Peat*, (1853), 9 Ex. 161, 2 W. R. C. L. Dig. 154; *Bell* v. *Hayden*; *Mills* v. *East London Union* (1872), 21 W. R. 142, L. R. 8 C. P. 79; *Beattie* v. *Quirey* (1876), Ir. Rep. 10 C. L. 516, 25 W. R. Dig. 139; *Metge* v. *Kavanagh* (1877), Ir. Rep. 11 C. L. 431, 26 W. R. Dig. 74. There is in these cases the less probability of injustice to the lessor in leaving the jury somewhat at large, because the lessor can bring repeated actions.

But when, as in the present case, the term has expired and damages must be recovered once for all, the necessity of a more certain rule is apparent. Two measures have been suggested, the first, the amount of money which it will cost the lessor to do the repairs, with some allowance for loss of rent or occupation during the time of reparation, and with some deduction, where proper, by reason of substitution of new for old; the second, the diminution of the value of the lessor's estate by reason of the non-repair. In general they will both come to the same thing, and it can seldom be the case that the diminution in value can be more than the cost of repair. It may, however, often be the case that the diminution in value by reason of some or all of the tenant's defaults is much less than the cost of making them good. A part of the structure may have been designed for a purpose which has become obsolete, or a building may for many reasons be found at the end of a term to be as valuable, or nearly as valuable, in a partially as in a completely repaired state. In such cases which measure is to preferred? The former, the cost of repairing, is adopted with more or less positiveness in the following cases:—*Vivian* v. *Champion* (action during term); *Davies* v. *Underwood*, *per* Watson, B.; *Rawlings* v. *Morgan*, *per* Montague Smith, J.; *Woodhouse* v. *Walker* (1880), 28 W. R. 765, 5 Q. B. D. 404, *per* Lush, J.; *Morgan* v. *Hardy* (not reversed on this point); *Nixon* v. *Denham*, 1 Ir. L. R. 100; *Metge* v. *Kavanagh*. The latter, the diminution in value, is supported in the following:—*Colley* v. *Streeton* (action during term); *Doe* v. *Rowlands* (action during term); *Turner* v. *Lamb* (action during term); *Smith* v. *Peat*; *Davies* v. *Underwood*, *per* Bramwell, B.; *Rawlings* v. *Morgan*, *per* Erle, C.J.; *Mills* v. *East London Union* (action during term); *Beattie* v. *Quirey*; *Lombard* v. *Kennedy* (1888), 21 L. R. Ir. Ch. D. 201, 36 W. R. Dig. 113.

In *Inderwick* v. *Leech* the two measures seem to be regarded as identical.

It appears to us that the better measure is the amount of the diminution of value, but not exceeding the cost of doing the repairs (with the addition or deduction as above suggested), and that in the cases which appeared to adopt the other test it was not intended to decide that the cost of repairing ought to be, or can properly be, given so far as it exceeds the diminution of value. To give that excess might, in effect, be to give an unfair kind of specific performance to the great detriment of the lessee without any advantage to the lessor, as such, whereas the proper function of a right of action for damages for breach of contract seems to be to make good to the aggrieved party the damage which he has actually sustained: see *Robinson* v. *Harman* (1848), 1 Ex. 850, and *per* Erle, C.J., in *Rawlings* v. *Morgan*.

A similar rule has been applied in an action for wrongfully pulling down a house: *Hosking* v. *Phillips* (1848), 3 Ex. 168, at p. 182, except—where the value was personal and exceptional: *Duke of Newcastle* v. *Hundred of Broxtowe*, 4 B. & Ad. 273—in an action for breach of covenant to build a wall: *Wigsell* v. *School for Indigent Blind* (1882), 30 W. R. 474, 8 Q. B. D. 357—and in an action for waste by removing soil: *Whitham* v. *Kershaw* (1885), 34 W. R. 340, 16 Q. B. D. 613. And compare *Pell* v. *Shearman* (1855), 10 Ex. 766, 4 W. R. C. L. Dig. 164, as to breach of covenant to sink a coal pit.

It may be urged that such a rule will admit expert evidence to an inconvenient extent; but this is not a sufficient reason for acting upon a wrong principle. Nor is this objection in fact obviated by the apparently more simple rule of taking the cost of repairs. It is matter of common experience that the cost of repairs is the subject of oppressive litigation.

Applying these conclusions to the present case, we think that the judgment of the official referee must be set aside, but that judgment cannot be entered for the £70 or the £45, or any other sum, and a new trial must take place (unless the parties can agree), in which the question will be how much, if at all, the value of the plaintiff's estate and interest in the premises was diminished by the non-repair, regard being had to the situation and other circumstances, including the consideration that a tenant of the adjoining houses might be willing to give as much for the plaintiff's house in its unrepaired state as he would have given if the covenant had been performed. In this inquiry the suggested doctrine (if in any case correct) that in actions brought during the term the jury are never bound to give more than nominal damages, appears to us to be inapplicable, notwithstanding the *dictum* attributed to Byles, J., in *Rawlings* v. *Morgan*. When the action is brought after the end of the term and the damages assessed

according to legal principle are shown to be of any particular amount, we see no justification for reducing them on the mere ground that the plaintiff has, by reason of some matter not legally relevant, been saved from being out of pocket or being recouped. Further, even if the referee should come to the conclusion that the damages sustained are small, we think that if a substantial breach of the covenant has been committed, he would not be justified in dismissing the action, as he has practically done. The Divisional Court cannot interfere with his legal discretion as to costs, but in an action of this kind, where the defendant has made a substantial default, the circumstances must, in our opinion, be very peculiar which could make it right, not merely to deprive the plaintiff of costs, but to make him pay the costs of the action. There must be an order for a new trial; the costs of this motion will be reserved.

May 5.—The defendant appealed against this decision.

Jelf, *Q.C.*, and *Clay*, for the appellant.

Lumley Smith, *Q.C.*, and *Chapman*, for the respondent.

The arguments used and cases cited were the same as in the court below.

Lord ESHER, M.R.—In this case the plaintiff brings an action against the defendant upon a covenant in a lease that the defendant would leave the premises in repair. It is admitted that the lease has come to an end and that the premises were then left out of repair by the defendant. That is to say, there was a breach of covenant as between the plaintiff and defendant. The plaintiff has proved that the cost of putting the premises into such repair as was originally contemplated by the covenant would be £70. The defendant says that he is not bound to pay that sum to the plaintiff because the plaintiff had really suffered damages only to a nominal extent, or that, at any rate, he was not liable for more than £45, which he accordingly paid into court, with an alternative defence denying liability. The ground on which the defendant establishes his case is that during the time that the lease was running, and while the defendant was in possession of the premises, the plaintiff demised them to a third party, who covenanted to pull down and alter them, and to hold them at an advanced rent. The defendant, therefore, says that, under those circumstances, his breach of the covenant to leave the premises in repair did the plaintiff no harm. The question for us is whether or not the court is entitled to take those circumstances into consideration in estimating the damages due for the breach of covenant. The case was sent for trial to an official referee, and he gave the plaintiff one farthing damages and ordered him to pay all the costs. The plaintiff appealed, and the Divisional Court sent the matter back for a new trial, and in a long and most industrious judgment they laid down for the guidance of the official referee the rule on which the damages ought to be assessed. Then there is an appeal to us, and we have to say whether, on the undisputed facts, judgment ought not to be entered for the plaintiff for £90, and whether the rule laid down by the Divisional Court as to the mode of assessing the damages is right or wrong.

There is only one case directly in point on the question, but there are a long series of *dicta* which affirm a universal practice which has always been exercised in these cases as to the measure of damages. Such a constant practice really amounts to a rule of law. The rule is that where there is a lease with a covenant to leave premises in repair the measure of damages for the breach of such a covenant is the amount which the landlord proves to be fairly and reasonably necessary in order to put the premises into that state of repair in which he is entitled to have them. It is unnecessary now to say that that rule is absolute in all cases. I strongly incline to think that it is, and, if it were necessary to do so, I should say that it was. It is a highly convenient rule, and has been in constant practice, and it saves the vast expenses which would result if the inquiry were to be allowed to range over all sorts of matters in the manner now suggested. But at all events, unless something has taken place in the condition of the property which affects the relationship of the landlord and tenant, that is the ordinary rule for the ascertainment of damages in such cases. That is, in my opinion, absolutely clear. Now is there anything here which has so altered the condition of the premises as to affect the relationship of the plaintiff and defendant with regard to it? It is plain that there is nothing. The transactions between the plaintiff and a third party do not in any way affect that relationship. No estate passed to the third party during the continuance of the defendant's tenancy. He had only an *interesse termini* while that lasted, and he only got an estate in the premises after the relationship of the plaintiff and defendant as lessor and lessee had come to an end. When that relationship ceased it is admitted that the premises were out of repair. The case is, therefore, an ordinary one, and the defendant has nothing whatever to do with the transactions between the plaintiff and the third party, and they can in no way be taken into account in arriving at the damages. The plaintiff is entitled to act on the ordinary rule and to receive the £70 as the damages for the defendant's breach of covenant. Throughout all the years in which the relationship of landlord and tenant has existed no case can be found which contravenes this rule.

The case of *Morgan* v. *Hardy*, although not binding on us, is, as I have said, precisely in point, and Denman, J., there lays the rule down in plain terms after reviewing the authorities almost as elaborately as the judgment now before us. Then there is the case of *Inderwick* v. *Leech*, which, as we are told, was affirmed by this court on the authority of *Rawlings* v. *Morgan*. The principle there laid down was the same as that which appears from all the cases—namely, that unless something has taken place as regards the property itself during the tenancy, which alters the relationship of the landlord and tenant, the measure of damages for breach of a covenant to leave premises in repair is the amount which the repairs would cost. That seems to me a good, simple working rule and thoroughly intelligible, while, as to the rule laid down by the Divisional Court, with all deference to their careful and industrious judgment I must say that I cannot understand it, that it has never been heard of before, and that it seems to me to be entirely wrong. In my opinion, therefore, judgment must be entered for the plaintiff for £70.

FRY, L.J.—I am of the same opinion. It must be borne in mind that we are not now dealing with the case of an action brought before the end of the term, or one in which *vis major*, or act of God, can be set up as a defence. The inquiry is simply as to the measure of damages in the present case for not yielding the premises up in repair at the end of the term. In my judgment the ordinary rule which is laid down in Mayne on Damages, 4th ed., at p. 253, and which was adopted by my brother Denman in *Morgan* v. *Hardy*, applies here: "Where the action is brought upon the covenant to repair at the end of the term the damages are such a sum as will put the premises into

the state of repair in which the tenant was bound to leave them." The same rule may be implied from the case of *Davies* v. *Underwood*, and from other cases. The rule appears to me to be both simple and convenient. The Divisional Court have said that the measure of damages in such a case is the diminution in the value of the plaintiff's estate if not exceeding the cost of the repairs. That involves at least two inquiries, and seems to me most complex and unfit for the determination of affairs as between man and man in a court of law.

Is there, then, in this case anything which renders the *primâ facie* application of the rule inapplicable? It is said that the agreement in 1887 between the plaintiff and Lewis has that effect. But how can that agreement affect the rights between the plaintiff and the defendant. The agreement was for a reversionary estate. It passed no estate at the time, but only an *interesse termini*. The lessor had the right to enter at the determination of the defendant's tenancy, and the moment he did so his right of action in respect of the defendant's breach of covenant accrued. That right of action therefore vested in the plaintiff before Lewis acquired any estate in the reversionary lease. Lewis's covenants to alter and rebuild were not performed at the time of the vesting of the plaintiff's right of action against the defendant. How, then, can those covenants affect the rights of the lessor and lessee, and how can a subsequent performance of them by Lewis deprive the lessor of damages a right to which vested in him before Lewis acquired any estate in the premises? I can find no authority for any such proposition. The damages must be ascertained at the time of the vesting of the cause of action in the plaintiff. There is nothing in the present case to rebut the ordinary rule, and the plaintiff is entitled to judgment for the £70 which have been found to be necessary to put the premises into the state of repair in which the defendant was bound to leave them.

Judgment for the plaintiff for £70.

Solicitors for the plaintiff, *Baker & Nairne.*

Solicitors for the defendant, *Paul E. Vanderpump & Eve.*

From Q. B. Div. April 29.

UNWIN *v.* HANSON. (*a.*)

Highway—Trees overhanging—Right of surveyor to lop, but not to top, trees—Highway Act, 1835 (5 & 6 *Will.* 4, c. 50), *s.* 65.

By section 65 *of the Highway Act*, 1835, *power is given to the surveyor, under certain conditions, "to prune and lop" trees adjoining the highway.*

Held, that this gave him no right to "top" the trees by cutting off their tops, but only allowed him to cut off lateral branches.

Appeal from the decision of Pollock, B.

The action was brought by the owner of a number of trees adjoining the highway, to recover damages from the defendant, who was the assistant surveyor of parish highways, for unauthorized interference with the trees.

It appeared that by an order of the justices, under section 65 of the Highways Act, 1835, the defendant had been directed to "lop and top" the trees belonging to the plaintiff overhanging the highway. He had accordingly lopped the lateral branches of a number of trees, and had cut off the tops of two.

Pollock, B., gave judgment for the defendant.

The plaintiff appealed.

By the Highway Act, 1835, s. 65, power is given to the surveyor, under certain circumstances, to "prune and lop" trees growing in or near hedges or fences, and which appear to him to be prejudicial to the highway by excluding sun and wind from it.

Channell, Q.C., and *Trevelyan*, for the appellant.—The Act gives power to lop, but not to top trees. It cannot be said that lopping includes topping. The words are always used in different senses. By the Turnpike Act, 1822 (3 Geo. 4, c. 126), s. 116, by which a similar power is given to the surveyor, the words used are "prune or lop the branches of trees," thus clearly excluding topping.

Kemp, Q.C., and *Claude Plumptre, contrà.*

Lord ESHER, M.R.—In this case the owner of some trees adjoining the highway brings an action against the surveyor for having done an unauthorized injury to his trees, in that he has cut off the tops of some of them, and not merely cut off branches overhanging the highway. The plaintiff contends that by the Act of Parliament the defendant had no right to do this. He certainly had no such right at common law. The defendant says that by statute he had a right to lop the trees for the purpose of admitting light and air to the highway, and that although he has cut off the tops of some of those trees, he was entitled to do so, since he had power to lop them. The simple question, therefore, is whether the right to lop given by the Act includes the right to top the trees. When Acts of Parliament have to deal with general matters affecting everyone, they use ordinary language in its ordinary sense, but when they have to deal with particular businesses or transactions in which certain words have a well-understood special meaning, then if they use those words they must be taken to use them in that well-understood and special sense. Here is an Act dealing with the cutting back of trees, and the terms to lop and to top are well known and well understood as having perfectly different meanings by all persons who have to do with the cutting back of trees. It would, I think, be mere pedantry in us to assume not to know this, but even if we were ignorant there was abundant evidence at the trial that lopping referred only to the branches, while topping meant taking off the head of the tree. The Act speaks of lopping, and does not authorize topping, and therefore, in my opinion, the defendant exceeded his authority when he cut off the tops of two of the trees. I am strengthened in this opinion by referring to the Turnpike Act, 1822, which in a similar section speaks of "lopping the branches." That clearly would not authorize topping, and so, if we were to hold that lopping in the Act before us included topping, we should have the absurd result that trees adjoining highways might be topped, while trees adjoining turnpikes might only be lopped. The appeal must, therefore, be allowed.

FRY, L.J.—I take the same view. It is impossible, I think, even in ordinary language to say that lopping includes topping. But if the words have a merely technical meaning there is abundant evidence to show that it does not. It is no doubt true that in some cases the highway might be damaged by the overhanging top of a tree, but those cases would be of rare occurrence, and in my opinion the Legislature, by using the word lop in the Act and abstaining from using the word top, intended to give the surveyor the authority only to lop and not to top overhanging trees. The words are so closely connected together, both in arboriculture and in the drafting of deeds, that it is impossible to use one without thinking of the other.

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

LOPES, L.J.—The Act of Parliament relates to country matters, and is to be administered by country justices. Having regard to the object to which the Act relates, we must interpret the word lop in the manner in which it is always interpreted in country life, that is, as not including "top." The words are perfectly distinct, and are used in quite different senses. I agree that this appeal must be allowed.

Appeal allowed.

Solicitor for the plaintiff, *Godfrey Pownall.*

Solicitor for the defendant, *A. L. Houlder.*

High Court of Justice.

Chan. Div. } Chitty, J. } June 9.

In re SCHWEDER'S ESTATE.
OPPENHEIM *v.* SCHWEDER. (*a.*)

Will—Legacy to wife—Priority.

Pecuniary legacy to the testator's wife, to be paid to her within three calendar months after the testator's decease, to enable her to provide and furnish a suitable house and to defray any other expenses.

Held, that the legacy to the wife had no priority over the other legacies, but was liable to abate with them on the estate proving insufficient for payment in full.

Blower *v.* Morret, 2 *Ves. sen.* 420, *followed.*

In re Hardy, Wells *v.* Borwick, 29 *W. R.* 834, 17 *Ch. D.* 798, *dissented from.*

Adjourned summons.

By will, dated November, 1889, Edward Schweder gave his wife certain jewellery, furniture, ornaments, and plate, and also "the sum of £600 to enable her to provide and furnish a suitable house and to defray any other expenses, such pecuniary legacy to be paid to my said wife within three calendar months after my decease, and to be for her own absolute use and benefit." The testator gave other legacies and annuities, and with regard to the latter he gave certain directions as to priority *inter se*, and, if need be, abatement in consequence.

The testator died in 1890. His personal estate was insufficient to pay the legacies and annuities in full.

An originating summons was taken out by the executors and trustees against the widow and beneficiaries for the determination, among other questions, whether the legacy to the widow had priority over the other legacies.

Whitehorne, Q.C., and *Prior*, for the executors and trustees.

Byrne, Q.C., and *Ingle Joyce*, for the widow.—We rely on *In re Hardy, Wells* v. *Borwick*, 29 W. R. 834, 17 Ch. D. 798.

Farwell, Q.C., and *Swinfen Eady*, for other beneficiaries.—We rely on the earlier decision in *Blower* v. *Morret*, 2 Ves. sen. 420, followed in *Cazenove* v. *Cazenove*, 61 L. T. N. S. 115, 38 W. R. Dig. 211, in preference to *In re Hardy*. A direction as to the time of payment gives no priority: *Miller* v. *Huddlestone*, 3 Mac. & G. 513. All the authorities are considered in *Roche* v. *Harding*, 7 Ir. Ch. Rep. 338.

Corrie and *W. F. Webster*, for other beneficiaries.

CHITTY, J.—It is well settled at the present day that near relationship to the testator does not of itself give a legatee priority over other legatees. It may be said that a man is morally bound to provide for his widow and children, and, therefore, that the widow and children ought to have priority over strangers if the estate is insufficient to pay all the legacies in full, but the natural inference or moral obligation is not of itself sufficient to give preference to a widow or child. It is also a well-established rule that a mere direction to pay a legacy immediately, or within one month, or within three months after a testator's decease affords no evidence of any intention on the part of the testator to give priority to that particular legacy in case of a deficiency in the estate, because it is to be presumed that the testator intended all the legacies to be paid in full when he gave them. The testator in the case now before me has miscalculated, as often happens, the value of his estate, but at the time he made his will he certainly intended that there should be equality among his legatees, and it probably never occurred to him that his personal estate would not be sufficient to answer all his testamentary dispositions. Even on the words of the will it is clear that the widow is not entitled to any priority, because there are instances where, when the testator intended certain annuities to have a priority, he has made express provision by apt words for such priority.

The case of *In re Hardy* has been pressed upon me as directly in favour of the widow's claim to priority. In that case, the facts of which are very similar to the present case, Malins, V.C., dissented from *Blower* v. *Morret*, and declined to follow it. In my opinion the Vice-Chancellor was bound by that case, which was decided by Hardwicke, L.C., as long ago as 1752, and never questioned by anyone until it came before the Vice-Chancellor. The case had got into the text-books; it is referred to in Roper on Legacies, p. 423, 4th ed.; and had, up to 1881 at any rate, been generally accepted as an authority on this very point. The Vice-Chancellor says, in his judgment, that *Blower* v. *Morret*, is distinguishable, and if not, he dissents from it, and declines to follow it; but, in my opinion, it is not so distinguishable, and I think, with all due respect to the learned Vice-Chancellor, that he was bound by it. In *Blower* v. *Morret* there was a gift of a general legacy of £500 to the testator's wife, "to be paid her immediately after my decease out of the first money belonging to me that should be got in after my death," and the Lord Chancellor decided, notwithstanding the words of the will as to immediate payment, that the legacy was liable to abatement, and that the widow had no priority merely on that ground. I think, therefore, that I am constrained by *Blower* v. *Morret*, and by the continued course of the authorities since that decision to dissent from *In re Hardy*, as I do, and to hold in the result that the widow in the case before me has no priority over the other legatees in respect of the £600 legacy.

Solicitors, *Cowlard & Chowne; J. E. Fox & Co.; A. Schweder; Russell, Cooke, & Co.*

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

Chan. Div. }
Chitty, J. } Feb. 4, 5, 10.

BOLTON v. SALMON. (a.)

Principal and surety—Giving of time—Discharge of personal liability—Release of property—Tenants in common—Covenant to pay mortgage debt—Redemption action—Parties.

Where a surety pledges his personal credit by note, covenant, or otherwise, and by the same contract pledges his goods or charges or mortgages his lands as security for the same debt, any alteration of the contract without his consent discharges the surety from all personal liability, and releases the property which the surety had included in his contract.

Action.

By an indenture dated the 18th of October, 1854, two undivided fourth shares in a freehold farm belonging to Susan Booty and the defendant Sarah Buckenham, and an equitable charge on the whole of the farm of £850 belonging to the defendant S. Buckenham, were conveyed to one Eliza Middleditch by way of mortgage to secure the repayment of £1,000 and interest. Sarah Buckenham joined in the deed as surety only.

By an indenture dated the 4th of September, 1857, J. C. Buckenham, the defendant S. Buckenham, and R. S. Buckenham jointly and severally covenanted with one Cooper for the repayment, on the 4th of March next, of an advance of £450 made by Cooper to J. C. Buckenham, with interest at £5 per cent., and by the same deed two undivided fourth shares in the above-mentioned farm belonging respectively to J. C. Buckenham and R. S. Buckenham, and the defendant S. Buckenham's said undivided fourth share and her equitable charge for £850 on the entirety, were conveyed to Cooper, subject, as to the defendant S. Buckenham's interest, to the said mortgage of the 18th of October, by way of security for the said sum of £450 and interest. This deed was executed by the defendant S. Buckenham and R. G. Buckenham as sureties for J. C. Buckenham.

J. C. Buckenham having made other mortgages of his interest in the farm and of other property to secure the repayment of advances, subsequently arranged for the consolidation of all his mortgages by a deed dated the 15th of December, 1884, under which the plaintiff G. Bolton was mortgagee. The question in the present action, so far as it is material to be reported, turned upon whether the effect of this consolidation deed, by giving time to J. C. Buckenham, the principal debtor, without consulting the surety, S. Buckenham, was not only to discharge her from all personal liability under the deed of the 4th of September, 1857, but also to release the securities which she, as surety, had included in that mortgage.

The consolidation deed recited that J. C. Buckenham was entitled to one undivided share in the farm, subject to the incumbrance created by the indenture of the 4th of September, 1857, and to other subsequent charges thereon which were specified, and that he was also entitled to other property, subject to some of the aforesaid charges and other charges therein specified, and recited that J. C. Buckenham had applied to the plaintiff to advance the total sum of £3,200, in order to pay off the before-mentioned several mortgages and charges which he, the plaintiff, had agreed to do "upon having the said several mortgages and charges transferred to him, and upon having repayment thereof with interest further secured in manner hereinafter appearing," the various mortgagees respectively, in consideration of the payment of the amount of their respective debts, conveyed to the plaintiff such debts "and the full benefit of the covenants and other powers and provisions" contained in their respective mortgage deeds for securing the payment of the respective principal sums and interest, "and all securities for the same." The one undivided fourth share in the farm belonging to J. C. Buckenham was, with other properties, then conveyed to the plaintiff subject to a proviso for redemption upon the repayment of the total amount of £3,200 advanced by him; and J. C. Buckenham covenanted to pay to the plaintiff the sum of £3,200 on the 19th of January, 1885, with interest.

By another indenture dated the 27th of July, 1889, the rights and shares of the defendant S. Buckenham and R. G. Buckenham in the farm, so far as the same were then vested in the transferees under the said indenture of mortgage of the 4th of September, 1857, were, according to the plaintiff, conveyed to him in fee simple, subject to such right as was then subsisting therein under such indenture.

Neither the defendant S. Buckenham nor R. G. Buckenham were parties to either of the two last-mentioned deeds.

In 1889 the defendant S. Buckenham paid off the £1,000 secured by the indenture of the 18th of October, 1854, and caused the same to be transferred to the defendant C. E. Salmon as a trustee for her.

The present action was commenced by S. Bolton against C. E. Salmon and S. Buckenham for a declaration that he was entitled to redeem the mortgage of October 18, 1854, redemption, and foreclosure of the equity of redemption of the defendant S. Buckenham.

Byrne, Q.C., *Haldane, Q.C.*, and *Chubb*, for the plaintiff.

Jason Smith, for the defendants.

He referred to *Wheatley* v. *Bastow*, 7 De G. M. & G. 261, 4 W. R. Dig. 90; *Hodgson* v. *Hodgson*, 2 Keen, 704; *Holme* v. *Brunskill*, 3 Q. B. D. 495, 26 W. R. Dig. 194.

Byrne, Q.C., replied.

CHITTY, J.—The plaintiff claims to redeem the mortgage of 1854, and, on redemption, to foreclose the defendants by virtue of a subsequent security which he alleges is vested in him. The only parties to the action are the plaintiff and the defendants Salmon and Miss Buckenham. As a redemption suit it is plain that the action is defective for want of parties. Mr. and Mrs. Booty are not parties, nor are their interests in Mrs. Booty's one-fourth share represented in the action. The plaintiff claims only to be a subsequent incumbrancer. Where a mortgage is made by two tenants in common both of them must be parties to the action to redeem; one cannot redeem in the absence of the other. Where two different estates are mortgaged, the person entitled to redeem one estate cannot bring an action to redeem, without making the person entitled to redeem the other estate a party: see *Cholmondeley* v. *Clinton*, 2 J. & W. 134. For this purpose there is no difference between a mortgage of two different estates or two undivided shares of the same estate. Towards the close of the argument the plaintiff's counsel asked for liberty to amend by adding parties; had I granted this liberty it would only have been on terms of the plaintiff paying all the costs thrown away. There are other objections for want of parties, but it is not necessary to discuss them beyond saying that all the four tenants in common, or those who claim the equity of redemption under them, are

(a.) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

parties to an action to redeem the charge on the entirety.

The plaintiff claims a right to redeem as a puisne incumbrancer by virtue of a mortgage of 1857, and he alleges that all the securities created by this mortgage are now vested in and enforceable by him by virtue of a deed of transfer and consolidation dated the 15th of December, 1884, and another deed dated the 27th of July, 1889. For the purposes of this portion of my judgment I will assume, in favour of the plaintiff, that the security created by Miss Buckenham by the deed of 1857 was effectually transferred to and vested in the plaintiff by the operation of these two deeds, though Miss Buckehnam was not a party to either.

Now it has been decided in an action brought by the plaintiff against Miss Buckenham in the Queen's Bench Division that the effect of the deed of 1884 was to discharge Miss Buckenham from her liability under the covenant in the deed of 1857. The plaintiff's counsel, however, contend that although Miss Buckenham's covenant is gone by reason of time having been given to the principal debtor, the security which she gave remains. With all their learning and research the plaintiff's counsel were not able to produce any authority for this proposition. The reason may be that no one had ever previously thought of raising such a contention.

For the defendants two cases were cited. The first was *Wheatley* v. *Bastow*. This is not an express decision on the point. There a brother and sister entitled in moieties to a reversionary interest in a fund in court mortgaged it to secure the debt of the brother, the sister joining as surety only. On the facts the court decided that the surety was not discharged. But it seems to have been assumed throughout the case, both by the eminent counsel engaged and by the court, consisting of Knight-Bruce and Turner, L.JJ., that if the facts had shown a release the mortgaged property of the surety would have been discharged. The second case is *Hodgson* v. *Hodgson*. There it was held that the release of one co-surety discharged the security given by the other. This is in point. On principle I can find no ground for the proposition, that although the surety's covenant is gone by alteration of the contract with the principal debtor, yet the security which the surety has given remains bound. A surety pledges his personal credit by note, covenant, or otherwise, and by the same contract pledges also his goods, or charges or mortgages his lands as security for the same debt. The alteration of the contract without his consent or without the reservation of rights against him affects his position equally in regard to every part of his contract of suretyship. As was said by Cotton, L.J., in *Holmes* v. *Brunskill*, "The cases as to discharge of a surety by an agreement made by the creditor to give time to the principal debtor are only an exemplification of the rule stated by Lord Loughborough in *Rees* v. *Berrington*, 2 Ves. jun. 540. It is the clearest and most evident equity not to carry on any transaction without the knowledge of him (the surety) who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him." The true rule, as the Lord Justice went on to show, is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if there is any alteration which is not obviously either unsubstantial or for the benefit of the surety he is to be the sole judge whether he will remain liable. This reasoning applies with the same force to a security given by the surety as it does to a personal obligation entered into by him. Moreover, the deed of 1884 gave time to J. C. Buckenham, the principal debtor, not only in respect of his covenant by the taking of a new covenant, which, at least, suspended the right to sue on the covenant of 1857, but also in respect of the right and the time for redemption. The right of redemption under the indenture of 1857 was discharged, and a new proviso for redemption was inserted, conferring, according to its terms, the right to redeem by J. C. Buckenham or any person claiming under him on payment of the entire consolidated debt of £3,200 on the 19th of January, 1885. So that there was in this respect a giving of time in relation to the security itself. The result is that the security Miss Buckenham gave by the deed of the 4th of September, 1857, is released, and consequently the plaintiff has no title to redeem her.

His lordship then dealt with the consolidation deed of the 15th of December, 1884, and the transfer of the 27th of July, 1889, which he held as a matter of construction did not pass the shares and interests of the defendant Sarah Buckenham and Robert G. Buckenham, and eventually dismissed the action, with costs.

Solicitors, *Arthur B. Chubb; Gilbert Robins*, for *Salmon & Sons*, Bury St. Edmunds.

Chan. Div. } Kekewich, J. } May 2, 8, 9.

In re SMITH'S SETTLED ESTATES. (*a*.)

Settled land—Sale by tenant for life—Property not sold—Costs of attempted sale—Capital money—Charge on settled land—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 4, 21 (*x.*), 46 (*sub-section* 6), 47, 55 (*sub-section* 3).

The costs, charges, and expenses incurred by a tenant for life of settled land in an unsuccessful attempt to sell the property may be paid out of capital moneys arising under the Settled Land Acts.

In re Llewellin, Llewellin *v.* Williams, 36 *W. R.* 347, 37 *Ch. D.* 317, *considered and followed.*

When there are no capital moneys out of which such costs, charges, and expenses can be paid, the court has jurisdiction, upon an application by the tenant for life for directions as to the payment of such costs, charges, and expenses, to order that the same be raised by means of a charge on the settled property.

Adjourned summons.

By a settlement, dated the 14th of August, 1879, real estate was limited to uses under which J. C. T. Smith became, at the death of W. C. Smith, beneficially entitled in possession as tenant for life.

By his will, dated the 18th of April, 1879, W. C. Smith devised and bequeathed to trustees certain real estate and stock, and empowered his trustees, upon the request of any tenant for life, to apply all or any principal trust moneys which might from time to time be in their hands under or by virtue of any of the trusts or powers therein contained in or towards paying off or discharging any mortgage or other charge or incumbrance for the time being affecting any of the hereditaments subject to the subsisting uses or trusts of his will, or any similarly settled hereditaments.

The limitations of the settlement were similar to, but not identical with, the trusts declared by the will. The testator died on the 6th of June, 1883.

On the 25th of June, 1889, J. C. T. Smith, with the

(*a*.) Reported by JAMES H. BAKEWELL, Esq., Barrister-at-Law.

leave of the court, put up for sale by auction the mansion house and demesnes and other lands settled by the settlement of the 14th of August, 1879, but the reserve prices were not reached, except in the case of two small lots, which were sold for £325. The costs and expenses of and incidental to the sale amounted to £1,171. There was a sum of £520 Consols standing in the names of the trustees of the settlement, representing capital moneys under the Settled Land Act; and there were also certain sums of Bank Stock and Consols standing in the names of the trustees of the will.

This was a summons by J. C. T. Smith asking that the costs and expenses incurred by him in the attempted sale of the property subject to the settlement might be declared to be costs, charges, and expenses incidental to the exercise of the powers of sale conferred on him by the Settled Land Act; that it might be declared that the said costs and expenses, so far as they had been incurred in relation to such property, were payable by means of a charge upon that property or the unsold part thereof; and that it might be declared that the said costs and expenses and the costs of all parties of the application might be raised and paid out of the sums of stock and Consols held by the trustees of the will of W. C. Smith.

Warmington, Q.C., and *Brinton*, for the summons.—The costs incurred by the tenant for life are costs, charges, and expenses of and incidental to the exercise of his power of sale, within the meaning of section 21 (x.) of the Settled Land Act, 1882; and he is entitled to have them paid out of any capital moneys in the hands of the trustees of the settlement: *In re Llewellin, Llewellin* v. *Williams*, 36 W. R. 347, 37 Ch. D. 317; *In re Lord Stamford's Settled Estates*, 38 W. R. 317, 43 Ch. D. 84.

Butcher, for the trustees.

Cartmell, for the mortgagees of the life estate of J. C. T. Smith.

Hood, for persons entitled in remainder, referred to *Sebright* v. *Thornton*, W. N., 1885, p. 176.

May 8.—KEKEWICH, J.—The question which I have to consider in this case may be thus stated. When a tenant for life honestly and with due diligence attempts to sell the whole or part of the property comprised in the settlement under which he holds, and that attempt is wholly or partially unsuccessful, is he at liberty to charge the costs incurred in that attempted sale against "capital moneys" arising under the Settled Land Act? So far as the sale is successful, for instance, if the land has been put up in twelve lots, and two of those lots have been sold, there can be no doubt that he would be entitled, under the words of the Act, to a proportionate part of the costs incurred; either one sixth or whatever might be the proper proportion, having regard to the value of the property sold.

But is he entitled to charge the costs incurred by putting up for sale that portion of the property which was not sold; and, if the sale is wholly unsuccessful, is he entitled to charge against capital moneys the entire costs of a sale which has had no result?

This question came before Stirling, J., in *In re Llewellin, Llewellin* v. *Williams*, not precisely in the form in which it is now before me, but in substantially the same manner; the sections of the Act which have been referred to before me were there discussed, and the case was fully argued. Stirling, J., came to the clear decision that the tenant for life is, for the reasons mentioned by him, entitled to charge his costs against the estate. I am of course at liberty to reconsider the question, since that decision was made in 1887, on an Act which was then of recent date, and there is, so far as I am aware, no other reported case in point.

But I do not doubt that many tenants for life, and solicitors who have advised them, have acted on that decision, and I should not reconsider it without reluctance. Having carefully considered it, I have decided not only to follow it, but to express my entire concurrence with it. I think that it is better that I should simply adopt the language of Stirling, J., and not attempt to express the same result in my own language. I, therefore, not merely follow that case as an authority, but adopt it as my own decision.

May 9.—*Warmington, Q.C.*, and *Brinton*, for J. C. T. Smith.—There is jurisdiction to charge the costs and expenses of the attempted sale upon the settled land: Settled Land Act, 1882, s. 46, sub-section 6; s. 47; s. 55, sub-section 3. These costs and expenses may, then, be paid by the trustees of the will under their power to discharge incumbrances.

Butcher, for the trustees.—If the court has no jurisdiction to make this charge, capital money may have to be raised by selling the settled land. Section 46 is wide and is only limited by section 55, sub section 3: *In re Llewellin*, 37 Ch. D., at p. 327.

Brinton replied.

KEKEWICH, J.—I have already decided that the costs of the abortive sale by the tenant for life are costs, charges, and expenses payable out of capital money within the meaning of section 21 of the Settled Land Act, 1882.

It now appears that there is no capital money, or not enough capital money, attributable to this particular settlement. The question therefore arises whether those costs can be directed to be paid out of the land; if they can, the result will be to make them a charge on the land, and thereupon they could be raised as any other charge, or in the particular instance they can conveniently be raised under the will, which appears to contain express powers to pay off charges affecting the lands held under the settlement.

If that power did not exist I should not be very much disposed to give weight to the argument on the inconvenience of not reaching the lands in a direct way; but, seeing that there is that power, I need not pause to consider whether it would be right to make a charge which would enable the tenant for life to raise the money by mortgage, or otherwise than by sale; it being conceded, and being part of my decision, that if he sold the proceeds of sale would be applicable for payment of these costs.

The Act does not say in so many words that the costs incurred by the tenant for life shall be a charge upon the settled land. But large powers are given to the court by section 46 of the Act, to which section 47 is supplementary, and the real question is whether the powers given by section 46 (6) reach this particular case. I am not aware of any other sections of the Act which can help me in deciding this question.

Section 46 assigns all matters coming within the jurisdiction of the court to the Chancery Division, and gives the court certain powers; and sub-section 6 gives to the court power to make such order as it thinks fit respecting the costs, charges, and expenses of all or any of the parties to any application. The section does not say costs, charges, and expenses of any application, nor could such language have been properly used, for there are not any costs, charges,

and expenses of the application. What is incurred are costs, and the expression "costs, charges, and expenses" points to something beyond the liability incurred by an application to the court. The difficulty arises from the fact that the tenant for life sold outside of the court, simply in exercise of his statutory power. One has to search narrowly and suspiciously for any authority on the part of the court to allow the expenses of what did not require the sanction of the court.

The tenant for life, not having sold the land, desires to know whether the costs, charges, and expenses of the attempted sale may be paid out of capital moneys and moneys in hand. I have heard that application, and have decided it. Is not that an application on which I can deal with the costs, charges, and expenses of the parties, one of whom is the tenant for life, and, if so, do not these costs, charges, and expenses include those which I held ought to be paid to him out of capital moneys? I think that, without straining the language of the section, I may arrive at that conclusion. I think that the provision which enables me to do so is section 55, sub-section 3, because that provides a limit to the word "expenses." Probably, on section 46 (6) I should be bound to hold that costs, charges, or expenses meant those connected with the powers of the Act; but under section 55 (3) I have an express limitation which prevents the court from going beyond what is indicated as right and reasonable. I may read sub-section 6 as providing that the court may make such order as it thinks fit respecting the costs, charges, and expenses of all or any of the parties who are before it in connection with the Act or incurred under the Act. The sub-section goes on to empower the court to order that all or any of the costs, charges, or expenses be paid out of property subject to the settlement. Section 47 states what is to happen when the direction is given. The result of that applied to the particular case is to make the costs in law a charge on the land, and the trustees of the will may, if they think fit, in exercise of their powers, pay off this charge.

I think I ought to follow the words of the Act, and that I ought not to declare that the costs are payable out of and charged upon the settled land, but to order that the costs, charges, or expenses be paid out of the property subject to the settlement; then I may go on to direct them to be raised by means of a charge on the settled property. That will put the trustees of the will in as good a position as if these costs were secured by an equitable charge. The costs of the mortgagees of the life estate of the present application must be borne by the tenant for life.

Solicitors, *Field, Roscoe, & Co.*, for *Grim & Matthew*, Cambridge; *Prideaux & Sons; Wade & Lyall.*

Q. B. Div. (Denman and Wills, JJ.) June 26, 29.

MOORE *v.* PEACHEY. (*a.*)

Practice—Discovery—Right to inspection of documents disclosed in answer to interrogatories — Rules of Supreme Court, 1883, *ord.* 31, *rr.* 15-18.

A plaintiff sued upon an agreement, and, in answer to interrogatories, stated that the agreement was in writing, and was contained in three documents referred to.

Held, that the defendant was entitled to an order for inspection under ord. 31, *rr.* 15-18, *on the ground that these were "documents referred to in an affidavit in the cause," and that a further application for discovery, to be accompanied with a further deposit of £5, was not necessary.*

Appeal from the refusal of Henn Collins, J., at chambers, affirming the refusal of the master, to order inspection of documents.

This action was for the recovery of a commission on an alleged betting transaction. The plaintiff sued upon an agreement, and in answer to interrogatories alleged that the agreement was in writing, contained on a card and in two letters. The defendant applied for inspection of these under ord. 31, r. 15. The plaintiff objected that this amounted to discovery without the deposit of the security of £5, or the affidavit, as required by rule 26. Both master and judge held that this was a "sufficient excuse" for objecting to inspection under rule 18 of order 31, and on the ground that there was an established practice of the masters in chambers to refuse such applications without a further deposit of £5.

L. J. Pike, for the defendant, the appellant.—The appellant was entitled to inspection after the documents had been disclosed in the plaintiff's answers to interrogatories. It was an application for inspection, not for discovery.

A. V. Lawrence, for the plaintiff, the respondent.—Discovery of facts is allowed by interrogatories, discovery of documents is by another process—viz., on affidavit and by the deposit of security. This is an attempt to evade the payment of the second deposit, and to get the advantage of discovery under the process of interrogatories: *vide Compagnie du Pacifique* v. *Guano Co.*, W. N., 1883, p. 166, and the note to ord. 31, r. 26, in the Annual Practice, 1890.

Cur. adv. vult.

DENMAN, J.—I may say that in this case we have thought it right to speak to some of our brother judges and to one of the masters of great experience in chambers' practice, because it was said that the judge had been led to believe in this case that it was an established practice to refuse inspection of documents in applications similar to this without a deposit of £5 having been paid. But upon inquiry we find that there is no such practice established, and that the learned judge was misinstructed in being led to believe that it had been so settled. The application was made under ord. 31, rr. 15-18. Rule 15 says that "every party to a cause or matter shall be entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice or his solicitor, and to permit him to take copies thereof." Any party not complying with such notice is to be debarred from putting in such document unless by leave of the court, "or unless he shall have some cause or excuse—other than those mentioned—which the court or judge shall deem sufficient for not complying with such notice." Rule 16 gives the form of notice. Rule 17 regulates the time for inspection. Then comes rule 18, enacting that "If the party served with notice . . . objects to give inspection . . . the judge may, on the application of the party desiring it, make an order for inspection in such place or manner as he may think fit, and except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought."

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

It was contended that these rules did not apply to this case. The plaintiff here sued upon an agreement. The defendant obtained leave to interrogate him, upon the usual terms of a deposit of £5, as to "whether this agreement was verbal or in writing? and, if in writing, identify the documents?" In the plaintiff's affidavit of answers he alleged the agreement to be in writing and contained in certain documents, namely, a card and two letters. The defendant thereupon applied, under ord. 31, r. 15, for an inspection of these documents, but the plaintiff contended that this amounted to an application for discovery under the guise of interrogatories by which the defendant evaded the necessity of a second deposit of £5 required on application for discovery of documents. I do not say that there might not be cases in which, if the court found that any such evasion was being attempted, it would be justified in upholding the objection, but I cannot see that it is necessary to do so here. The affidavit mentioned in ord. 31, r. 15, is large enough to include answers to particulars which are on affidavit. Under that affidavit the plaintiff had referred to the documents in question. He practically admitted that he was suing upon a written agreement. Even under the old Common Law Procedure Act the defendant would have thereupon been entitled to inspection or to force the plaintiff to set out the documents upon which he relied. I see no reason why he should not be equally entitled to take advantage of this rule 15, which gives a right to inspection of documents disclosed or referred to in pleadings or "affidavits." This order should, therefore, be made, and the appeal be allowed.

WILLS, J.—I quite agree. I see no reason for limiting the use of the word affidavit in ord. 31, r. 15, as contended to an affidavit of documents. This was not an application for discovery, for that had already been obtained in the answers to interrogatories, but for the fruits of discovery. The plaintiff is too late also in form in objecting to this application. He should have done so by objecting to answer the interrogatory, though I do not see how that objection could have been sustained.

Appeal allowed.

Solicitor for the appellant, *R. H. King.*

Solicitor for the respondent, *C. R. S. Hooper.*

Court of Appeal.

From Q. B. Div. June 26.

In re AGRICULTURAL HOLDINGS (ENGLAND) ACT, 1883.
GOUGH *v.* GOUGH. (*a.*)

Landlord and tenant—Compensation for improvements—Payment by executors of deceased landlord—Right of executors to a charge on the land—"Designation of landlord"—"Parties"—Agricultural Holdings (England) Act, 1883 (46 & 47 *Vict. c.* 61), *ss.* 29, 61.

A landlord (tenant for life of an agricultural holding) died after the sum payable by him to an outgoing tenant as compensation for unexhausted improvements under the Agricultural Holdings (England) Act, 1883, *had been fixed. His executors paid the sum, and presented a petition asking that the holding should be charged therewith, under section* 29 *of the same Act.*

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

Held (reversing the decision of the Divisional Court, ante, *p.* 494), *that the executors, being "parties" to the proceedings, came within the "designation of landlord" under section* 61 *of the Act, and were therefore entitled to the charge.*

Appeal from the decision of the Queen's Bench Division (Cave, J., Vaughan Williams, J., dissenting), reported *ante*, p. 494.

John Gough, as tenant for life of a farm, let the same to a tenant from year to year. In March, 1889, the tenant gave notice to Gough of his intention to quit the farm at Lady Day, 1890, and in January, 1890, served upon him notice of a claim for £130 for unexhausted improvements under the provisions of the Agricultural Holdings (England) Act, 1883. On the 5th of April the amount payable by Gough to the tenant was fixed by valuers appointed under the provisions of the Act at £35. On the 8th of April Gough died, having up to that date been in receipt of the rent of the farm as tenant for life. On the 24th of April Gough's executors paid the £35 to the tenant. They then presented a petition in the Wells County Court asking for a charge upon the farm in respect of the £35 under section 29 of the Act. The remainderman opposed the petition, and the county court judge held that the executors were not the "landlord" within the definition given in section 61 of the Act, and were therefore not entitled to the charge.

On the appeal of the executors to a divisional court the learned judges differed, Cave, J., holding that the executors were not entitled to claim the charge, Vaughan Williams, J., holding that they were so entitled. The decision of the county court judge therefore stood.

The executors appealed.

The arguments sufficiently appear from the judgments.

H. F. Lawes, for the appellants.

McCall, Q.C., and *C. Garland*, for the respondents.

Lord ESHER, M.R.—This Act of Parliament is certainly not framed in such a way as to convey a clear meaning to the minds of ordinary people, but we must try to interpret it.

The appellants cannot succeed unless they can bring themselves within the last clause of section 61; for I agree with Vaughan Williams, J., that the definition of "landlord" would shut them out. The words in the definition clause (section 61) are "'landlord' in relation to a holding means any person for the time being entitled to receive the rents and profits of any holding; 'tenant' means the holder of land under a landlord for a term of years or for lives or for lives and years or from year to year." And "holding" is defined as meaning "any parcel of land held by a tenant." Now the result of that definition is that you cannot give any other meaning to the word "landlord" than that which is given in that definition. As to the word "tenant," besides the definition which I have read, the section provides that the word "includes the executors, administrators, assigns, &c., of a tenant"; but as to "landlord" the only word used is "means," and the word "landlord" in this Act means what it is there stated to mean, and that only.

But there is another clause in this section which is useless if considered in relation to those two definitions only, and must be intended to deal with something not included in those definitions: "The designations of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings taken under or in pursuance of this Act in respect of

compensation for improvements." There is, therefore, a time when the terms landlord and tenant are not to be strictly taken according to the definitions, but are to apply although the definitions would not apply. The question is whether in such a case as the present the word "parties" includes the executors of the landlord, who was here tenant for life of the property. It has been shown that the proceedings which are contemplated by this Act were begun in the lifetime of the tenant for life. They are to go on until their conclusion; before that happens the tenant for life dies. That event does not conclude the proceedings, but the executors thereupon become parties to the proceedings. Does the word "parties" in that clause mean parties to the original contract of tenancy only? Mr. McCall said that that was so. But this clause replaces a clause in the Agricultural Holdings Act, 1875, an Act which was repealed by the Act of 1883. The clause in the Act of 1875 is at the end of section 4, and provides that "the designations of landlord and tenant shall for the purposes of this Act continue to apply to the parties to a contract of tenancy until the conclusion of any proceedings," &c. But the clause in the present Act omits the words "to a contract of tenancy." That was a more limited expression than "parties" generally: the word is left at large by the later Act, and some effect must be given to that larger expression; "parties" includes a larger number of persons than "parties to a contract of tenancy." It must, however, be limited in some way, and I think that it means "parties to the proceedings"; it, therefore, includes executors whenever they have become parties to the proceedings. The executors of the landlord are not within the definition of landlord, yet if a question of compensation under this Act has arisen they are parties until the conclusion of any proceedings taken under the Act. This construction is a natural one, and carries out the intention of the Legislature, and avoids an injustice which has been described by my learned brethren on the bench during the argument as monstrous and senseless. I think, therefore, that the appeal should be allowed.

BOWEN, L.J.—I am of the same opinion, and would leave the matter as it stands were it not for the difference of opinion in the court below. I think that the construction arrived at by the Master of the Rolls is the one to which we are naturally borne, in spite of the obscurity of the Act. The first question is whether the executors are included within the definition of landlord in section 61. It was argued that since the executors of a tenant for life are entitled (under the Apportionment Acts) to recover from his lessees rent which had accrued at the date of his death, they are, therefore, to be considered as the landlord within this definition. I myself would shrink from saying that the Apportionment Acts are sufficient to bring executors within the definition of landlord in the Agricultural Holdings Act, but I express no opinion. There is still, however, the important paragraph at the end of the section which may bring them in, as justice certainly requires. What does the word "parties" mean in that clause? Mr. McCall said that it meant the parties who before were landlord and tenant. But we must look through the Act to see whether that construction does not make the Act a monstrosity. There is provision in the Act for a tenant making a claim for unexhausted improvements, and elaborate machinery is provided for arriving at the amount which ought to be paid. Is it conceivable that all that procedure is to be made useless if the landlord dies? It is admitted on the contrary, that the tenant does not lose his right if his landlord ceases to be landlord: is he to lose it if his landlord dies? Surely if the designations of landlord and tenant are to continue, they must apply to those who have succeeded to, and represent each of them. That was the case under the Act of 1875; there the executors were for all purposes to be deemed to be landlords. The present Act limits the scope of the term "landlord," but then the clause which deals with the continuance of these designations is altered, and I have come to the conclusion that this word "parties" must have been intended to have a wider sense, and to include this very case.

KAY, L.J.—The Agricultural Holdings Acts give to the tenant rights which he did not possess before to claim compensation from his landlord for unexhausted improvements. Under the Act of 1875 it was possible for the landlord and the tenant to contract themselves out of the Act. But the Act of 1883 went a step further and forbade that, and made the provisions of the Act binding on the landlord. It is clear that in the present case the executors were bound to pay the £35, and they did pay it. Turning to section 29 I find that these executors, if they can be brought within the term landlord, are entitled to obtain a charge upon the land for this £35. It was paid by them for unexhausted improvements of which the land would get the benefit—that is, the land of the remainderman—and out of which the estate of the tenant for life would get no benefit whatever. Can it have been intended that under this Act the landlord, if he is alive, can obtain a charge on the land, but if he has died his executors cannot obtain it? that they should pay out of his estate for improvements upon the land of the remainderman and yet get no charge upon the land which has been improved? I think that the language which I have used during the argument is not too strong to describe such a result. It is incredible that the Legislature should have intended that the Act should have that effect. But is that the necessary construction?

Turning to the definition of the word landlord, I think that it is probable that the executors do not come within it, and I do not rely upon that. It is argued that in the Agricultural Holdings Act, 1875, s. 4, "landlord" is defined so as to include the executors, and that that is not so in the present Act, whereas in the definition of "tenant" the words including the executors are still retained. That argument is worthy of attention, but there is another difference between these sections of the two Acts. [His lordship read the clauses in section 4 of the Act of 1875 and section 61 of the Act of 1883, commencing, "The designations of landlord and tenant," and continued:—] These clauses are like and yet very unlike; is not the reason for this alteration the fact that the executors of a landlord have been omitted from the definition of "landlord"? so that, although not within the definition, they may be within the designation as long as proceedings under this Act are going on. It seems to me that it was a mistake to say that a landlord should mean his executors, for the landlord's interest often ceases entirely at his death, and such a definition might therefore give rise to difficulties. But to say that the executors shall be included in the designation of landlord until the conclusion of proceedings under this Act makes the Act intelligible; for the proceedings are not determined by the death of a landlord who is tenant for life of the property, nor until this application for a charge has been made and disposed of. The result is that, this being a proceeding under the Act, the executors, as parties to that proceeding, are within the designation of "landlord" until the conclusion of the proceedings, and are entitled to this charge. I think that we are able to come to this conclusion without doing

olence to the construction of the Act, and I agree at the judgment of the Divisional Court should be versed.

Order accordingly.

Solicitors for the appellants, *Pilgrim & Phillips*, for . *F. Poynton*, Bristol.

Solicitors for the respondent, *Moon & Gilks*, for . *W. B. Leach*, Martock.

From Q. B. Div. April 25.

COMFORT *v.* BETTS. (*a.*)

ssignment of debt—Assignment subject to a trust—Assignment of debts for purpose of suing—Right of assignee to sue—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6.

By a deed made between the plaintiff and certain reditors of the defendant, which recited that the plaintiff ad agreed to take an assignment of the debts due from he defendant to the creditors upon the terms that he hould forthwith proceed to recover the same, and, upon ecovery, should pay to the creditors respectively the mount of their debts, or such part thereof as might have een recovered, the creditors assigned the debts to the laintiff absolutely. Notice of the assignment was given o the defendant.

Held, that this was an "absolute assignment not purorting to be by way of charge only" within section 25, *ub-section* 6, *of the Judicature Act*, 1873, *and that the laintiff was entitled to maintain the action.*

Application to set aside the verdict and judgment for the plaintiff, and to enter judgment for the defendant.

The plaintiff sued as assignee, under a deed of assignment, of debts, amounting in all to the sum of £70, due from the defendant to various tradesmen. The deed, after reciting that the assignors had respectively agreed to assign, and the assignee had agreed to take an assignment of, the respective debts in the schedule opposite their names upon the terms that the assignee should forthwith proceed to recover the same by action at law or otherwise, and upon recovery thereof should pay to the assignors respectively out of the aggregate amount recovered such proportionate part of such aggregate sum as should represent the individual debt due to them respectively, or such part thereof as might have been so recovered by the assignee, stated that in consideration of the premises the assignors assigned the said debts to the assignee absolutely. The plaintiff and the several creditors were parties to the deed. Notice of the assignment was given to the defendant.

At the trial before Pollock, B., and a jury the learned judge held that this was an absolute assignment within section 25, sub-section 6, of the Judicature Act, 1873, and the verdict and judgment were entered for the plaintiff.

Horace Browne, for the defendant.—This is not an absolute assignment. No beneficial interest was intended to pass to the assignee. There was no intention to pass any property in the debts at all. Section 25, sub-section 6, of the Judicature Act, 1873, was not applicable, and the plaintiff was not entitled to sue.

He referred to *Walker* v. *Bradford Old Bank*, 32 W. R. 644, 12 Q. B. D. 511; *National Provincial Bank* v. *Harle*, 29 W. R. 564, 6 Q. B. D. 626; *Harding* v. *Harding*, 34 W. R. 775, 17 Q. B. D. 442; Story's Equity Jurisprudence, s. 1039.

E. Morten, for the plaintiff.—The recital in the deed shows that the intention was to pass the legal property for the purpose of enabling the plaintiff to sue. The assignment was absolute, though the plaintiff might be a trustee of the moneys recovered from the defendant. The case of *National Provincial Bank* v. *Harle* was doubted in *Burlinson* v. *Hall*, 32 W. R. 492, 12 Q. B. D. 347; and this latter case was followed in *Tancred* v. *Delagoa Bay Railway Co.*, 38 W. R. 15, 23 Q. B. D. 239.

Horace Browne replied.

Lord ESHER, M.R.—But for the Judicature Act, 1873, these debts, which are *choses in action*, could not be assigned at law. Since that Act this can be done, and in the present case each of these creditors has assigned his debt to the plaintiff. At first I thought that if such a thing could be done with the sole object of enabling the assignee to sue for all the debts in one action, it might lead to mischievous results, as the assignee might thereby be enabled to sue in the High Court, whereas if each creditor had to sue alone he would have to bring his action in the county court. That seemed to me at first as likely to lead to mischievous results, more especially in a university town. But the words of the section are clear. This deed is in form an absolute assignment of each debt to the plaintiff. It was intended by the parties to be an absolute assignment of the debts to him, subject to a trust in favour of the assignors when the debts were recovered. It was intended that the legal property in the debts should be assigned to the plaintiff. Therefore, it is in form an absolute assignment, and it was intended by the parties to be an assignment. It seems to me that the case comes within the words of the section. Upon reflection I cannot see that any injustice will be done by giving the words their ordinary meaning, and I do not see that any inconvenience or mischief will be caused thereby. The assignment, therefore, comes within the section, and the plaintiff is entitled to recover.

FRY, L.J.—Section 25, sub-section 6, of the Judicature Act of 1873 for the first time enabled the owner of a debt or *chose in action* to assign the legal right to that debt or *chose in action*. The necessary requirements were that there must be an absolute assignment not purporting to be by way of charge only; and express notice in writing of the assignment must be given to the debtor. The assignment would then take effect as from the date of the notice. The question is whether the assignment in the present case is an absolute assignment not purporting to be by way of charge only. The deed purports to be an absolute assignment. It is quite true that a trust is constituted for the assignors of the moneys recovered from the debtor. Nevertheless, the intention was that the assignment should be absolute in point of form, and that the assignee should have all the rights of an assignee under the Judicature Act. Therefore, in form it was an absolute assignment, and the intention of the parties was that there should be an absolute assignment subject to a trust. I know of no objection to the owner of a legal *chose in action* converting himself into an equitable owner of it. Before the Judicature Act a *chose in action* could not have been assigned at law. But before that Act it was a common practice for the owner, for instance, of leasehold property to assign it to an assignee in trust for himself. There were many advantages in pursuing this course rather than acting by power of attorney; for instance, it would preclude any question arising

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

by reason of the death of the assignor. Therefore, in the corresponding cases before the Judicature Act there was no objection to this being done. It seems to me clear that that was the intention of the parties in this case, and I can see no objection to it. The deed was intended to pass the legal property in the debts and it did so. I am aware that we may be opening the door to a new course of business. Whether that will be convenient or not is not for us to say. The court must not weigh the balance of conveniences. In the present case the defendant would be in no better position if he were sued in a number of actions in the county court instead of being sued in one action in the High Court.

LOPES, L.J.—I concur. In my opinion this is an absolute assignment within section 25, sub-section 6, of the Judicature Act, 1873. The deed is in form an absolute assignment, and it passed the legal right to the *choses in action* to the assignee. That being so, it comes within the section, all the requirements of the section having been complied with, and the plaintiff is entitled to sue. I was at first impressed during the argument with the possible inconvenience of so holding, especially in the case of universities. But upon reflection I cannot see the inconvenience. The defendant in this case will be better off than if he were sued in a number of actions in the county court. Moreover the same result might be achieved, though not so effectively, by means of a power of attorney.

Application refused.

Solicitors for the plaintiff, *Clement Cheese & Green.*

Solicitor for the defendant, *J. A. Hales.*

From Q. B. Div. April 15.

LEVASSEUR AND ANOTHER *v.* MASON & BARRY (LIMITED). (*a.*)

Practice—Receiver—Receivership order obtained by judgment creditor—Effect of—Foreign bankruptcy.

The defendants having recovered judgment against a French company, domiciled and carrying on business in France, an order was made, on the ex parte *application of the defendants, for the appointment of a receiver to receive the interest of the French company in certain copper belonging to the company in the possession of persons in England who had a lien upon it. Shortly afterwards a decree of judicial liquidation was pronounced by the French court against the company, and the plaintiffs were appointed liquidators. The copper was then sold, and the proceeds, after discharging the lien, were paid into court. In an interpleader issue to determine the right to the proceeds,*

Held (affirming the judgment of Day, J.), *that the effect of the receivership order was to give the defendants a title to the copper or its proceeds at the date when the order was made, subject to the lien and to any prior claims upon the copper; and that, as the title of the plaintiffs arose subsequent to that order, the defendants were entitled, as against them, to the proceeds.*

Appeal from the judgment of Day, J., in favour of the defendants upon an interpleader issue.

The plaintiffs were the liquidators of the Société des Métaux, a company domiciled and carrying on business in France, and the question in the issue was whether the plaintiffs or the defendants were entitled to a sum of £9,468 paid into court.

On the 4th of April, 1889, the defendants recovered judgment in England against the Société des Métaux for £42,090, the price of copper sold and delivered to the société.

On the 8th of April, 1889, the defendants applied *ex parte* at chambers for and obtained an order appointing a receiver to receive the interest of the société in certain copper belonging to the société in England in the possession of the Tharsis Sulphur and Copper Co. (who claimed a lien upon it for work and labour done), the appointment to operate at once, but to be without prejudice to the rights of any prior incumbrancers, and directing the receiver to pay the balance appearing due on his accounts in or towards satisfaction of what should for the time being be due in respect of the judgment for £42,090. Notice of this order was served on the Tharsis Co. on the 9th of April.

On the 15th of April, 1889, while the copper was still in the possession of the Tharsis Co., a decree of judicial liquidation was pronounced by the French court against the Société des Métaux, and the plaintiffs were appointed judicial liquidators. The liquidators then applied to set aside the receivership order, but the application was refused, the court, however, varying the receivership order by adding thereto a direction that the receiver should not pay out anything received under the order without the direction of the court. This order was affirmed by the Court of Appeal.

On the 11th of May, 1889, the defendants sent in a proof for £42,090. without giving credit for any lien or charge, in the liquidation in France, and the proof was admitted.

The plaintiffs, as liquidators of the société, having claimed the copper subject to the lien of the Tharsis Co., an order was made that the copper should be sold, that the lien of the Tharsis Co. should be satisfied out of the proceeds, and that the balance in the hands of the receiver should be paid into court, and that the present issue should be tried as to whether the plaintiffs or the defendants were entitled to the money in court.

Day, J., held that the defendants were entitled under the receivership order and gave judgment for them.

The plaintiffs appealed.

Sir H. Davey, Q.C., and *Kennedy, Q.C.* (*Tindal Atkinson* with them), for the plaintiffs.—The effect of a receivership order is merely to hold the property *in medio;* no mortgage, charge, or lien was created. Before anything had been done under the order—before any copper had been received, a decree of judicial liquidation was pronounced against the Société des Métaux in France. The property in the copper which was being held *in medio* under the receivership order vested in the plaintiffs as judicial liquidators. The court had no jurisdiction to make an *ex parte* order affecting the title to the property. The liquidation in France, which the courts here will recognize, vested the property in the plaintiffs before the defendants had gained any title under the receivership order.

They referred to *Ex parte Charrington*, 37 W. R. 130, 22 Q. B. D. 187; *In re Shephard*, 38 W. R. 133, 43 Ch. D. 131; Judicature Act, 1873, s. 25, sub-section 8; ord. 50, rr. 15a, *et seq.*

[They also contended that, upon the evidence as to the French law, the liquidation related back for ten days and avoided the receivership order; and, secondly, that the defendants, by proving for the full amount of their claim in the French liquidation had forfeited their rights under the receivership order.]

Sir C. Russell, Q.C., Finlay, Q.C., and *F. W. Hollams*, for the defendants, were not called upon.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Lord COLERIDGE, C.J.—This case seems to me to be determinable according to English law. The receivership order, when it was made, must be taken to be an ascertainment or decision by the court that the defendants were entitled to the property, the subject-matter of the order. A receivership order is a process of equitable execution, as it has been called; in other words, it shows that the party obtaining it would be entitled to execution upon the property in question but for some legal impediment standing in the way. In the present case the receivership order was obtained at a date when the French liquidation had not arisen, and, in my opinion, the order must be taken as ascertaining from that date the right of the party obtaining it to the property in question. The defendants were unable to take the property in execution because it was in the possession of persons who had a lien on it. But the right to take it in execution as soon as the legal impediment was removed was determined by the order. When the lien was discharged the right to the copper or its proceeds was complete. [His lordship then said that the difficulties which might have occurred upon the application of the French law did not arise, as he agreed with Day, J., that it was not proved that, according to French law, the French liquidation, which occurred within ten days after the receivership order, related back so as to avoid the receivership order; nor was it proved that, according to French law, the sending in of a proof in the French liquidation was an irrevocable act which forfeited the defendants' rights under the receivership order.] The two points, therefore, upon the French law cannot avail the plaintiffs, and the judgment of Day, J., must be affirmed.

Lord ESHER, M.R.—The present defendants, having recovered judgment against the Société des Métaux, would have been entitled to issue execution against the copper in question if the Tharsis Copper Co. had not had a lien upon it. Before the Judicature Act the judgment creditors would have invoked the assistance of the Court of Chancery, and the court would have appointed a receiver. The receiver would not have been able to obtain the copper until the lien was satisfied, but the moment the lien was satisfied he would obtain possession. The object of the receivership order was to do away with the difficulty of obtaining possession of the goods. Though that is sometimes called equitable execution, in one sense it is not execution at all. It is simply a process to get rid of the difficulty of issuing execution at law. Since the Judicature Act there is no necessity to go to the Court of Chancery. The same court which gives judgment can now make a receivership order, which has the same effect as the receivership order made by the Court of Chancery. The defendants accordingly obtained a receivership order, and subsequently to the order a decree of judicial liquidation was pronounced against the Société des Métaux in France. The liquidators having claimed the copper after the lien upon it had been satisfied, the present issue was directed to be tried. If the French liquidation had occurred before the receivership order was made, the English courts would have recognized the rights of the French liquidators as against the defendants, if the French law vested the property in them. The defendants, however, contend that their rights were settled by the receivership order, and that as that order was prior in date to the French liquidation their rights are superior. That raises the question as to the effect of a receivership order. The receivership order, as I have stated, is made for the purpose of having the property handed over to the judgment creditor when the legal impediment is removed. The order may direct the receiver to receive the property and hand it over to the judgment creditor. The court, however, may hold its hand, and in view of any possible claimants may refrain from making an order to hand over the property. In the present case the court ordered the receiver not to pay out anything received under the order without the direction of the court. But the moment the order is made for the receiver to pay the proceeds to the defendants that order relates back to the date when the receivership order was made. That date was prior to the French liquidation, and the receivership order takes effect from that date. Unless, therefore, the two points taken by the plaintiffs upon the French law are made out, the defendants' rights have priority. [His lordship then said that he agreed with Day, J., that upon the evidence it was not proved that the French law was as contended for by the plaintiffs; and that if the French law had been as contended for, a serious question would have arisen whether the English courts would give effect to that law.]

FRY, L.J.—The defendants would have had a right of immediate execution under their judgment against the copper in question if it had not been for the lien of the Tharsis Copper Co. The receivership order was then obtained, which, as amended, directed that the receiver should not pay anything received by him without the direction of the court. No doubt down to the present time no direction to pay has been given, but the question is whether that direction ought not to be given, because, if so, the court must deal with it as though it had been given. It is not contended that, as matters stood on the 8th of April, the defendants had not a perfect right to this receivership order and to the payment of the moneys received by the receiver under it. It seems to me to make no difference that this is a receivership order made in the action instead of what would have been the case if it had been made under the old proceedings in Chancery before the Judicature Act. Then, as now, such an order was only made in the event of the judgment creditor proving a *primâ facie* title to execution against the goods of the judgment debtor at the date when the receivership order was made. Although under the old practice the cause was brought to a hearing, and a direction then given as to the moneys received, the court went back to the date of the appointment of the receiver, and considered who at that time was entitled to the moneys—in other words, who was entitled to execution at that time. In such a chancery suit the only question to be determined was, who was entitled at the time of the appointment of the receiver? It is not denied that according to English law the defendants would have been entitled to execution upon this copper, had it not been for the legal impediment in the way. It follows that they were entitled in equity to the proceeds of those goods, as soon as the legal impediment was removed, as from the date of the appointment of the receiver. In my opinion it makes no difference that in this case the receivership order does not direct payment. I agree with the argument that until the order for payment is made the receiver holds the property *in medio;* but when the court comes to determine the ultimate rights of the parties it must have regard to the question whether or not the defendants had, at the date of the appointment of the receiver, a right to the receivership order. If they had, they are entitled to the moneys; if they had not, they are not entitled. That seems to me to be the effect of the receivership order according to English law. [His lordship then said that he was unable to differ from the findings of Day, J., upon the two points raised upon the French law. If the French law had been proved as asserted, the court would have had to consider whether it

would recognize and give effect to that law on those points.]

Appeal dismissed.

Solicitors for the plaintiffs, *Murray, Hutchins, & Stirling.*

Solicitors for the defendants, *Hollams, Sons, Coward, & Hawksley.*

From Chan. Div. April 30.

GEDYE v. COMMISSIONERS OF HER MAJESTY'S WORKS AND PUBLIC BUILDINGS. (a.)

Lands Clauses Consolidation Act—Compulsory taking of land—Payment of purchase-money into court—Payment out to person in possession—Land sold as freehold—Leasehold title adduced—Absence of claim by reversioner—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 79.

G., whose house had been compulsorily taken in 1865, *by a public body in pursuance of powers conferred upon them by Acts of Parliament, had claimed to be the owner of the house in fee, but could only adduce a title to the residue of a long term of years expiring in* 1878, *and the purchasers paid into court a sum representing the value of the reversion in fee. G., after the expiration of twelve years from the end of the term, claimed to be entitled to have the money in court paid to him (he having already received the value of the leasehold interest) as being the person "in possession" of the house within the meaning of section* 79 *of the Lands Clauses Consolidation Act,* 1845, *it not being known who the reversioner was.*

Held, that G., never having been in possession of the reversion, was not so entitled.

Ex parte Chamberlain, 28 *W. R.* 565, 14 *Ch. D.* 323, *doubted.*

Decision of North, J. (35 *S. J.* 295), *affirmed.*

Appeal from North, J.

This was an appeal by an assignee of the plaintiff from a decision of North, J., refusing an application for the payment out to him of a fund in court, under the following circumstances:—

The plaintiff, Gedye, purchased a house, No. 13, Clement's-lane, in 1856, which was assigned to him on the 6th of May in that year.

At the time of the purchase it was stated by Gedye's vendor that his title was derived under a long term of years, the exact date of the commencement of which was not known, but that there was a recital in an old deed to the effect that at Michaelmas, 1771, the term had still 107 years to run. The house was assigned to Gedye for the residue of the term, and for all other the interest of the vendor (if any).

For many years previously Gedye's predecessors in title had paid no rent for the house, and after his purchase no rent was ever paid. It was not known who the reversioner was.

Under these circumstances Gedye believed that he would, by virtue of the Statute of Limitations, become the absolute owner of the house in fee simple, and he acted as if he were the absolute owner by granting a lease of the house to a tenant for a term of twenty-one years from Michaelmas, 1863, which extended six years beyond his own term.

Under the Courts of Justice Concentration (Site) Act, the defendant commissioners were empowered to acquire certain property, including Gedye's house, for the purpose of a site for the concentrated courts of justice; and with this Act the Lands Clauses Consolidation Act, 1845, was incorporated.

The commissioners gave notice to Gedye that they required to take his house. He sent in a claim for compensation on the footing of his being the owner of the house in fee, and on the 23rd of April, 1866, the compensation was assessed by a jury at £1,205.

On the 13th of October, 1866, Gedye sent an abstract of his title to the commissioners' solicitors. In the course of investigating this title, and the title to some adjoining houses, which had also been taken by the commissioners, the solicitors discovered that in July, 1578, a plot of land, upon which Gedye's house and some adjoining houses were afterwards erected, was demised by one Clifton to one Crouch for the term of 300 years from the 24th of June, 1578, at the annual rent of £5 for the whole plot. A claim for compensation was sent in to the commissioners on behalf of some persons who alleged that they were the owners of the reversion in fee subject to the lease, but the claim was not prosecuted.

The commissioners declined to pay Gedye the amount which had been assessed as compensation on the footing of his being the owner of the house in fee, and in 1867 he commenced this suit in the Court of Chancery, claiming the specific performance of the contract by the commissioners for the purchase of his house.

On the 9th of March, 1869, on the further consideration of the suit, an order was made (by consent, and without prejudice to the plaintiff's claim to the reversion) that the value of the plaintiff's leasehold interest in the house should be taken to be £500, and that on payment of this sum to him he should assign his leasehold interest to the commissioners; and it was further ordered that the commissioners should, on or before the 30th of April, 1869, pay into court the sum of £705 as the value of the reversion in fee simple expectant on the determination of the plaintiff's term. The £705 was to be invested and the dividends accumulated.

On the 22nd of March, 1869, the commissioners paid the £705 into court, and executed a deed poll under section 77 of the Lands Clauses Consolidation Act, 1845, vesting the reversion in themselves.

In 1890 a person to whom Gedye had assigned his interest applied by a summons in the suit, asking that the fund in court, which had arisen from the investment of the £705 and the accumulation of the dividends thereon, might be paid to him.

Since the expiration of the term of 300 years in June, 1878, no claim had been made to the reversion in fee of the house.

This summons was heard by North, J., on the 2nd of February, 1891.

North, J., held that the applicant had not made out any title to the reversion. The term had expired and Gedye had been paid for his interest in it. Neither Gedye nor the applicant ever had any inchoate title by possession of the reversion, and, therefore, such a case as *Ex parte Chamberlain*, 28 W. R. 565, 14 Ch. D. 323, did not apply. The claimant had never had any possession of the reversion, actually or constructively. He had been in possession only as termor.

From that decision the claimant now appealed.

Cozens-Hardy, Q.C., and *Borthwick*, for the appellant.—By virtue of section 79 of the Land Clauses Consolidation Act, 1845, the appellant would have been entitled, and here the order for payment out in respect of the leasehold interest was made expressly by consent and without prejudice to his claim. He ought to be in the same position as the owner of the

(a.) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

fee, it being reasonably clear that he would have become entitled to it.

They cited *Ex parte Winder*, 25 W. R. 768, 6 Ch. D. 696, and *Ex parte Chamberlain*.

Vaughan Hawkins, for the respondents, was not called upon.

LINDLEY, L.J.—This is an ingenious attempt by the appellant to get what does not belong to him. Mr. Gedye was entitled to the unexpired residue of a long term, which would run out in 1878. In 1864, regarding himself as owner in fee, he granted a lease of the property for twenty-one years; but in 1865, before the expiry of his term, the land was compulsorily sold under the Lands Clauses Act, when it was clearly found that he had a title to the unexpired term only, and not to the fee. The value of the fee simple was found to be £1,205, of which a sum of £500 was paid to him as representing the leasehold interest, and £705 was paid into court as the value of the reversion in fee. Some further time has elapsed, and no reversioner has appeared, and this sum in court is now claimed by this applicant, who has no more right to it than I have, under section 79 of the Lands Clauses Consolidation Act, for he has clearly no common law right to it whatever.

This section runs thus: "If any question arise respecting the title to the lands in respect whereof such moneys shall have been so paid or deposited as aforesaid, the parties respectively in possession of such lands, as being the owners thereof, or in receipt of the rents of such lands, as being entitled thereto at the time of such lands being purchased or taken, shall be deemed to have been lawfully entitled to such lands until the contrary be shown to the satisfaction of the court; and, unless the contrary be shown as aforesaid, the parties so in possession, and all parties claiming under them, or consistently with their possession, shall be deemed entitled to the money so deposited, and to the dividends or interest of the annuities or securities purchased therewith, and the same shall be paid and applied accordingly."

Now the appellant clearly is not, and never was, in a position to bring himself within this section, for Mr. Gedye was not in possession as owner in fee, but as a termor. It has been decided by Hall, V.C., in *Ex parte Winder*, that a party in possession, and against whom no claim is made till after the expiration of twenty years from the time of his taking possession, was entitled to the purchase-money for the fee simple, the land having been taken compulsorily by a railway company. In *Ex parte Chamberlain* Bacon, V.C., went further, and I doubt whether the evidence of possession in that case was sufficient to justify the decision. But be that as it may, Mr. Gedye was never in possession as owner. The appeal must be dismissed.

BOWEN, L.J.—The claimant has no more claim to the reversion than I have, except on the ground that, if things had gone otherwise, Mr. Gedye (his assignor) might have stayed on after his lease had expired, and after twelve years of possession by wrong, that wrong might have ripened into right, there being possibly no persons who could establish their right to the reversion. But all this never happened, and one finds here merely an expectation which has never been realized. I gravely doubt the correctness of the decision in *Ex parte Chamberlain*.

KAY, L.J.—The appellant says that it makes a difference in this case that the sale of the interest was not a voluntary one. It is the first time that I have heard that this Act alters the rights and title of a vendor under it. Section 79 simply provides that the party in possession is to be entitled to the purchase-money if someone else does not make out a better title to the property; but it cannot give the fee simple to a leaseholder. Mr. Gedye never had that possession which could ripen into a fee simple.

Solicitors, *C. M. Hotson; The Solicitor to the Treasury*.

From Chan. Div. Feb. 25.

DANIEL v. FERGUSON. (a.)

Injunction—Mandatory injunction—Altering status quo *after notice of motion for injunction.*

The defendant in a light and air case, after receiving notice of motion for an interlocutory injunction, put on a number of men, who worked night and day, and ran up his building to a height of nearly forty feet before he received notice that an injunction had been granted against him.

Held (affirming the decision of Stirling, J.), *that he ought to be ordered to restore the* status quo ante *by pulling down the building at once, without reference to the question, to be decided at the trial, whether the plaintiff was entitled to the access of light and air which he claimed.*

Appeal from Stirling, J.

The action was to restrain the defendant from building so as to diminish the plaintiff's access of light and air.

It appeared that the plaintiff was the leaseholder on long terms of years of three adjoining houses in Hereford-road, Bayswater, and that in September, 1890, the defendant was preparing to erect on an adjoining plot of ground a large building which the plaintiff considered would diminish the access of light and air to his houses. The plaintiff accordingly issued his writ, and with it, on Saturday, November 29, by leave of the court, served on the defendant a notice of motion for an interlocutory injunction for the following Friday. Within two hours from the receipt of that notice the defendant put on a large gang of men, who, by working all Saturday afternoon and through the night, and the greater part of Sunday and Monday, ran up a wall on the plot of ground adjoining the plaintiff's houses to a height of thirty-nine feet. The plaintiff, hearing of what was being done, applied on the Monday *ex parte* for an *interim* injunction till the following Friday. That was granted, and it was not till receipt of notice of that injunction that the defendant ceased building up the wall.

When the motion for the interlocutory injunction came on before Stirling, J., it was shown that the access of light to the plaintiff's houses would be materially diminished by the defendant's building, but the defendant contended that the plaintiff had no right to the access of light and air which he claimed.

It appeared from the evidence that the plot of ground on which the defendant was now building had been demised by one Jenkins, in 1841, to James Bott for a term of eighty years, and had been sub-leased by him, in 1860, for a term of sixty years. In 1866 Bott died, and in 1884 the residue of the eighty years term, which had remained in his executors in the meantime, was assigned to the predecessors in title of Ferguson, the defendant, and they had since acquired also both the residue of the sixty years' term and the fee. It further appeared that the land on which the plaintiff's houses stood had been demised in

(a.) Reported by R. H. DEANE, Esq., Barrister-at-Law.

1854 to the same James Bott by the trustees of the Bishop of London's Paddington Estate, and that this term also had remained vested successively in Bott and his executors till the year 1882. At that date it became the property of the plaintiff's predecessor in title.

Upon that state of facts the defendant contended that there had been a unity of interest in the two properties existing in James Bott and his executors from 1854 to 1882 which prevented or suspended the acquisition by prescription of any right to access of light and air to the plaintiff's houses.

Stirling, J., granted an injunction to restrain the defendant until judgment or further order from building so as to darken the light of the plaintiff's houses, and from permitting the wall which had been run up in the manner described to remain on the defendant's land.

The defendant appealed from that order.

Horace Kent, for the appellant.—There was such a unity of interest in Bott as to prevent the Prescription Act applying: *Clay* v. *Thackrah*, 9 Car. & P. 47. The authorities are clear that where there is unity of possession no easement of light can be acquired. Bott could not acquire an easement over land leased to himself, though it was not in his own occupation. [KAY, L.J.—You would have had no right to build as against the Bishop of London, and, therefore, there was no unity of interest for all intents and purposes.] A tenant cannot acquire rights by prescription as against his landlord: *Outram* v. *Maude*, 29 W. R. 818, 17 Ch. D. 391. Every interest in Jenkins's land is now vested in the appellant, including the sublease to Underwood for sixty years, as well as Bott's underlease from Jenkins, and the fee. The plaintiff has only got seven years' prescription. The cases show that unity of interest without actual possession is sufficient, though no doubt if the right has been already acquired it is only suspended, and not destroyed, even by unity of possession: *Simper* v. *Foley*, 2 J. & H. 555, 10 W. R. Ch. Dig. 23. But here it had not been acquired. At all events a mandatory injunction to pull down will not be granted on an interlocutory application.

Buckley, Q.C., and *Frank Watson*, for the respondent, were not called upon.

LINDLEY, L.J.—I think this appeal should be dismissed without going into the question whether the plaintiff is entitled to the access of light which he claims. It is admitted that his lights are ancient, but it seems that there is some question whether there has not been a unity of possession such as to prevent his acquiring the easement he claims. The plaintiff asked for an injunction in order that the *status quo* might be maintained until the trial, and he made out a *primâ facie* case entitling him to what he asked. Thereupon the defendant, having received notice that the plaintiff was going to ask for such an injunction, puts on a gang of men and runs up a wall thirty-nine feet high between receipt of that notice on Saturday morning and receipt of notice of the granting of an *interim* injunction on the following Monday. Under those circumstances I think the judge was quite right to make an order to preserve the matter as it was when the defendant received the notice of motion. I should not think it right to say anything, to throw the slightest doubt on the right of the court to order a building to be pulled down in such a case.

KAY, L.J.—I quite agree. There will be questions of some nicety to be decided at the trial, but this is not the time to decide them. After the defendant had had notice that the plaintiff was going to apply for an injunction, he determined to alter the *status quo* before the matter came into court, and accordingly he put on a gang of men to work all through Saturday night and the greater part of Sunday and Monday so that by the time he received notice that an *interim* injunction had been obtained against him he had run up the wall to the height of thirty-nine feet. Now, whether he turns out at the trial to be right or wrong on the merits, he ought to be ordered to pull down that wall on the ground that in doing what he did, he was endeavouring to make it difficult for the court to preserve the *status quo*. He was trading on the supposed reluctance of the court to order a building once erected to be pulled down. I have always thought that such conduct ought to be dealt with severely. If we altered the order under appeal it would encourage other people to act in that way, because they would say the court was reluctant to order buildings to be pulled down. I am not at all reluctant to order this wall to be pulled down whatever the result of the case may be at the trial. The appeal will, therefore, be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Hatt & Co.*

Solicitor for the respondent, *G. Cheesman.*

High Court of Justice.

Chan. Div. } April 15, 21.
Chitty, J. }

COXON v. GORST. (a.)

Company—Winding up—Order for dissolution—Action by creditors against late directors—Fraud—Companies Act, 1862, *s.* 111.

After a company has been completely wound up, and an order for dissolution of the company obtained, a creditor, in the absence of fraud, has no cause of action against the late directors to recover assets alleged not to have been got in pending the winding up.

Motion.

The plaintiff was a creditor of a company, which had been ordered to be wound up, at the date of the winding up. The liquidator had obtained an order under section 111 of the Companies Act, 1862, dissolving the company.

The plaintiff commenced an action against the directors and the official liquidator. The statement of claim alleged that the directors had made payments of dividends out of capital and had received part thereof for themselves, and other matters; the object of the action being to recover assets of the late company not got in during the winding up, and to have such assets distributed among the plaintiff and the other creditors of the company.

The defendants in their defence denied the allegations in the statement of claim, and stated that the company had been completely wound up, and that all its available assets had been got in and accounted for.

The defendants now moved that the statement of claim might be struck out, on the ground that it disclosed no reasonable cause of action.

Byrne, Q.C., and *Stack*, for the motion, referred to *In re Pinto Silver Mining Co.*, 26 W. R. 622, 8 Ch. D. 273; *In re London and Caledonian Marine Insurance*

(a.) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Co., 27 W. R. 713, 11 Ch. D. 140; *Mills* v. *Northern Railway of Buenos Ayres Co.*, 19 W. R. 171, L. R. 5 Ch. App. 621; The Companies Act, 1862. s. 142; The Companies Act, 1880, s. 7, sub-section (4).

C. Macnaghten (*Byrne, Q.C.*, with him), for directors in the same interest.

Farwell, Q.C., and *Hamilton*, for the plaintiff.—The dissolution of a company does not deprive the court of its jurisdiction over the company: *In re Crookhaven Mining Co.*, 15 W. R. 28, L. R. 3 Eq. 69; *Evans* v. *Coventry*, 8 De G. M. & G. 835, 5 W. R. Ch. Dig. 40; *In re National Funds Assurance Co.*, 27 W. R. 302, 10 Ch. D. 118; *Cavendish Bentinck* v. *Fenn*, 36 W. R. 641, 12 App. Cas. 652.

Byrne, Q.C., replied.

CHITTY, J.—This action may be disposed of on the short ground that it is barred by the order of the court in the winding up whereby the company was dissolved. The plaintiff purports to sue on behalf of himself and all other the creditors of the company. This is obviously wrong, the company has ceased to exist. If this were a matter of form only it could be remedied by amendment, but it is a matter of substance. The defendants are, persons who had been or were directors of the company previously to or at the date of the order to wind up, and the person who was the official liquidator of the company down to the order dissolving the company.

The object of the action is to recover assets of the late company alleged not to have been got in pending the winding up, and to have such assets distributed among the plaintiff, and the others on whose behalf he is suing. In other words, it is an action for a further and complete winding up of the affairs of the company.

The assets sought to be recovered are the sums alleged to have been wrongfully paid by the directors out of capital by way of dividends. In fairness to them it ought to be stated that they are not charged with fraud in making the alleged payments, the only charge against them is that they did not take proper precautions before the dividend was paid to ascertain that the capital was left intact. Such a claim might have been made in the winding up under the 165th section of the Act of 1862. So far as anything to the contrary appears in the statement of claim, the question of the liability of the directors may have been duly considered in the winding up. No relief is sought against the late liquidator except possible costs.

Such, then, is the relief sought in an action in which an attempt is made to impeach the order dissolving the company. The only allegation against the order is the immaterial statement that it was made without the knowledge or consent of an informal committee of creditors, who had no authority by statute or otherwise. Where a voluntary winding up of the company had been dissolved pursuant to section 142 of the Companies Act, 1862, it has been decided by the Court of Appeal that the court has no jurisdiction to make an order on petition for winding up by the court unless the dissolution can be impeached on the ground of fraud: *In re Pinto Silver Mining Co.; In re London and Caledonian Marine Insurance Co.* These decisions apply in full force to a dissolution by order of the court in a winding up by the court. Consequently, the plaintiff, who does not even allege fraud, cannot proceed by petition for a discharge of the order of dissolution, and for a continuance of the winding up by the court. But it is argued that he is at liberty to proceed by an action in which he does not impeach the order of dissolution. In my opinion, he cannot. Putting fraud aside, the creditors of a company are bound by the proceedings in a winding up, and the orders made therein. The 111th section of the Companies Act, 1862, enacts that "when the affairs of the company have been completely wound up, the court shall make an order that the company be dissolved from the date of such order, and the company shall be dissolved accordingly." The 66th rule of the General Orders of November, 1862, directs that when the official liquidator has passed his final account, and the balance (if any) due thereon has been paid, a certificate shall be made by the chief clerk that the affairs of the company have been completely wound up, and that in case the company has not been already dissolved the official liquidator shall, immediately after such certificate shall become binding, apply to the judge for an order that the company be dissolved from the date of the order. The statement of claim does not mention any certificate, but it must be presumed, in the absence of any statement to the contrary, that the order for dissolution in this case was rightly obtained.

According to the authorities above cited a creditor cannot deny that the affairs of the company have been fully wound up where the dissolution is a voluntary winding up under section 142 and no fraud is alleged. *A fortiori* he cannot do so where the dissolution is in a winding up by the court and no fraud is alleged. The plaintiff, therefore, being bound by the order, cannot be permitted, whatever be the form of his proceeding, whether by action or petition, to allege that the winding up is not complete. I must not be supposed to assent to the argument that a creditor can proceed by action to recover from directors capital wrongfully paid away in the shape of dividends where the company still exists; but, assuming, notwithstanding Lord Hatherley's decision in *Mills* v. *Northern Railway of Buenos Ayres Co.*, that he can, and assuming that the principle of the decision in *Evans* v. *Coventry*, where the plaintiff, as one of the assured, had a contract affecting the capital of the insurance company or partnership, would apply, I am of opinion that no such action can be maintained where the company has been dissolved. The plaintiff cannot sue without making the company a party, and the existence of the company having been put an end to by the operation of the statute, he cannot sue at all; where the company still exists the capital wrongfully paid away would have to be restored to the company's coffers, if it was a going concern, or paid to the official liquidator or into court if the company was being wound up by the court.

The statement of claim contains an allegation, possibly with a view to get over this difficulty, to the effect that the right to recover the amount alleged to have been wrongfully paid away is a *chose in action* which, on the dissolution of the company, passed to the creditors. This supposed vesting in the creditors of the company's *chose in action* is a mere fiction, with nothing in the statute to support it, and is in the teeth of the provisions of the statute.

The result is that the affairs of this company have been completely wound up, and the company itself has been duly dissolved. Consequently the amended statement of claim discloses no reasonable cause of action, and the action must be dismissed as against the moving defendants, with costs.

Solicitors, *Turnbull, Tilly, & Mousir; Newman, Hays, & Co.; Bedford, Monier Williams, & Robinson.*

Chan. Div. } Jan. 23, 28, 29; Feb. 17.
Chitty, J. }

PERRY v. EAMES.
SALAMAN v. EAMES.
MERCERS' COMPANY v. EAMES. (a.)

Easement—Ancient lights—Crown—Crown land—Sale by trustees—Prerogative—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *ss.* 1-3.

Land was held in trust for the Crown from a period prior to the Prescription Act. The Crown is not named in section 3 *of that Act.*

Held, that no prescriptive right to the access of light over the land to adjoining buildings had been acquired against the Crown during its beneficial ownership, although the legal estate therein was not vested in the Crown, and that purchasers from the Crown were entitled to build thereon so as to interfere with the access of light.

Motion treated as trial of action.

In the year 1820 the site of the old Bankruptcy Court in Basinghall-street was purchased by the Government out of moneys provided by Parliament, and was conveyed to trustees for the Crown.

The conveyance was confirmed by an Act passed in the 1 & 2 Geo. 4, c. 115. The buildings were then erected and used for the purposes mentioned in the Act.

In 1886 the site was sold to the Corporation of the City of London by the Crown, and in 1890 became vested in the defendant Eames under a building agreement from the Corporation of the City of London.

The defendant commenced to erect buildings on the site which obstructed the access of light to windows in opposite buildings belonging to the plaintiffs, and these actions were brought for an injunction to restrain such buildings.

By consent of all parties these motions were treated as the trials of the actions so far as the question of law was concerned, which was whether the plaintiffs could claim any prescriptive right to access of light over the site of the old Bankruptcy Court prior to the year 1886, the court having been Crown property from 1820 to 1886.

Whitehorne, Q.C., and *W. F. Hamilton*, for the defendant, referred to *Mersey Docks* v. *Cameron*, 13 W. R. 1069, 11 H. L. Cas. 443; *Reg.* v. *McCann*, 16 W. R. 397, L. R. 3 Q. B. 141; *Ex parte Postmaster-General*, 27 W. R. 325, 10 Ch. D. 595; *Corporation of Weymouth* v. *Nugent*, 13 W. R. 338, 6 B. & S. 22; Chitty on Prerogative, p. 383; *Corporation of Yarmouth* v. *Simmons*, 26 W. R. 802, 10 Ch. D. 518; *In re Oriental Bank Corporation*, 28 Ch. D. 643, 33 W. R. Dig. 47; *Magdalen College case*, 11 Rep. 74b; *Wynstanley* v. *Lee*, 2 Swans. 333.

Seward Brice, Q.C., Byrne, Q.C., Stokes, Beaumont, and *Butcher*, for the plaintiffs in the different actions, referred to *Sharp* v. *St. Sauveur*, 20 W. R. 269, L. R. 7 Ch. App. 343; *Barrow* v. *Wadkin*, 5 W. R. 695, 24 Beav. 1; *Hawley* v. *Steele*, 6 Ch. D. 521, 26 W. R. Dig. 76; *In re Wood's Estate*, 34 W. R. 375, 31 Ch. D. 607; *Kinloch* v. *Secretary of State for India*, 30 W. R. 845, 7 App. Cas. 619; Maxwell on Statutes, 2nd ed., p. 165; Staunforde on the King's Prerogative, pp. 42, 43; Chitty on the King's Prerogative, pp. 380, 382, 383.

Whitehorne, Q.C., replied.

CHITTY, J.—It appears that there are several Government buildings held in trust for the Crown under modern statutes. For instance, the General Post Office is vested in the Postmaster-General in trust for her Majesty. The decision in these cases has, therefore, an importance extending beyond the interests of the parties engaged in the litigation.

The plaintiffs claim a right of access of light to their dwelling-houses over the site of the old Bankruptcy Court in Basinghall-street, in the City of London, subject only to the obstruction which was caused by the former building. The site of the court was purchased in 1820, and the building was shortly after erected thereon; the money required for the purchase and the erection of the building being provided by Parliament. On the 23rd of April, 1820, the site was conveyed to five subjects nominated by the Crown as trustees, and the conveyance was made to them in fee in trust for his Majesty and his successors, and to the intent and purpose only that certain buildings might be erected on the said ground for the meetings of the Commissioners of Bankruptcy, and for transaction of business in bankruptcy. The conveyance was confirmed by the public statute 1 & 2 Geo. 4, c. 115. The 4th section enacted that the ground and buildings should thenceforth be vested in the five trustees named in trust for his Majesty, his heirs and successors, to the intent that the ground and buildings erected, or to be erected, thereon might for ever thereafter be used and applied for the purposes and in the manner described in the Act (that is, putting it shortly, for the purposes of the Court of Bankruptcy), subject to such rules respecting the use thereof as the Lord Chancellor might make, and for no other purposes. By the 60th section of the Bankruptcy Act, 1849, the ground and building were vested in the Commissioners of the Court for the time being for the purposes of the Act. This left the Crown's title as beneficial owner unaffected. By the 68th section of the Bankruptcy Act, 1861, the ground and building were vested in the Commissioners of her Majesty's Works and Public Buildings, and it was enacted that the same should be appropriated to such purposes as the Lord Chancellor should direct. This enactment also left the Crown's equitable title unaffected, unless and until the Lord Chancellor directed that the property should be appropriated to some purposes other than those to which the property had been previously dedicated. Even apart from the trust for the Crown in the conveyance and the statute of Geo. 4, it cannot be doubted that where property is held for such public purposes as those described in the above Acts the equitable title is in the Crown. The building was used for the purposes of the Court of Bankruptcy until after the passing of the Act of 1861, and also until it was sold and conveyed in 1886 to the Corporation of London pursuant to a direction of the Lord Chancellor in exercise of the power conferred on him by the 68th section of the Act, 1861. On the execution of this conveyance the Crown's title was divested. The Crown's title thus continued down to the conveyance in 1886. The defendant claims under this conveyance. The result is, that from 1820 to 1886—a period of sixty-six years—the legal estate was vested in trustees who were subjects and mere depositories of the legal estate, but the sole equitable ownership was in the Crown for the public purposes of the Acts, and during the same period the Crown had, by its minister of justice and other officers, the sole and exclusive possession of the property.

The plaintiffs claim the access of light under the 3rd section of 2 & 3 Will. 4, c. 71, the Act for shortening the time of prescription in certain cases, which came into operation on the first day of Michaelmas Term, 1832. The Crown is not named in that section, but is named in the 1st and 2nd sections.

(a.) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Therefore, regard being had to the general rule that the Crown is not bound by a statute unless named, a very strong case arises for holding that the Crown is not bound by the 3rd section. It was, however, argued for the plaintiff that the Crown is bound by necessary implication because the servient tenement is not mentioned in the 3rd section. I am unable to follow this argument. It is true that the servient tenement is not expressly mentioned in the section, although it is referred to by the words "any local usage or custom to the contrary notwithstanding," words which apply to the servient tenement only. But it appears to me to be a wholly immaterial circumstance whether the servient tenement is mentioned or not. It is not a circumstance from which any intention on the part of the Legislature to bind the Crown can be inferred, much less is it sufficient to raise a necessary implication or to support an irresistible inference of intention to bind the Crown. I hold, then, that the Crown is not bound by the 3rd section.

It was further argued for the plaintiffs that the right to light, falls within the meaning of the terms "or other easement" in the 2nd section, in which the Crown is named, and in support of this argument the observations of Lord Selborne in *Dalton* v. *Angus*, 30 W. R., at p. 208, were cited. But although Lord Selborne was of opinion that the right of support in the case of two adjoining buildings, a right he considered to be an easement not purely negative, fell within the 2nd section, he did not say that the negative right to light was within that section, nor is there anything in his observations to justify an argument that he held any such opinion. To whatever other easements the terms of the 2nd section may extend, it is, I think, clear that they do not include light. The statute places the acquisition of the right to access of light upon a footing entirely different from that on which it rests the other incorporeal hereditaments with which it deals. The right to light is dealt with exclusively by the 3rd section, and the subsequent ancillary sections, such as the 4th, which defines the period of twenty years and what is meant by interruption. The right to light, as between subject and subject, is acquired indefeasibly by simple enjoyment for the statutory period of twenty years without the statutory interruption, unless the enjoyment be by consent or agreement expressly made or given by deed or writing.

If the 3rd section is contrasted with the 2nd section it will be found that the only reason that can be suggested for including light in the 2nd section is to bind the Crown. As between subjects, the 3rd section covers more, and more than covers all the ground of the 2nd section, and would be an unnecessary and superfluous enactment in regard to light. The language of the 2nd section ought not to be construed to include light merely for the purpose of binding the Crown. The 3rd section with its ancillary sections constitute the entire statutory code as to light, and provides a simpler mode for the acquisition of light than the other sections of the Act do for the acquisitions of other easements of rights. The statute has been in operation for considerably more than half a century, and hitherto no one, so far as I am aware, has ever contended that light falls within the 2nd section.

The plaintiffs further contended that previously to the conveyance of 1820 the right of light to their tenements had been acquired by prescription at the common law, or that a lost grant ought to be presumed, so that when the Crown acquired its title to the site of the Bankruptcy Court the site was already subject to the servitude of light which they claim. But according to the evidence put in on behalf of the plaintiff Salaman, there was standing thereon an ancient building. The evidence is to the following effect:—

In 1398 there was standing on the ground a building called "Blackwell Hall," which belonged to King Richard II. This building was then sold by the king to the Corporation of London. In 1658 the hall was rebuilt, in 1666 it was destroyed in the Great Fire, in 1672 it was again rebuilt on the same site, the building standing on the ground was used from 1398 to 1820 by the corporation as the cloth hall. This evidence is fatal to the plaintiff Salaman for a reason presently to be mentioned.

From the statute of Geo. 4 it appears that the ground comprised in the conveyance of 1820 included part of the site of the ancient cloth market of Black well Hall or the buildings belonging thereto, and that other part thereof was the site or part of the site of two messuages in Basinghall-street. The result, then, is that in 1820 the defendant's site was occupied by the ancient tenement of the cloth hall or market, and by other messuages which, in the absence of evidence to the contrary, must be presumed to be ancient. To these tenements the custom of the City of London extended, which custom was that a man might rebuild his house or other edifice upon the ancient foundation to what height he pleased, though thereby the ancient windows or light of the adjoining or opposite houses were obstructed, if there were no agreement in writing to the contrary: *Wynstanley* v. *Lee*. The plaintiffs' houses have been rebuilt in recent times, and evidence was given for the purpose of showing that parts of their windows are in the same position as the lights of the houses which previously stood upon their ground. Some evidence is given on behalf of the plaintiff Salaman with a view to show that his lights were ancient; the evidence, however, is for the most part conjectural, and of an unsatisfactory character. But assuming that it would in the ordinary course be sufficient to raise a case upon which a jury might find that the light had been enjoyed from time immemorial, or that a lost grant ought to be presumed, there is a short answer in point of law which is fatal to any such claim in all the cases before me. The presumption of any such right from twenty years' enjoyment previously to 1820 is excluded by the custom of the City of London; to allow any such presumption would be to destroy the custom: *Wynstanley* v. *Lee*. The same answer applies with equal force to the period of twenty years which elapsed down to the first day of Michaelmas Term, 1832, when the Act of 2 & 3 Will. 4, c. 71, came into operation. Curiously the custom of London as to light is not simply abolished by that statute, but it is abolished merely for the purposes of the 3rd section. The plaintiffs cannot, therefore, maintain their claim to light by prescription from time immemorial or as founded on a supposed lost grant. This claim is defeated by considerations wholly independent of the royal prerogative and the passage cited from Staunforde on the King's Prerogative if a correct statement of the law is irrelevant.

The argument for the plaintiffs, then, turned back to the 3rd section. It was contended that, although the section might not apply where the legal estate was vested in the Crown, it does apply where the legal estate is held by subjects in trust for the Crown. In support of this contention some authorities were cited for the plaintiffs, but none of them really touched the point. One of them was *Sharp* v. *St. Sauveur*. All that was decided in that case was that the Crown could enforce in the Court of Chancery a trust of land created for an alien prior to the Naturalization Act, 1870. That has no bearing on the cases before me. In

ancient times it was not the practice to vest the legal estate in trustees for the Crown, and thus there is little or no direct ancient authority on the point. The second resolution in the *Magdalen College case* appears, however, to be large enough to cover it. It was resolved that where the king has any prerogative, estate, right, title, or interest he shall not be barred of them by the general words of an Act of Parliament. There is no reason for confining this resolution to mere legal interests, or for excluding an absolute beneficial ownership in the Crown. In *Mersey Docks* v. *Cameron*, a case involving the question of the liability of the Mersey Docks to be rated to the poor under the statute of Elizabeth, Lord Cranworth stated the law as to the exemption of the Crown in the following passage: "The Crown, not being named, is not bound by the Act. It follows, therefore, that land or houses occupied by the Crown, or by servants of the Crown for the purposes of the Crown, are not liable to be rated, and I conceive that it is from a confusion between property occupied for public purposes and property occupied by servants of the Crown that this mistake has arisen. This principle exempts from rates not only royal palaces, but also the offices of the Secretaries of State, the Horse Guards, the Post Office, and many similar buildings. On the same ground police courts, county courts, and even county buildings occupied as lodgings at the assizes for the judges have been held exempt. These decisions, however, have all gone on the ground, more or less sound, that these might be treated as buildings occupied by servants of the Crown and for the Crown, extending in some instances the shield of the Crown to what might more fitly be described as the public government of the country. In none of these cases was exemption conceded on the ground contended for in the present case, and I cannot but think that the error which has crept into the decisions has arisen from confusing cases like the present with those in which the interests of the Crown, through its servants, were directly concerned."

The judgment of Lord Blackburn in *Reg.* v. *McCann* (also a rating case) is much to the same effect: at p. 146 he expressly places a trustee for the Crown in the same position as a servant of the Crown. Now, in the cases before me the Crown's absolute beneficial ownership for the purposes of the Act is expressly manifested by a public statute, and it is obvious that the bare legal estate was vested in trustees merely for the purposes of more convenient administration by a department of the Queen's Government. I am of opinion that the prerogative of the Crown takes these cases out of the operation of the 3rd section.

Only one other point remains. It was urged for the plaintiffs that, the defendant's ground being now held by him, a subject, he is not entitled to avail himself of the Crown's rights, and that, inasmuch as the plaintiffs have enjoyed the light for twenty years before this action, their title to the right is indefeasible. But this is only repeating one of the old arguments on the statute in a new form. It would allow the plaintiffs to claim that they were in process of acquiring the right to the light during that part of the twenty years during which the property was in the possession of the Crown. The case must be tried as if the actions had been brought the day after the conveyance of 1886. To hold that the statutory period of twenty years had then run would be to ignore the Crown's rights, and the result would be that the Crown could not dispose of the property for the interest therein to which it was then entitled, or, in other words, that, although the Crown held the property free from the servitude or easement of light, it could not dispose of it except subject to such servitude or easement.

There are, as I understand, other points of facts in dispute in these actions; but it was arranged by counsel that these should not be gone into until after I had given judgment on the above questions of law, and that it would not be necessary to go into them in the event of my judgment being (as it is) adverse to the plaintiffs on the questions argued. Upon the facts as I have stated them giving rise to these questions of law there was no dispute between the parties. The result is that the actions are dismissed, with costs.

Solicitors, *Munns & Longden; Emanuel Round & Nathan; Morice & Blakesley; Howard C. Morris.*

Chan. Div. North, J. } March 20.

In re HARTLEY.
NUTTALL *v.* WHITTAKER. (*a.*)

Practice—Pleading—Non-appearance of defendant—Amendment of writ—Service of amended writ—Rules of Court, 1883, *ord.* 19, *r.* 10; *ord.* 28, *r.* 10.

When a defendant has made default in appearing to a writ, and the writ is subsequently amended, the amended writ need not be served upon the defendant who has made default in appearance; but filing it at the Central Office is sufficient.

Motion.

The question to be decided was whether, when a writ has been served upon a defendant who has made default in appearance, and the writ is afterwards amended, it is necessary to serve the amended writ upon the defendant in order to obtain judgment against him.

The action was brought by beneficiaries under the will and codicil of Edmund Hartley, deceased, against the trustees thereof. By the original writ, which was issued on the 9th of December, 1890, the plaintiffs claimed that new trustees of the will should be appointed in the place of James Whittaker and Betty Whittaker, two of the defendants; that a receiver should be appointed; and that James Whittaker and Betty Whittaker should be ordered to pay the costs. The writ was served on James Whittaker and Betty Whittaker personally, but they made default in appearance.

On the 19th of December, 1890, the plaintiffs obtained an order for the appointment of a receiver, and also leave to amend the writ.

The writ was accordingly amended by adding, "In the matter of the estate of Edmund Hartley, deceased, to the title of the action; by inserting the words 'and codicil,' after the word 'will,' in the original writ; and by adding a claim for administration of the testator's estate. The amended writ was filed with the proper officer, but was not served on the defendants James Whittaker and Betty Whittaker.

On the 31st of January, 1891, judgment was obtained for the appointment of new trustees of the will and codicil of the testator in the place of the defendants James Whittaker and Betty Whittaker; for the administration of the testator's estate; and that the defendants James Whittaker and Betty Whittaker should pay the costs of the action.

This was a motion by the two defendants James Whittaker and Betty Whittaker for liberty to enter an appearance and defend the action, and that the judgment already obtained might be set aside as

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

irregular, on the ground that the amended writ ought to have been served on them.

There was an affidavit by the two defendants stating that they had a good defence to the action.

The Rules of Court, 1883, ord. 19, r. 10, provide, "Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor, but, if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer."

And ord. 28, r. 10, "Whenever any indorsement or pleading is amended, such amended document shall be delivered to the opposite party within the time allowed for amending the same."

Napier Higgins, Q.C., and *Church*, for the motion.—The amended writ ought to have been served on the applicants personally: *The Cassiopeia*, 27 W. R. 703, 4 P. D. 188. A defendant may not appear and defend when a certain claim is made against him, but it does not follow that if that claim is added to he will not appear and defend.

Cozens-Hardy, Q.C., and *Maidlow*, for the plaintiffs.—The decision in the case of *The Cassiopeia* was given upon the repealed rules of 1875, ord. 28, r. 10, which did not contain the words "indorsement or," which occur in the rule now in force. The amended writ need not have been served upon the applicants who did not appear to the original writ, under the present rules of 1883, ord. 19, r. 10, and ord. 28, r. 10.

They also referred to the Rules of Court, 1883, ord. 16, r. 13, and ord. 67, r. 4.

Napier Higgins, Q.C., replied.

NORTH, J.—I do not think that the proceedings as to the delivery of the amended writ were irregular. I think that rule 10 of order 28 and rule 10 of order 19 apply to the present case. The latter provides that every pleading or other document required to be delivered to a party or between parties shall be delivered to the solicitor of every party, or to every party who does not appear by a solicitor, where appearance has been entered; "but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer." It is true that that rule does not contain words relating expressly to an indorsement or pleading; but rule 10 of order 28 provides, "Whenever any indorsement or pleading is amended, such amended document shall be delivered to the opposite party within the time allowed for amending the same." I think that these rules were complied with in this case. Some irregularities have been mentioned, but not such as to make a substantial difference.

I am told that the defendants have made an affidavit stating that they have a good defence to the action, and I am willing to allow them to have the judgment set aside, and to give them leave to defend upon the terms that the plaintiffs' costs, from the filing of the amended writ down to and including the trial, and also the costs of subsequent proceedings, including this motion, should, as between the plaintiffs and these defendants, be the plaintiffs' costs in any event. I will add a direction that the account of debts and the proceedings already taken for the purpose of administration be adopted, but that no further proceedings beyond the adjudication on claims be taken without the leave of the judge.

Solicitors, *Church; Wynne, Baxter, & Keeble*, for *Beldon & Ackroyd*, Bradford.

Q. B. Div. (Denman and Wills, JJ.) June 12.

LAWRENCE v. NEWBERRY. (a.)

Libel—Publication—Letter applying to plaintiff derogatory remarks made by third person on privileged occasion.

The defendant published in a newspaper, under the heading "Parochial Matters at Eversley," a letter containing the words: "I refer all readers of the letters on this subject to the Primate's speech on the Clergy Discipline Act." The Primate's speech contained serious allegations against an unnamed clergyman. Three paragraphs of the statement of claim in an action for libel brought by the rector of Eversley against the defendant set out the defendant's letter and the portion of the Primate's speech which contained the allegations, and alleged that the defendant intended by his letter that the plaintiff was the object of the Primate's allegations.

Held, upon an application to strike out the three paragraphs, that the matters therein alleged amounted to a publication of a libel by the defendant upon the plaintiff, and disclosed a cause of action.

Appeal from chambers.

This was an appeal from the decision of Henn Collins, J., in chambers, varying the order of a master, and allowing certain paragraphs of the plaintiff's statement of claim to stand.

The action was brought by the rector of the parish of Eversley for libel, and the paragraphs in question were as follows:—

"Paragraph 4.—On or about the 14th day of March, 1891, the defendant falsely and maliciously wrote and published, under the heading 'Parochial Matters at Eversley,' "in a certain newspaper" of and concerning the plaintiff, and in relation to his said profession and office of clergyman of the Church of England and rector of the said parish, the words following, that is to say, 'I refer all readers of the letters on this subject' (meaning parochial matters at Eversley, and the connection of the plaintiff therewith) 'to the Primate's speech on the Clergy Discipline Act.'"

Paragraph 5 set out an extract from the speech of the Primate, and alleged that it was the portion to which the defendant referred in the above letter. The extract contained allegations as to the conduct of a clergyman (without mentioning his name or parish), which would undoubtedly be libellous if written and published concerning a named person without privilege.

"Paragraph 6.—The defendant thereby meant and intended that it should be believed the said portion of the said speech had reference to, and was directed against, the plaintiff, and that he was the person, the object of the Primate's said allegations, and that the said speech was intended to, and did in fact, describe the actions and character of the plaintiff in and about the exercise and performance by him of his said office and profession."

E. U. Bullen, for the defendant.—These paragraphs disclose no cause of action. The letter itself is not libellous, and the reference in it to the Primate's speech is not a publication of that speech. The statement of claim in a libel action must allege facts which, if proved, would amount to a publication.

Bigham, Q.C., and *Oswell*, for the plaintiff, were not called upon to argue.

DENMAN, J.—I think that Henn Collins, J., took the

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

true view in holding that it is impossible to strike out paragraphs 4, 5, and 6, on the ground that they do not call attention to matters which would make out a charge of libel. The objection made is that the words, "I refer all readers of the letters on this subject to the Primate's speech on the Clergy Discipline Act," are not libellous. What "this subject" is, is explained by the innuendo—"meaning parochial matters at Eversley, and the connection of the plaintiff therewith," and we must assume for the purposes of this decision that there had been previous letters on this subject. The letter not being in itself libellous, but necessarily leading to the perusal of statements which are libellous, can the plaintiff go to the jury on those statements? They were, it is true, made upon a privileged occasion, but it is very old law that the mere fact that libellous words were privileged in the mouth of him who spoke them is not sufficient to justify their re-publication by another. The words used here are clearly libellous: the innuendo says that the defendant has applied them to the plaintiff, and it will be for the jury to say whether that is so. I know of no decision which is exactly in point. Suppose that a man says that A. B. has behaved in such a way that it is sufficient to refer for a description of him to the description of a very wicked person at a certain page of some book. I think that that would be a libel, and if that be admitted I do not think that the fact that the description referred to was given by a person who was privileged in giving it, would exempt the person who referred to it from liability in an action for libel. That disposes of this appeal in favour of the plaintiff, and I think that it ought to be dismissed.

WILLS, J.—I am of the same opinion. The innuendo says that the words in the defendant's letter mean that the plaintiff is the person of whom these words were spoken by the Primate. Of course the jury may say that that is a mistake; that will be a question of evidence. If A. B. makes a speech, and someone says of X. Y., "I refer you to what A. B. has said," the only difficulty is in persuading the jury that the meaning is that A. B.'s words apply to X. Y. If the contrary were law it would be easy for any person to libel another by referring to some statement which everyone knew, and liability for libel would be entirely evaded.

Appeal dismissed.

Solicitors for the defendant, *Stocken & Jupp*, for *Webb & Lear*, Basingstoke.

Solicitors for the plaintiff, *Withall, Holland, & Withall.*

Q. B. Div. [Divsnl. Ct.] (Day and Lawrance, JJ.) May 11.

HIGHWAY BOARD OF THE STOCKPORT AND HYDE DIVISIONS OF THE HUNDRED OF MACCLESFIELD *v.* COUNTY COUNCIL OF THE COUNTY OF CHESTER. (*a.*)

Local government — County council — Highway—Road authority—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 3—*Local Government Act,* 1888 (51 & 52 *Vict. c.* 41), *s.* 11.

A county council continues to be the road authority under the Tramways Act, 1870, *over main roads, notwithstanding a contract made by the county council with a highway board for the repair of such roads by the board.*

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

Point of law raised upon the pleadings and set down for hearing before trial under ord. 25, r. 2.

On the 6th of September, 1889, the County Council of Cheshire contracted with the Highway Board for the Stockport and Hyde Divisions of the Hundred of Macclesfield for the repair by the board of certain main roads within the district of the highway board for one year for a fixed sum.

For this sum the board brought an action against the county council, who counter-claimed for £345, the value of certain road-making materials extracted from a main road for the purpose of laying a tramway. These materials had been received by the defendants' surveyor, and had been used by the defendants for the repair of roads within their district other than main roads. It was provided by the provisional order authorizing the tramway that these materials were the property of the road authority, which both the defendants and the plaintiffs claimed to be.

Section 3 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), defines a "road authority" as "any local authority, board, town council, body corporate, commissioners, trustees, vestry or other body, or persons in whom a road, as defined by this Act, is vested, or who have the power to maintain or repair such road."

Sub-section 4 of section 11 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), provides that "the county council and any district council" (which term includes a highway board) "may from time to time contract for the undertaking by the district council of the maintenance, repair, improvement, and enlargement of, and other dealing with any main road . . . and for the purposes of such undertaking the district council shall have the same powers and be subject to the same duties and liabilities as if the road were an ordinary road vested in them."

Sub-section 6 of the same section enacts that "a main road and the materials thereof . . . shall . . . vest in the county council."

Sub-section 8 of the same section empowers the county council, if a district council has not duly repaired a main road under a statutory contract, to do so in their stead.

Macmorran, for the defendants.—The county council are the road authority; because, under sub-section 6 of section 11 of the Local Government Act, all main roads and their materials are vested in them. The true construction of section 3 of the Tramways Act is, that the road authority is that body in whom a road is vested; and only failing such a body, those who have the power to maintain and repair it. The highway board are mere contractors; if not, the absurd result would follow that the road authority would be a shifting body from year to year, according as the contract was renewed or not.

Slade Butler, for the plaintiffs.—During this contract the highway board are the road authority by virtue of their contract and of sub-section 4 of section 11 of the Local Government Act, which gives them the same powers, duties, and liabilities as if the road were vested in them.

DAY, J.—I am of opinion that the defendants are right in their contention. Main roads are vested by the Local Government Act in the county council, who are therefore the road authority. The highway board are only entitled and bound to repair during their contract. In substance, the county council are the road authority in spite of sub-section 4, which only gives all necessary and incidental powers to the highway board. That sub-section confers "powers,

duties, and liabilities," not rights. Moreover, in this case they agreed for a price fixed, and cannot claim windfalls.

LAWRANCE, J., concurred.

Solicitors for the plaintiffs, *R. L. Butler*, for *Vaughan*, Stockport.

Solicitors for the defendants, *Philpot & Sons*, for *Reginald Potts*, Chester.

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) May 6.

HOTCHIN *v.* HINDMARSH. (*a.*)

Sale of food—Adulteration of milk—Sale by servant on behalf of master—Information against servant—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 25.

An information for selling food not of the nature, substance, and quality of the article demanded, under section 6 *of the Sale of Food and Drugs Act*, 1875, *may properly be laid against a person who merely sells as a servant on behalf of his master; and such servant, not having himself purchased the article, cannot rely for his defence on section* 25.

Appeal from a conviction under the Sale of Food and Drugs Act, 1875, by way of case stated by justices under 20 & 21 Vict. c. 43.

The appellant, who was a milkman in the employ of the Farmers' and Cleveland Dairy Co., was in charge of a cart, on which was painted the name of the company, selling milk on behalf of his employers. The respondent, who was sanitary inspector to the urban sanitary authority of South Shields, acting under sections 13 and 14 of the Sale of Food and Drugs Act, 1875, asked the appellant for three gills of milk, for which he paid threepence, at the same time notifying to the appellant his intention to have the milk analyzed by the public analyst. The milk was found to contain twelve per cent. of added water. An information was accordingly laid against the appellant that he had sold to the respondent three gills of milk "not of the nature, substance, and quality of the article demanded," contrary to the provisions of section 6 of the Sale of Food and Drugs Act.

At the hearing it was objected on the part of the appellant that he was not the seller of the milk, but this objection was overruled by the justices. The appellant next relied on section 25, which says:—"If the defendant in any prosecution under this Act prove to the satisfaction of the justices or court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect; that he had no reason to believe at the time when he sold it that the article was otherwise; and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution."

It appeared that one Thompson, of Dumfries, had contracted in writing with the company to supply them for a period of six months with the whole of his dairy of good new milk, warranting each and every supply of milk delivered under the contract to be pure, genuine new milk, unadulterated, with all its cream on. Evidence was given that on the morning of the day in question two cans of milk consigned by Thompson to the company arrived by railway, having come a distance of ninety miles. The contents of the two cans were given to the appellant and another man to sell. The appellant was called as a witness, and said that he had sold the milk exactly as he received it; he had a lactometer, but he did not use it on that day.

The justices thought that it was not sufficiently shown that the milk sold was the same as the milk sent under the contract, inasmuch as there was no evidence that it had not been tampered with during the journey from Dumfries, and that the appellant had failed to show that he had no reason to believe that the milk was other than pure milk, and they accordingly convicted him.

Mansfield, for the appellant.—An information does not properly lie against the appellant as seller under section 6. He was merely acting as a servant for his employers, the company, who alone were sellers within the meaning of section 6, and are alone responsible: *Core* v. *James*, 20 W. R. 201, L. R. 7 Q. B. 135. If, however, the court should hold that he was the seller, section 25 affords a good defence; the appellant brings himself within the terms of that section by showing that the milk was purchased as the same in nature, substance, and quality as that demanded by the purchaser, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that it was otherwise, and that he sold it in the same state as when he received it: see *Farmers' and Cleveland Dairy Co.* v. *Stevenson*, 60 L. J. M. C. 70. The respondent cannot be allowed to answer that the appellant did not purchase the milk so as to come within section 25; for if the court puts a construction on section 6 sufficiently wide to include a servant selling for his master, by parity of reasoning section 25 ought to be construed to apply equally to such a servant. Reading sections 6 and 25 together, either seller in section 6 ought to be limited to mean only a person who has previously bought with the intention of selling again, or section 25 ought to be extended so as to include persons not strictly within its words. The decision in *Pain* v. *Boughtwood*, 38 W. R. 428, 24 Q. B. D. 353, seems to show that the protection afforded by section 25 was intended to be commensurate with the liability imposed by the previous sections.

T. W. Chitty, for the respondent.—The appellant was the seller of this milk, though he was acting as the agent of others. It is clear that the operation of the Act was not intended to be confined to sellers in the sense of principal vendors. Section 25 does not afford the appellant any defence. In the first place he failed to satisfy the magistrates of the facts which must be established in order to bring a case within the section, whereas in *Farmers' and Cleveland Dairy Co.* v. *Stevenson* those facts were proved to the satisfaction of the magistrates. In the second place, he never purchased the milk, and therefore is not in a position to rely on the section. There is no reason for giving a forced construction to the words of the section.

Lord COLERIDGE, C.J.—I have come clearly to the conclusion that this conviction ought to be upheld. The Act points at the adulteration of food. Sections 3, 4, and 6 all point at certain physical acts done or permitted by persons, for which they are made responsible. Where a particular intent is made part of the offence, the magistrates are to judge as to whether the intent existed. But the act itself is in each case a physical act, which the person pointed at by the statute must know he is doing. If

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

the magistrates find that any person has done any such act, and that the case is not within the proviso for protection, that person must be treated as the person pointed at by the statute, even although he did the act under the instructions of his master. The act pointed at by section 6 is the selling to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser; and it seems to me that the person who performs the physical act of selling such article under such circumstances is the person pointed at by the section. I think that the word "sell" in section 6 is applicable to one who sells as a servant.

But section 25 enacts that if the defendant in any prosecution under this Act shows that he purchased the article in question under certain circumstances, and sold it as he purchased it, then he is protected. It is said that the appellant can rely on this section, although he does not strictly come within its words, in that, being merely a servant, he never purchased the milk at all. The argument is that if "seller" means one who sells without having purchased we must extend section 25 so as to include persons who do not strictly come within its words. But if that were the meaning of the statute it might just as well have never been passed. A fraudulent dealer might so act that neither he nor his agent could be convicted.

I am therefore of opinion that section 25 does not apply to this case. But even if it did apply, the magistrates have not found that the terms of that section have been satisfied. In the case of *Farmers' and Cleveland Dairy Co.* v. *Stevenson* the statement of the facts found by the magistrates exonerated the defendants. This case stands quite apart from that case.

MATHEW, J., concurred.

Appeal dismissed.

Solicitors for the appellant, *J. E. & H. Scott*, for *William Bell & Son*, Sunderland.

Solicitors for the respondent, *Clarke, Rawlins, & Co.*, for *J. M. Moore*, South Shields.

Q. B. Div. (Day and Lawrance, JJ.) April 22.

REG. v. GOOLE LOCAL BOARD. (a.)

Local government—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 157, *sub-section* 1—"*Street*"—*Passage at back of houses.*

A passage planned to run along the backs of a row of new houses upon land laid out for building, and intended for access to privies and ashpits belonging to the several houses, is a new "street" within the definition clause, section 4, *of the Public Health Act*, 1875, *and is subject to regulation by the local sanitary authority of the district under the power given by section* 157, *sub-section* 1, *of the said Act, "with respect to the level, width, and construction of new streets."*

Rule *nisi* for a *mandamus*.

Certain land, within the local board district of Goole, being about to be laid out in building, plans were deposited by the appellant, a builder, with the local board of Goole for approval. The plans showed a narrow passage, six feet wide, running along the backs of each row of houses open at each end, and the object of which was to allow access to the ash-pits and privies of each house and for the removal therefrom of dust and refuse. The board had drawn up bye-laws, sanctioned by the Local Government Board, under the powers given by the Public Health Act, 1875, s. 157, for regulating the width of any new streets laid out on building lands. The particular bye-law in question required any new roadway to be level, and if for carriages to be thirty-six feet wide with a footway, if not for carriages to be twenty feet wide, but it also empowered the board to make a reduction in any particular case. The board had in the present case considered these passages to be "streets," within the definition clause of the Public Health Act, 1875, s. 4, and refused to pass the plans unless that width was increased to ten feet. The appellant obtained a rule *nisi* for a *mandamus* to compel the board to pass the plans, on the ground that they had no jurisdiction over these passages as "streets."

Montague Lush, for the appellant, showed cause.—These passages are private; "streets" must mean public roadways. The board have no jurisdiction to use their bye-laws regulating streets in regard to such passages as these: *Waite* v. *Garston Local Board*, 16 W. R. 78, L. R. 3 Q. B. 5; *Le Neve* v. *Vestry of Mile End*, 6 W. R. 338.

Tindal Atkinson and *Holder* (*Dickins* with them).—"Street" includes any "road, footway, or passage" by section 4 of the Public Health Act, 1875. It is a question of fact in each case for the local authority: *Taylor* v. *Oldham Corporation*, 25 W. R. 178, 4 Ch. D. 395.

Lush replied.

DAY, J.—The respondents, the local board of Goole, have made certain bye-laws which have been approved by the Local Government Board, and which must be taken as valid and as in force within the district of the board. The particular bye-law here in question provides that new streets shall be of a particular width according to circumstances stated, and also enables the board to vary or reduce the width on occasion.

This bye-law was made in pursuance of the powers given in the Public Health Act, 1875, s. 157, sub-section 1. The word "street" is defined in section 4 as inclusive of any "highway, . . . and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not." Substantially the same provisions and interpretation were given in previous Public Health Acts. Local boards are equivalent under these and similar statutes to guardians on behalf of public interests so far as the public are affected by sanitary matters. These Acts are beneficial regulations for the health of the several districts, and are absolutely necessary in view of the teeming population in many parts of the country. The discretion of the local boards is to be diligently exercised, wherever it is desirable, for public interests, and to those interests owners of building land and builders must defer. The fact that their private interests are injuriously affected by any action of the local board is no argument where public interests in the matter of health would be injuriously affected by private action. That is a fair, just, and true legal construction of the Public Health Acts. Here certain persons were entitled to build on this land. Plans were necessary of the streets. These were duly submitted to the board. On these plans the appellant showed what were termed "streets" and also "passages." The streets were passed by the board, but they objected to the narrowness of the passages. The appellant contended that these passages were not within the definition of "streets" at all, nor

(a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

under the jurisdiction of the board. The local board maintain that these passages are "streets" under their control, and that they are not of the width required by their bye-laws. These passages are primarily for the use of the owners in regard to ash-p its and privies. The board requires access, however to be open for the removal by their servants of filth and dust. No doubt the width of such passages has varied in many places. Originally they were exceedingly narrow. The local board of Goole formerly required these passages to be six feet wide, but now insist on a width of ten feet. Such a provision may be very beneficial. The discretion lies in the local board, and by their bye-law they may, as they have done, reduce the width of whatever comes under the head of "streets."

But it is said that they have no jurisdiction over the width of these passages at all. I am clearly of opinion that such passages are within the definition of "street" in the Public Health Act, 1875, s. 4, and, therefore, within the control of the local board, who have discretion to regulate their width. The judgments in *Waite* v. *Garston Local Board* were given by judges whom I should always feel bound, if I could, to follow, but there the question to be decided was whether an ashpit came under sub-section 4 of section 157. Here we have not to deal with a bye-law as to ashpits, but with one as to new "streets" under sub-section 1 of section 157. The point decided in that case is not raised here at all. It is argued that even if these passages be called "streets" they are not public streets, and, therefore, not under the control of the respondents. The thing proposed to be made is to be used as a passage. It would not be a private passage. It would not belong to any one person in particular. No gate is indicated on the plan nor alleged to be in view at all. The public will undoubtedly pass along this passage after a time. Unless it be kept clear for access the passage might become a great public inconvenience, owing to the difficulty of clearing these places, to which it primarily leads. I hold that this passage will be a public street within the definition of the Act, and I fully concur with the judgment of Jessel, M.R., in *Taylor* v. *Corporation of Oldham*, that a street is any way over which the public may travel, which the public use, and over which they may acquire rights.

LAWRANCE, J.—I am of the same opinion. The respondents were bound in the exercise of their jurisdiction to regulate the laying out of passages such as these. It is not necessary in my opinion to decide whether they will be public or not, because the Public Health Act, 1875, applies to streets generally, and not merely to thoroughfares. The local board may come in to private streets for paving and lighting purposes, and to see whether such private streets are properly paved or lighted. I think these passages are clearly "streets" within the Act.

Appeal dismissed.

Solicitors for the appellant, *Williamson, Hill, & Co.*

Solicitor for the respondents, *Woodhouse.*

Court of Appeal

From Q. B. Div. June 28.

ALLDRED v. WEST METROPOLITAN TRAMWAYS CO. (*a.*)

Tramway—Repair of road—Contract with road authority to repair—Liability of tramway company—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *ss.* 28, 29, 55.

Where a tramway company has entered into an agreement with the road authority under section 29 *of the Tramways Act,* 1870, *whereby the road authority undertakes to maintain and keep in repair the roadway between and adjoining the tramway lines, the tramway company is not liable for injuries to a person caused by the road where the tramway is laid not being maintained in proper repair.*

Howitt v. Nottingham Tramways Co., 32 *W. R.* 248, 12 *Q. B. D.* 16, *followed.*

Application on behalf of the plaintiff for a new trial.

The action was brought to recover damages for personal injuries sustained by the plaintiff, who was thrown out of his carriage by reason of the road between and adjoining the tram lines being worn and sunken and not being maintained in proper repair. The defence, so far as material, was that the defendants had entered into an agreement, under section 29 of the Tramways Act, 1870, with the vestry of Hammersmith, who were the road authority, whereby the vestry undertook to maintain and keep in repair that part of the road where the tramway was laid, and that the defendants, therefore, were not liable. At the trial, before Hawkins, J., and a jury, the learned judge nonsuited the plaintiff, on the authority of *Howitt* v. *Nottingham Tramways Co.*, 32 W. R. 248, 12 Q. B. D. 16.

McCall, Q.C. (*Guiry* with him), for the plaintiff.—By section 28 of the Tramways Act, 1870, the tramway company are bound to repair the roadway between the tram lines and for eighteen inches on each side. By section 29 they may enter into a contract with the road authority that the latter should do the repairs. But that does not get rid of the absolute liability imposed upon them by section 28. Section 55 shows that the liability still remains on them. The case of *Howitt* v. *Nottingham Tramways Co.* was wrongly decided, and ought to be overruled.

He also referred to *Steward* v. *North Metropolitan Tramways Co.*, 34 W. R. 316, 16 Q. B. D. 556.

Kemp, Q.C., and *Atherley Jones*, for the defendants, were not called upon.

Lord ESHER, M.R.—The facts of the present case are the same as those in *Howitt* v. *Nottingham Tramways Co.*, and we must therefore consider whether that case is rightly decided. In *Steward* v. *North Metropolitan Tramways Co.* the point was mentioned, but it was not argued or decided. The question turns upon the true construction of the Tramways Act, 1870. The court decided in *Howitt* v. *Nottingham Tramways Co.* that by section 28 the duty of the tramway company to keep that part of the road between and adjoining the tramway lines in good condition and repair to the satisfaction of the road authority imposed upon the company a *primâ facie* liability to any person injured by the road not being so kept in repair. I do not think that the decision went further than that upon section 28. That case also decided that

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

sections 28 and 29 must be read together, and if under section 29 the tramway company have transferred the duty of keeping the road in good condition and repair to the road authority, the company will escape liability on account of the road authority not having done what they had undertaken to do. The court held that section 29 is to be read as a proviso on section 28, and that the liability is taken away if the duty to do the repairs is transferred to the road authority under section 29. If that were not the true construction of the sections, the tramway company would be placed in this singular position: they would be liable for the acts and defaults of the road authority after the contract had been entered into, though they could exercise no control over the road authority. The road authority are to do the work to their own satisfaction. The construction adopted in *Howitt* v. *Nottingham Tramways Co.* seems to me, therefore, a necessary implication from section 29. I do not think that section 55, which has been relied upon, affects the above construction placed on sections 28 and 29. Section 55 can apply without being inconsistent with the construction placed upon those sections. In my opinion, therefore, the decision in *Howitt* v. *Nottingham Tramways Co.* is right, and this application must be refused.

BOWEN and KAY, L.JJ., concurred.

Motion dismissed.

Solicitors for the plaintiff, *Hewitt & Chapman.*

Solicitor for the defendants, *H. C. Godfray.*

From Chan. Div. June 15.

In re PORTUGUESE CONSOLIDATED COPPER MINES (LIMITED).

Ex parte LORD INCHIQUIN. (*a.*)

Company — Winding up — Contributory — Director — Qualification shares—Allotment notice—Agreement to take shares—Acquisition within reasonable time.

I. became a director, on the 25th of October, 1888, *of a company, the articles of association of which provided that a director's qualification should be forty shares. On the same day forty shares were, without his knowledge, allotted to him, and his name placed on the register. He first acted as a director on the 24th of November,* 1888, *and acted again on the 16th of January and the 18th of January,* 1889. *On the 19th of January,* 1889, *he himself acquired forty fully paid-up shares, which were duly registered in his name. I. retired from the directorship on the 28th of January,* 1889, *and the company was, in the same year, ordered to be wound up, whereupon I. first discovered that the original forty shares had been allotted to him. He took out a summons to have his name removed from the list of contributories, upon which he had been placed in respect of the original forty shares. North, J., refused to order his name to be removed from the list of contributories.*

Held, on appeal, without deciding that the mere circumstance that the original forty shares were standing in I.'s name was notice to him of the fact that the shares had been allotted to him, that I. must be taken to have known that it was his duty to qualify by acquiring forty shares, as required by the articles of association, and that he was bound to qualify within a reasonable time; and that, if a reasonable time had not actually elapsed by the 24th of November, 1888, *it certainly had before January,* 1889; *and, consequently, that I. was not entitled to have his name struck off the list.*

(*a.*) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

Appeal from North, J.

This was an appeal from an order made by North, J., on the 24th of April last, dismissing a summons taken out by Lord Inchiquin to have his name removed from the list of contributories of the above-named company in respect of forty £5 shares upon which nothing had been paid. The company was registered on the 20th of October, 1888. The articles of association provided that each of the directors should hold at least forty shares in the company. On the 25th of October, 1888, Lord Inchiquin was appointed one of the original directors. By the minutes of a directors' meeting held on the same day, at which Lord Inchiquin was not present, it appeared that the forty shares in question were allotted to Lord Inchiquin, and his name was placed on the register of shareholders in respect of those shares before he acted as a director. He, had not, however, then applied for any shares, and he stated in his affidavit that he did not know until the company had been ordered to be wound up that these shares had been allotted to him, or that his name had been placed on the register of shareholders in respect of them. He first acted as a director on the 24th of November, 1888, when he attended a meeting of the board and was elected chairman. He attended subsequent meetings on the 16th and 18th of January, 1889, the latter being the general meeting. He acquired another forty shares—which, however, were fully paid-up—in the company on the 19th of January, 1889, which were duly transferred to him and registered in his name. On the 28th of January, 1889, he retired from the board of directors. A petition was presented in January, 1890, and the company was ordered to be wound up. Lord Inchiquin was then placed upon the list of contributories in respect of the forty shares originally allotted to him.

North, J., held that the reasonable time for acquiring the qualification shares had expired as soon as Lord Inchiquin had acted as director; and that Lord Inchiquin, having no shares other than the unpaid shares at the time when he first acted as director, and his name being on the register as the holder of those shares, must be taken to have had notice that his name was on the register so as to bind him to take the shares. Accordingly his lordship refused to order Lord Inchiquin's name to be removed from the list of contributories.

Lord Inchiquin appealed.

Cozens-Hardy, Q.C., and *Reginald Saunders*, for the appellant.—The resolution of the 25th of October, 1888, allotting shares to Lord Inchiquin was insufficient, and was decided in *Steele's case*, 42 Ch. D. 160, 37 W. R. Dig. 36, 38 *Ibid.* 38, to be invalid. Lord Inchiquin did not attend any meetings of the directors until the 24th of November, 1888. He was present again on the 16th and 18th of January, 1889, and retired on the 28th of January, 1889. The mere fact of his thus acting as a director did not amount to a contract to take the forty unpaid shares directly from the company: *Brown's case*, 22 W. R. 171, L. R. 9 Ch. App. 102. [BOWEN L. J.,—The point that differentiates this case is, that here Lord Inchiquin was acting as a director at the time he was on the register for forty shares.] No calls were ever made. Lord Inchiquin was not bound to examine the entries in the company's books, nor had he constructive notice of their contents: *In re Denham & Co.*, 32 W. R. 487, 25 Ch. D. 752. The Court of Appeal decided, in *Badman's case and Bosanquet's case, ante*, p. 25, 45 Ch. D. 16, that, although the original allotments of shares were invalid, they might be ratified by the company, provided such ratification were made within a reasonable time. Lord Inchiquin by subsequently acquiring the forty fully paid-up

shares, fulfilled the qualification of a director, and did so within a reasonable time. The obligation of a director has never been put so high as that he should take shares at once: *In re Wheal Buller Consols*, 36 W. R. 723, 38 Ch. D. 42. [LINDLEY, L.J. — In *Leeke's case*, 19 W. R. 664, L. R. 6 Ch. App. 469, the director did not know he was registered. You are estopped from denying your qualification after a reasonable time.] That is so according to *Leeke's case*. [LINDLEY, L.J.—That would hit you if you had not paid up shares. FRY, L.J.—The duty to take shares must be supposed to be performed.] In *Miller's case*, 3 Ch. D. 661, 25 W. R. Dig. 54, Jessel, M.R., said that he took it to be settled by *Brown's case* that a director had a reasonable time for acquiring the qualification, either from the company or from anybody else. Lord Inchiquin never applied to the company for shares. He never agreed to take these shares, and no agreement can be inferred from the fact of his being on the register without his knowledge. Then the question as to what is a reasonable time for a director to acquire his qualification must depend on the circumstances of each case: *Hewitt's case* and *Brett's case*, 32 W. R. 234, 25 Ch. D. 283. Here Lord Inchiquin acquired the shares in the company within a reasonable time, and fulfilled the obligations imposed upon him.

Beddall, for the respondent, the liquidator, was not called upon.

LINDLEY, L.J., after stating the facts, said:—The 80th clause of the articles of association says that the first directors shall be appointed by a majority of the subscribers to the memorandum of association. I suppose Lord Inchiquin was appointed a director in pursuance of that 80th article. He has made an affidavit as to the fact that he did not know that any of these forty shares, which were, in fact, originally in his name on the 25th of October, 1888, were allotted to him. He does not say in terms, or in expressed clear language, that he did not know that those shares were on the register, but I think, on the fair construction of his affidavit, and in the absence of any evidence to the contrary, he meant to go that length. I certainly am not prepared to say offhand, without looking into the cases more carefully than I have done during the course of this discussion, whether the mere fact of the shares being registered in his name was notice to him of that fact. I shall proceed on the assumption that, as no notice was shown to him, he did not know. I do not know how the law is on that, and I shall assume it in his favour. The fact is that he became a director with his own sanction. He knew that he was a director; he knew it was his duty to qualify and get forty shares. Within what time was he bound to qualify? I think Mr. Cozens-Hardy is right upon that. He had a reasonable time to do it. Here, however, a month passed before he acted. Why is not that a reasonable time within which to qualify? Even if November is too soon, I cannot for the life of me see why January was too soon, when he again acted without any qualification at all. It appears to me, therefore, that a reasonable time to qualify had elapsed, if not by the 24th of November, certainly by the 1st of January, which is six weeks afterwards. Mr. Cozens-Hardy is quite right in saying upon the authorities that it was not incumbent on the appellant to acquire shares direct from the company, and that he had a reasonable time in which to acquire his qualification shares, and the whole stress of his argument turned on the fact that ultimately Lord Inchiquin did get forty shares paid up, which would have been sufficient to qualify him. Certainly if he acquired those in such a time as was reasonable for him to obtain his qualification I think that Mr. Cozens-Hardy's contention is correct, and that there would be nothing to stop him from denying that he held shares before that reasonable time had elapsed. But when this case is looked at it, strikes me that the only proper inference to draw from the facts is this, that he was estopped, before he acquired his fully paid-up shares, from denying that he had the forty shares in respect of which he was actually registered.

The cases on this subject are extremely numerous, and they subdivide themselves broadly into cases where a director in respect of his qualification shares is on the register, and cases where he is not. If he is on the register it is for him to show on what grounds he can get off after the winding up has commenced. It is a much more easy matter for a director who is not on, to show grounds for getting off liability in respect of his qualification shares. Having regard to the facts of this case it is impossible for the appellant to get his name struck off in respect of the shares which he ought to have had as qualification shares, and in respect of which he must be presumed to have acted.

I think, therefore, a reasonable time having elapsed for him to obtain his qualification, that this decision is right.

There is no difficulty on the authorities except *Hewitt's case* and *Brett's case*, where there were some three months, and where this court came to the conclusion that a reasonable time had not elapsed. The facts of that case were not like this. The articles were not like these, and the mere fact that the persons were qualified is unimportant; at all events, I do not discuss it, because a reasonable time in one case may not be a reasonable time in another. I think that a reasonable time for acquiring this qualification had elapsed long before the 19th of January.

BOWEN, L.J.—I am of the same opinion. The question we have to decide is whether Lord Inchiquin was a member of the company in respect of these qualification shares at or before the 19th of January, 1889. That seems to me to turn on the 23rd section of the Act, which says "every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company." Lord Inchiquin became a director, and knew by the articles of association that he was bound to qualify. The article says that the qualification of a director shall be the holding of at least forty shares, and he agreed to take the necessary number of shares. Then if there is a particular article on the subject, the question must be decided by the true construction of that article; but if there is no special article then by the true construction of the whole of the articles. If there is no agreement that the qualifying shares shall be taken at a particular moment, then we must apply the rule of law that they must be taken in a reasonable time. What is a reasonable time seems to me to depend in each case on the particular circumstances of the case. There may be something in the articles to throw light upon it, although it may not fix the exact time. On the other hand, there may be circumstances in the position of the company and the proceedings at the board of directors which throw light on the question as to the extent of time which is given for the completion of the contract to take shares. I do not like to lay down, and I do not think I can lay down, a rule as to what can be taken to be a reasonable time for the completion of the contract in a case where you cannot find in the articles of association anything in

the text exactly to decide the case which arises. I think here, on every view of the facts, that the time for the completion of Lord Inchiquin's contract to take shares had elapsed long before the 19th of January. He agrees to become a director on a certain day, and he attended a meeting or two, and was in the chair two or three times before the general meeting. I think that a reasonable time had elapsed for completing his contract with the company, by virtue of which he became a director and was bound to qualify. If so, he had agreed at that date to become a director, and therefore in every respect the requirements of the Act of Parliament have been fulfilled, and he must be taken to be a member of the company.

For myself, I should like to defer any consideration of the exact position of a person as a director who, having undertaken to perform the part of director by taking qualifying shares, is on the register, although he does not himself know that he is on the register; how far he is bound in such a case is a matter which I should like to leave open as a difficult question of law, and which would depend in most cases on the particular language of the articles.

It seems to me that, assuming that Lord Inchiquin did not know that he was on the register, and assuming in his favour that that is the true explanation of the oath which he has taken—which I am quite sure was taken properly—nevertheless the facts here show that at the critical moment he had agreed to become a member; he was therefore a member, and he was, at that moment, a member within the definition of these words.

FRY, L.J.—I agree.

Appeal dismissed.

Solicitors for the appellant, *Burn & Berridge.*

Solicitor for the liquidator, *A. Myers.*

From Q. B. Div. Feb. 2; May 5.

STUART *v.* BELL. (*a.*)

Slander—Privilege—Evidence of malice.

The defendant, who was Mayor of Newcastle-on-Tyne, was entertaining at the Mansion House the African explorer Stanley, who was accompanied by the plaintiff, his valet. The defendant received from the Chief Constable of Newcastle a letter, which had been sent to the latter by the Chief Constable of Edinburgh, stating that suspicion had fallen on the plaintiff of having stolen a watch in an Edinburgh hotel. The defendant told Stanley privately of this just before he was leaving Newcastle, and Stanley discharged the plaintiff a few days later.

In an action for slander,

Held, by the Court of Appeal (Lindley, Lopes, *and* Kay, L.JJ., Lopes, L.J., *dissenting*), *that the occasion was privileged, and, there being no evidence of malice in fact, to be left to the jury, that judgment ought to be entered for the defendant.*

Decision of Wills, J., *reversed.*

Application for a new trial, or that judgment should be entered for the defendant.

The action was for slander, and was brought under the circumstances very fully stated in the considered judgments of the court.

At the trial, before Wills, J., and a jury, the judge directed the jury that the occasion was not privileged, and the jury found a verdict for the plaintiff, with damages £250.

(*a.*) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

The defendant now moved for a new trial or that judgment might be entered for him, on the ground (amongst others) that the communication was privileged, and that there was no evidence of malice on the part of the defendant to go to the jury.

Tindal Atkinson, Q.C., and *T. Willes Chitty*, for the defendant.—The judge was wrong in holding that this was not a privileged occasion. There was a common interest—or, at any rate, a social or moral duty—in making the communication. Then there was no evidence of malice to be left to the jury, or, if there was, there should be a new trial on that issue.

Lockwood, Q.C., and *Robson*, for the plaintiff.—The judge's ruling was right. Such a relation as existed here between the defendant and Mr. Stanley has never been held to constitute privilege. There was no common interest, as the visit was over, and there was no duty. We are, at any rate, entitled to go to the jury as to malice.

The following cases were referred to:—*Harrison* v. *Bush*, 3 W. R. 474, 5 E. & B. 344; *Coxhead* v. *Richards*, 2 C. B. 569; *Amann* v. *Damm*, 8 W. R. 470, 8 C. B. N. S. 597; *Whiteley* v. *Adams*, 12 W. R. 153, 15 C. B. N. S., p. 418; *Allbutt* v. *General Council of Medical Education and Registration*, 37 W. R. 771, 23 Q. B. D. 400; *Davies* v. *Snead*, L. R. 5 Q. B. 608, 19 W. R. C. L. Dig. 64; *Waller* v. *Loch*, 30 W. R. 18, 7 Q. B. D. 619; *Pattison* v. *Jones*, 8 B. & Cr. 578.

May 5.—LINDLEY, L.J.—This is an action for slander. At the time when the slander was uttered the plaintiff was a valet in the employ of Mr. Stanley. Mr. Stanley was the guest of the defendant, who was the Mayor of Newcastle. The plaintiff was staying with his master at the Mansion House at Newcastle. They had come from Edinburgh and were going on further visits. Whilst Stanley and the plaintiff were still at the Mansion House, at Newcastle, the chief constable of that town received from the Chief Constable of Edinburgh a letter to the effect that a lady who had been staying at the same hotel as the plaintiff had lost a gold watch, and that suspicion had fallen on the plaintiff as the person who stole it. The Chief Constable of Newcastle sent this letter to the defendant, who read it and returned it, and then told Stanley privately what I have above stated. This communication, which is the slander complained of, was made to Stanley just before he and the plaintiff left Newcastle; they were, in fact, just about to leave. Two or three days afterwards Stanley told the plaintiff what had been communicated to him, and discharged the plaintiff on the ground that he could not keep in his employ a person on whom any suspicion of dishonesty had fallen. This discharge, and the inability of the plaintiff to obtain a fresh situation, have occasioned loss to the plaintiff, and this loss is the special damage which he has sustained by reason of the slander complained of. The learned judge who tried the case told the jury that the communication made by the defendant to Stanley was not privileged, and the jury found a verdict for the plaintiff, damages £250. The application to us is for a new trial, or that judgment may be given for the defendant, on the ground that the communication was privileged, and that there was no evidence to go to the jury of malice on the part of the defendant. To determine this matter it is necessary to consider—First, whether the judge was right in telling the jury that the communication was not privileged; and, secondly, if the judge was wrong in this respect, whether there was or was not evidence of malice proper to be left to the jury, which would justify their verdict.

In order to answer the first question it is necessary to consider what is meant by a privileged communication. A privileged communication is one made on a privileged occasion and fairly warranted by it, and not proved to have been made maliciously. A privileged occasion is one which is held in point of law to rebut the legal implication of malice which would otherwise be made from the utterance of untrue, defamatory language. This is the effect, in a few words, of the leading cases on the subject—namely, *Toogood* v. *Spyring*, 1 Cr. M. & R. 181; *Wright* v. *Woodgate*, 2 Cr. M. & R. 573; *Coxhead* v. *Richards*; *Whiteley* v. *Adams*; and *Clark* v. *Molyneux*, 26 W. R. 104, 3 Q. B. D. 237. It is the duty of the judge to determine whether an occasion is privileged or not, and if it is, and if there is no evidence of malice to go to the jury, it is his duty to enter judgment for the defendant (see *Whiteley* v. *Adams* and *Clark* v. *Molyneux*). On the other hand, if the occasion is not privileged, or if there is any evidence of malice (the meaning of which I will examine presently), then the case must be left to the jury. The law on this point has long been well settled, and was carefully explained in *Clark* v. *Molyneux*. What, then, are privileged occasions—what are the circumstances which must exist in order to rebut the implication of malice which arises from the utterance of untrue, defamatory language? Without referring to such matters as reports of what occurs in Parliament, courts of justice, or public meetings, which have no bearing on the present case, I can find no better answer to this question than that given by Parke, B., in *Toogood* v. *Spyring*, and by Erle, C.J., in *Whiteley* v. *Adams*. In *Toogood* v. *Spyring* Parke, B., in speaking of the publication of statements false in fact and injurious to the character of another, said:—"The law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion of exigency and honestly made, such communications are protected, for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." This passage has been frequently quoted, and always with approval.

The reason for holding any occasion privileged is common convenience and welfare of society, and it is obvious that no definite line can be so drawn as to mark off with precision those occasions which are privileged, and separate them from those which are not. *Coxhead* v. *Richards*, in which four very eminent judges were equally divided upon the question whether an occasion was privileged or not, is a striking illustration of the truth of this remark. In that case the mate of a ship wrote to the defendant, a friend of his, a letter reflecting on the character of the captain. The defendant, who was a stranger to the owner of the ship, showed the letter to the owner; the owner dismissed the captain, who sued the defendant for libel. Tindal, C.J., and Erle, J., held the occasion privileged. Coltman and Cresswell, JJ., held that it was not. In *Amann* v. *Damm* the late Willes, J., said he was fully prepared to go the whole length of the doctrine laid down by Tindal, C.J., and Erle, J., in *Coxhead* v. *Richards*. Lord Blackburn also approved of it in *Davies* v. *Snead*. Having carefully considered all the four judgments in that celebrated case (*Coxhead* v. *Richards*), I have no hesitation in saying that the judgment of Tindal, C.J., is the one which carries conviction to my own mind, and is the one which I consider the most accurate and safe to take as a guide; nor am I aware of any subsequent case in which that judgment has been disapproved. In *Whiteley* v. *Adams*, which was an action for libel on two letters, Erle, C.J., alludes to the difficulty of deciding questions of moral duty, to which I am now addressing myself. He said: "Each of these letters contains matter which is clearly defamatory to the plaintiff, and forms the foundation of an action, unless the circumstances under which it is written bring it within the protection of the law. I take it to be clear that the foundation for an action for defamation is malice, but defamation pure and simple affords presumptive evidence of malice. That presumption may be rebutted by showing that the circumstances under which the libel was written or the words uttered were such as to render it justifiable. The rule has been laid down in the Court of Exchequer, and again, lately, in the Court of Queen's Bench, that if the circumstances bring the judge to the opinion that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it, then, if the words pass in the honest belief on the part of the persons writing or uttering them, he is bound to hold that the action fails. In the present case the jury found that the letters were written by the defendant *bonâ fide* and in the honest belief that what he wrote was true, and that it was his duty to make the communications he did. Do the circumstances show that the letters were written in the discharge of some social or moral duty, or that the writer or the person to whom they were addressed had an interest in making or receiving the communications?" Then he says that in that particular case he felt bound to answer that question in the affirmative. There is another passage which appears to me important. He says:—"Judges who have had from time to time to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter have all felt great difficulty in defining what kind of social or moral duty or what amount of interest will afford a justification; but all are clear that it is a question for the judge to decide, and I am clear that the letters in question, seeing the circumstances under which they were written, do not show what in law amounts to malice." Then he goes on to say that "the rule has become gradually more extended on the principle that it is to the general interest of society that correct information should be obtained as to the character of the persons in whom others have an interest. If every word which is uttered to the discredit of another is to be made a ground of action, cautious persons will take care that all their words are words of praise only, and will cease to obey the dictates of truth."

Now, adopting the language of Erle, C.J., I ask, Do the circumstances show that the statement complained of was made in the discharge of some social or moral duty, or that the speaker or the person addressed had an interest in making or receiving the communication? That Stanley had an interest in the character of his servant and in receiving the communication made to him can hardly be denied. His interest in the matter is too obvious to require comment. If I understand rightly the judgment I have just read, Stanley's interest in receiving the communication made to him, is alone sufficient to render the occasion of making the communication a privileged occasion.

But this would be going further than is warranted by the language of Parke, B., in *Toogood* v. *Spyring*; it would not, therefore, be satisfactory to pass over the other matters indicated as important for considera-

tion—I mean the defendant's interest in making the communication and his duty to make it. Considering that Stanley and the plaintiff were just about to leave Newcastle when the defendant spoke to Stanley, I am not prepared to base my judgment on the ground that the defendant made the communication complained of in the conduct of his own affairs or in a matter in which his interest was concerned. I am not clear that the defendant had an interest as distinguished from a moral or social duty to act as he did. But the question still remains whether the defendant was not under a moral or social duty to make such communication. Both the defendant and Stanley say that the defendant acted under a sense of duty, but this, though important on the question of malice, is not, I think, relevant to the question whether the occasion was or was not privileged. That question does not depend on the defendant's belief, but on whether he was right or mistaken in that belief. As Tindal, C.J., said in *Coxhead* v. *Richards*, if the defendant took a course not justifiable in a court of law he, and not the plaintiff, must suffer for the error. In *Waller* v. *Loch* the Master of the Rolls (Sir George Jessel) is reported to have said that if the defendant *bonâ fide* thought that he was discharging a moral or social duty he would be protected, but in so saying the learned judge was not distinguishing a privileged occasion from malice, and his observation, if intended to apply to privileged occasions, is not in conformity with other authorities. Some passages in the judgments in *Pattison* v. *Jones* which were relied upon in support of the view of the Master of the Rolls (Sir George Jessel) obviously had reference to malice, and not to privileged occasion. Upon the point I am now considering, the headnote in *Whiteley* v. *Adams*, goes too far, and further than the judgments themselves warrant. The duty was affirmed by the court, and did not rest on the defendant's belief, although his belief showed that there was no malice.

The question of privileged occasion turning, then, on the question of moral or social duty, and being a question of law for the judge, and not a question for the jury, it is necessary to consider the grounds on which such duty can be maintained. The grounds in this case are the relation in which the defendant stood to Stanley, and the relation in which the defendant stood to the public. His relation to Stanley was that of host to guest, and, to some extent, of friend to friend. His relation to the public was that of mayor and magistrate in Newcastle, where Stanley was when the communication was made. The defendant knew that Stanley was about to be entertained by other people at other places, and that the plaintiff would accompany him. Under these circumstances I am clearly of opinion that it was the defendant's moral or social, though not legal, duty to communicate to Stanley the information which the defendant had received. That information was no vague rumour or idle gossip, but came officially from the Chief Constable of Edinburgh to the Chief Constable of Newcastle, and was sent by him to the defendant, who was, as I have said, Mayor of Newcastle and the host of Stanley. Suppose the suspicion which had fallen on the plaintiff had been well-founded, and not ill-founded, and that the defendant had withheld the information from Stanley, could the defendant have morally justified reticence? I answer, No; he would not have been acting up to his duty either to the public or to Stanley. Suppose the plaintiff had proved dishonest at the next place he visited, would the defendant then have been free from moral blame if he had not communicated to Stanley what he had learned from the police? In my opinion the defendant would then have been greatly to blame if he had held his tongue. The question of moral or social duty being for the judge, each judge must decide it as best he can for himself. I take moral or social duty to mean the duty recognized by English people of ordinary intelligence and moral principle; but, at the same time, not a duty enforceable by legal proceedings, whether civil or criminal. My own conviction is that all—or, at all events, the great mass of—right-minded men in the position of the defendant, would have considered it their duty, under the circumstances, to inform Stanley of the suspicion which had fallen on the plaintiff. My own opinion is clear and strong that it was his moral or social, although not his legal, duty to do so; in other words, the occasion was privileged, and the judge should have directed the jury to this effect. It follows that there ought to be a new trial unless there was no evidence of malice on which a jury could properly find a verdict for the defendant.

I pass, therefore, to the consideration of the question of malice. If the occasion is privileged the plaintiff must prove malice in fact; the burden of proving this is on him, as was settled in *Clark* v. *Molyneux*. Malice in fact is not confined to personal spite and ill-will, but includes every unjustifiable intention to inflict injury on the person defamed, or, in the words of Brett, L.J., in *Clark* v. *Molyneux*, every wrong feeling in a man's mind. There is no question here of the belief by the defendant in the truth of what he said. He did not say or intimate that the plaintiff had stolen a watch—he merely stated that the Edinburgh police suspected the plaintiff of having done so, which was true enough. This case illustrates the truth of the remark made by Lord Bramwell in *Clark* v. *Molyneux*. He said, "A person may honestly make on a particular occasion a defamatory statement without believing it to be true, because the statement may be of such a character as on that occasion it may be proper to communicate it to a particular person who ought to be informed of it. Can it be said that the person making the statement is liable to an action for slander?" What, therefore, has to be ascertained is whether the defendant acted *bonâ fide* in the discharge of that moral duty which he owed to Stanley or whether he acted from some other and unjustifiable motive—from some motive other than a sense of duty. As Lord Bramwell said, in *Clark* v. *Molyneux*, "If the defendant was actuated by some motive other than that which would alone excuse him, the jury may find for the plaintiff." The evidence on this head is contained in the examination and cross-examination of the only two persons present when the defamatory matter was uttered—viz., the defendant and Stanley. I have read their evidence with care, and I can find nothing to support a charge of malice against the defendant. On the contrary, the evidence disproves malice, and shows affirmatively that the defendant acted *bonâ fide* in the discharge of what he believed to be his duty, and of what was his duty, and did not exceed (either in what he said or in any other way) what a reasonably careful man would have said or done under similar circumstances.

It was contended that the defendant did not show Stanley the letter written by the Edinburgh police, and did not urge on Stanley the necessity for caution so carefully as the Edinburgh police urged caution in their letter to the Newcastle police. But even if the defendant was less cautious than he himself says he was, this would be too slight a matter to warrant a finding of malice against the defendant; and there is positively nothing else on which to found such a charge. The defendant knew nothing of the plaintiff and could have had no motive whatever for injuring him. The inspector who brought the letter to the defendant suggested to him the propriety of speaking

to Stanley on the subject. The defendant took Stanley aside and communicated to him in private the fact that the Edinburgh police had written a letter to the Newcastle police to the effect that the plaintiff was suspected of having stolen a watch when at the Waterloo Hotel in Edinburgh. This was really all that the defendant did.

The conclusions, then, at which I have arrived are that the occasion was privileged and that there was no evidence of malice. The judge, therefore, ought to have withdrawn the case from the jury and ought to have given judgment for the defendant. There is no question proper to be left to a jury; there are no grounds for a new trial, the verdict and judgment which have been entered for the plaintiff ought, in my opinion, to be set aside, and judgment ought to be entered for the defendant, with costs here and below. The result may seem hard on the plaintiff, who has unquestionably been injured. It was his misfortune to fall under suspicion, and to be dismissed by his master without inquiry. But this is no reason for holding the defendant responsible for this misfortune, and he cannot be so held without limiting privileged occasions to such an extent as to render the law applicable to them opposed to the general interests of society instead of being in harmony with them, nor without violating the important doctrine which has frequently been asserted by judges of the highest eminence—I mean the doctrine that the law has not restricted the right to make such communications within any narrow limits.

LOPES, L.J.—This is an exceptionally important case, in my opinion. As I take a different view from the other members of the court, I shall shortly state the facts as I understand them. The plaintiff, who had been in the service of persons of position and had borne a good character, was engaged by Mr. Stanley, the African explorer, as a valet. Mr. Stanley had been at Edinburgh, himself staying with a friend, the plaintiff, his valet, putting up at the Royal Waterloo Hotel. On Thursday, the 19th of June, 1890, Stanley left Edinburgh and proceeded to Newcastle, where he was entertained by the corporation, living with the plaintiff, his valet, at the Mansion House. Stanley left Newcastle the next day. It appears that while the plaintiff was at the Royal Waterloo Hotel a lady lost a gold watch out of her bedroom. While Stanley and the plaintiff were staying at the Mansion House at Newcastle a letter was received by the chief constable of that town from the Chief Constable of Edinburgh, which, in my opinion, is so important that I think it essential to state its terms *in extenso*—terms which appear to be entirely overlooked in the judgments of the other Lords Justices, both of which I have read:—

"Criminal Investigation Department, Police-chambers, Edinburgh, June 19, 1890.

"Urgent.

"Sir,—I am directed by the chief constable to acquaint you that between 5 and 11 p.m. yesterday a gold watch, &c, of which I annex description, was stolen from an unlocked drawer in a dressing table of a bedroom in the Waterloo Hotel here. At this hotel a man 'Stuart' (Christian name supposed Roderick), who is at present valet to Mr. H. M. Stanley, the African explorer, was putting up, and from the fact of his having been observed in a bedroom two doors from the one from which the property was stolen, occupied by a gentleman, and afterwards loitering in the passage near to the bedroom from which the property was abstracted, suspicion has been attached to him. The bedroom Stuart occupied was on the same floor, entering off the same passage. Nothing can be learned here regarding the character of Stuart, but it is understood he has only recently been employed by Mr. Stanley, who may know little or nothing of his antecedents. As you will readily observe, the groundwork of suspicion is very slender, and unless trace of the property to Stuart's possession is obtained, no action can be taken against him. The chief constable will be glad if you can see your way to have very careful and cautious inquiry made with the view of discovering whether Stuart is or has been in possession of the property. If it be traced to or found with him, arrest him and wire, when an officer will be sent for him. In the view that Stuart may be quite innocent, I am to urge that the inquiry should be so conducted as not to injure Stuart unless evidence of guilt be obtained. Requesting immediate action, I beg to thank you in anticipation.

I am, Sir, your obedient servant,

"W. M'EWEN, Dept. Insp."

"To the Chief Constable, Newcastle-upon-Tyne."

This letter was shown to the defendant by the Chief Constable of Newcastle. As Stanley was leaving the Mansion House the defendant, who had driven there for the purpose of escorting Stanley to the station, called him into a private room near the entrance door and told him that a lady's gold watch and chain had been stolen at the Waterloo Hotel, and that suspicion had fallen upon the plaintiff. The letter itself was not shown to Stanley, but had been shown by the chief constable to the defendant. Stanley some few days afterwards communicated what the defendant had told him, to the plaintiff, and dismissed him from his service, alleging as his reason his inability to keep in his service a person who had been suspected of dishonesty. In these circumstances the plaintiff has brought an action of slander against the defendant. The action came to be tried before Wills, J., at Leeds, and resulted in a verdict for the plaintiff for £250, the learned judge holding that the occasion was not a privileged occasion, and leaving only the question of damages to the jury. We are now asked to grant a new trial, or to enter judgment for the defendant, on the ground that the occasion was privileged, and on the ground that there was no evidence of express malice. I do not think, if the occasion was privileged, that there was any evidence proper to leave to the jury of express malice; nor do I think it could be successfully contended that the defendant did not act honestly and with good faith, if the occasion was such as to justify his making the communication to Stanley. The question, then, is whether the occasion was privileged. I do not know that I can express my view of the law in better language than by repeating what I said in *Pullman* v. *Walter Hill & Co.*, *ante*, p. 263, [1891] 1 Q. B. 524, at p. 529: "Assuming, then, that there was publication, the question next arises whether the occasion was privileged. A confusion is often made between a privileged communication and a privileged occasion. It is for the jury to say whether a communication was privileged, but the question whether an occasion was privileged is for the judge, and that question only arises when there has been publication to a third party. If the judge holds that the occasion was privileged, there is an end of the plaintiff's case, unless express malice is proved. The rule, I think, is this—that when the circumstances are such as to cast on the defendant the duty of making the communication to a third party, the occasion is privileged. So, again, when he has an interest in making the communication to the third person, and the third person has a corresponding interest in receiving it." The duty may be legal, social, or moral. I believe this to be the true principle deducible from all the authorities, and I do not think it necessary to refer to the cases which have already been exhaustively dealt with by Lindley, L.J.

I cannot understand how it can be said the defendant had any interest in making the statement to Stanley. Stanley and the plaintiff were on the point of leaving the Mansion House. What interest had the defendant in communicating to Stanley a suggestion of dishonesty with regard to the plaintiff which occurred at another place and before Stanley and the plaintiff came to the Mansion House? Again, there was no legal duty making it incumbent on the defendant to make the communication to the plaintiff. If any duty at all, it must be a moral or social duty. Having regard to the position the defendant occupied towards Stanley —namely, that of host—I can well imagine cases where, socially and morally, it would have been the duty of the defendant to make a communication to Stanley with regard to his servant. But surely it is all-important to observe the nature of the information furnished by the Chief Constable of Edinburgh to the Chief Constable of Newcastle, which was all that was communicated to defendant, and which was all he had before him when he communicated with Stanley. In order to determine what his duty was towards Stanley the defendant ought also to have regarded his duty and what was just towards the person sought to be inculpated. Was it the duty of the defendant, in his desire to serve Stanley, to overlook the grievous wrong to which by his want of caution he might subject the plaintiff? Was he justified, having regard to the exceptionally cautious and careful character of the information which he had received, in acting as he did?

Let us carefully scan the letter of the Chief Constable of Edinburgh—a more careful and judicious document it would be difficult to describe. He states the ground of suspicion, and then says: "As you will readily observe, the groundwork of suspicion is very slender, and unless trace of the property to Stuart's possession was obtained no action can be taken against him. The chief constable will be glad if you can see your way to have very careful and cautious inquiry made with the view of discovering whether Stuart is or has been in possession of the property. In the view that Stuart may be quite innocent, I am to urge that the inquiry should be so conducted as not to injure Stuart unless evidence of his guilt be obtained." The defendant says: "I had obtained no evidence of Stuart's guilt before I went to Stanley," "I did not speak to Stanley for any detective purpose or to help the police." "I did not think of Stuart at all." Having regard to the terms of that letter, so far from its being the duty of the defendant to communicate what he did to Stanley, I think it is the last thing he ought to have done. He is told the groundwork of suspicion is very slender. He is urged that, inasmuch as Stuart may be quite innocent, any inquiry is to be so conducted as not to injure Stuart unless evidence of his guilt is obtained. What does he do? Without obtaining any evidence, without any inquiry, in hot haste he makes a communication to the master impugning the honesty of his servant. I cannot think the defendant in so acting was discharging any duty, social or moral. I think it was an officious and uncalled-for act on his part, and that therefore the occasion was not privileged. *Waller* v. *Loch* was relied on by the learned counsel for the defendant, and certain expressions of the Master of the Rolls (Sir George Jessel) were cited. I feel confident that that learned judge was referring, not to a privileged occasion, but to a privileged communication, and the question of malice which then arises. He could not have said that if a defendant *bonâ fide* thought that he was discharging a moral or social duty that would be sufficient to constitute a privileged occasion although no such duty existed. Such a principle is opposed to all the authorities, is against common sense, and would be lamentably far-reaching and unjust in the consequences it would produce. In my opinion the learned judge was right and the verdict and judgment ought to stand.

KAY, L.J.—I cannot help regretting, as Lopes, L.J., differs from Lindley, L.J., that the casting vote does not fall to one to whom the law is more familiar than myself; but I am bound to give my own opinion, which I have formed after careful consideration. The question must be considered upon the basis that the suspicion suggested against the plaintiff's honesty is altogether unjust. He was valet to Mr. Stanley. The circumstances which raised the suspicion were communicated with all proper caution and reserve by the police at Edinburgh to the superintendent of police at Newcastle, obviously because it was known that Mr. Stanley and the plaintiff, his servant, were then at Newcastle, and with the object that very cautious inquiries should be made by the Newcastle police, principally as to whether the plaintiff was in possession or had in any way disposed of the stolen property. Mr. Stanley and the plaintiff were then staying at the Mansion House at Newcastle, and were the guests there of the mayor, but the mayor did not himself reside at the Mansion House. However, there was property in the Mansion House which I suppose it would be the mayor's duty to protect. It seems to me quite natural that the superintendent of police should have communicated as he did the letter which he had received from the police at Edinburgh to the Mayor of Newcastle, and I do not understand that the plaintiff makes any complaint on that ground. The mayor communicated the suspicion suggested by this letter to Mr. Stanley verbally. He did not at that time show him the letter. He only told him that the Edinburgh police suspected the plaintiff, which was perfectly true; he did not say that the plaintiff was dishonest. This verbal statement was made at the Mansion House just before Mr. Stanley left, in fact, when the mayor had gone thither to escort his guest to the railway station. The evidence makes it clear that the communication was not made for the purpose of founding any inquiry or eliciting information from Mr. Stanley for or against the suspicion. The learned judge has ruled that the position of the mayor and Mr. Stanley was not such as to privilege the mayor to make this communication to Mr. Stanley by way of warning.

The law on the subject cannot be better stated than in the words of Erle, C.J., in *Whiteley* v. *Adams*:—"The foundation of an action for defamation is malice, but defamation pure and simple affords presumptive evidence of malice. That presumption may be rebutted by showing that the circumstances under which the libel was written or the words uttered were such as to render it justifiable. The rule has been laid down in the Court of Exchequer, and again, lately, in the Court of Queen's Bench, that if the circumstances bring the judge to the opinion that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it, then, if the words passed in the honest belief on the part of the person writing or uttering them, he is bound to hold that the action fails." It has been argued in this case that whether the mayor had such a duty or not, yet, if he made the communication in the honest belief that it was his duty to make it, the occasion would be privileged. No decision going so far as that has been cited, and such a doctrine would not be within the words which I have quoted of Erle, C.J. I do not think that argument can be maintained. The real question is whether the mayor had a social or moral duty to communicate this information to Mr.

Stanley, or whether he and Mr. Stanley had such a common interest in the matter so communicated as to justify the communication on that ground. Lord Wensleydale, in *Toogood* v. *Spyring*, states the rule of law thus: "In general an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits." In that case the defamatory statement complained of was made concerning a workman employed by the agent of the landlord to do repairs at a farmhouse, and it was made by the tenant of the farm to the landlord's agent. It was held privileged because of the common interest which they had in the work being well done. The tenant was complaining that the work was not well done, that the man had got drunk while he was doing it, and that he believed that he had broken open the cellar door and taken out cider. The learned judge said, in addition to the remarks which I have quoted, that such a communication was privileged "if made with honesty of purpose to a party who has an interest in the inquiry, and that has been very liberally construed." The case of *Toogood* v. *Spyring* was cited with approval, and part of the words which I have read from it were quoted in the judgment of the Privy Council in *Hamon* v. *Falle*, 4 App. Cas. 247, 27 W. R. Dig. 206, and it was followed in *Croft* v. *Stephens*, 10 W. R. 272, 7 H. & N. 570, where the defendant returned some goods to a tradesman on the ground that he had not ordered them. The tradesman thereupon sent him the letter ordering the goods, which purported to be signed by the defendant, to which the defendant replied that it was his firm opinion that the letter was in the plaintiff's handwriting. This communication was held privileged because the defendant and the tradesman had a common interest in ascertaining in whose handwriting the letter was.

In the present case Mr. Stanley and his servant were both staying as guests of the mayor in the Mansion House, which we must take to have been under the mayor's control. I think it must be treated for this purpose as though it had been the mayor's own house. He was greatly interested in the honesty of his guests. It is true that they were on the point of leaving, but if it is admitted that the communication would have been privileged on the ground of common interest if their stay had been prolonged, I do not see how it can possibly be said that such interest ceased until they had actually left the house. Indeed, there is some reason for saying that the moment of departure was the most critical period of the visit, if the suspicion of the plaintiff's honesty had been well founded.

Lord Wensleydale says, as I have pointed out, that the question of interest in the inquiry has been very liberally construed. Without any great liberality of construction the communication in this case might be considered privileged on the ground of the common interest of the mayor and Mr. Stanley in the subject. But I do not rest my judgment on this point alone or principally. There is, in addition to that consideration, the relation of host and guest which existed between them at the time when the communication was made. I have a strong impression that this relation imposed upon the mayor a social and moral duty to act as he did. The true mode of judging upon the question is to put oneself as much as possible in the position of the defendant. I think that most reasonable and cautious people under the same circumstances would have acted as he did, and would have done so from a sense of the duty of a host to his guest.

For these reasons I differ, with respect, from the learned judge who ruled that the defendant was not privileged to make the communication in question to Mr. Stanley. I think that he was so privileged. But then this privilege will be lost if the defendant was actuated by malice; and if there was evidence of such malice this question must be tried by a jury. I have read through the evidence again, both in the notes of the learned judge and in the shorthand notes with reference to the question. The result is that, not only am I convinced of the entire absence of malice on the defendant's part, but, further, I cannot find any evidence of it whatever. The communication which he made was a cautious one, to the effect that the plaintiff was suspected only, and did not go beyond the terms of the letter which had been shown to him. The superintendent of police at Newcastle, who showed him the letter, suggested that he should communicate its contents to Mr. Stanley. The defendant did not know the plaintiff. In fact, he says he had never seen him. There was no conceivable reason why he should have any malicious motive or feeling in the matter. It seems to me neither necessary nor proper to submit the case again to a jury, and I think that the action should be dismissed.

Appeal allowed; judgment entered for the defendant.

Solicitors for the plaintiff, *John Nicholls & Co.*

Solicitors for the defendant, *Collyer-Bristowe & Co.*, for *Hill Motum*, Newcastle-on-Tyne.

From Chan. Div. Jan. 28.

In re STUBBS & CO.

BARNEY AND BIRMINGHAM BANKING CO. *v.* STUBBS & CO. (*a.*)

Company — Winding up — Debenture — Liquidator — Receiver.

Where a company is being wound up, and an application is made by debenture-holders to appoint a receiver, and another application is made by the creditors in the winding up to appoint a liquidator, the court, in order to avoid trouble and expense, will usually appoint the same person liquidator and receiver.

But, in a case where the only outstanding property of the company consisted of a sum of £180, and the debenture-holders had obtained an order for the appointment of a receiver in a debenture-holders' action previously to the appointment of a liquidator in the winding up,

The Court of Appeal (Lindley *and* Kay, L.JJ.) (*affirming the decision of* Kekewich, J., ante, *p.* 200) *refused to appoint the liquidator receiver, in the place of the receiver already appointed in the debenture-holders' action.*

In re Henry Pound, Son, & Hutchins, 38 *W. R.* 18, 42 *Ch. D.* 402, *distinguished.*

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

Appeal from the decision of Kekewich, J. (reported *ante*, p. 200).

On the 30th of September, 1890, a creditor's petition for the winding up of Joshua Stubbs & Co. had been presented. On the 2nd of October an action had been instituted by debenture-holders, whose debentures constituted a charge on the whole of the undertaking and property of the company (including uncalled capital for the time being), with the exception of the company's freehold and leasehold premises; and on the same day an order by consent was made in that action appointing Fisher receiver and manager. On the 15th of October an order was made on the winding-up petition, and Hill was appointed official liquidator.

The debenture-holders, although present when this order was made, neither supported nor opposed it. Subsequently, however, the debenture-holders took out a summons under section 87 of the Companies Act, 1862, for leave to proceed with their action, notwithstanding the winding up. The official liquidator moved that the order made on the 2nd of October appointing Fisher receiver and manager might be discharged, and that the official liquidator might be appointed receiver for the debenture-holders in place of Fisher.

The summons and the motion were heard together by Kekewich, J., who dismissed the motion of the official liquidator, and made an order on the summons giving the debenture-holders leave to continue their action (see the report *ante*, p. 200).

It appeared that the whole amount of the share capital not paid up was only £180.

The official liquidator appealed.

Renshaw, Q.C., and *Ashton Cross*, for the appellant.—The usual practice of the court should have been followed, which is to appoint the official liquidator receiver, and discharge the receiver previously appointed: *In re David Lloyd & Co.*, 25 W. R. 872, 6 Ch. D. 339; *Campbell* v. *Compagnie Générale de Bellegarde*, 24 W. R. 573, 2 Ch. D. 181; *Tottenham* v. *Swansea Zinc Ore Co.*, 32 W. R. 716; *Perry* v. *Oriental Hotels Co.*, 18 W. R. 779, L. R. 5 Ch. App. 420. [KAY, L.J.—How do you get over *In re Henry Pound, Son, & Hutchins*, 38 W. R. 18, 42 Ch. D. 402?] In the present case the debenture-holders are obliged to come to the court to get a receiver appointed and to proceed with their action, and must, therefore, submit to the jurisdiction of the court. The appointment of the liquidator as receiver will not prejudice the debenture-holders, as he must keep separate accounts. It is both inconvenient and expensive that the court should sanction two officers to realize the same property.

Warmington, Q.C., and *R. J. Parker*, for the respondents.—There are in fact only eighteen shares of £10 each, not paid up, so that in reality the liquidator has nothing to do. Under the circumstances, the Court of Appeal ought not to interfere with the exercise of discretion of the judge below: *Bartlett* v. *Northumberland-avenue Hotel Co.*, 53 L. T. N. S. 611, 34 W. R. Dig. 36.

Swinfen Eady, for an assignor of the debentures.

LINDLEY, L.J.—This is an application by the official liquidator of Joshua Stubbs (Limited), that an order of the 2nd of October, 1890, appointing a receiver in a debenture-holders' action may be discharged on the liquidator undertaking to keep a separate account on behalf of the debenture-holders; or, in the alternative, that the liquidator may be appointed receiver for the plaintiffs in the place of the existing receiver. As the case was opened on behalf of the liquidator, it assumed this position—that the court was really employing two officers to realize the same property, namely, Mr. Fisher as receiver for the debenture-holders, and Mr. Hill as official liquidator in the winding up. If there had been nothing more in the case than that, I should have been prepared to say that it was not covered either by *In re David Lloyd & Co.* or by *In re Henry Pound, Son, & Hutchins*, and that it fell within the other line of authorities beginning with *Perry* v. *Oriental Hotels Co.*, and ending with *Tottenham* v. *Swansea Zinc Ore Co.* I say that for this reason, that *In re David Lloyd & Co.* did not involve the consideration of the appointment of a receiver at all. The question there was whether a mortgagee who had commenced a foreclosure action should be allowed to continue it, notwithstanding the winding up, and it was held that he was entitled to leave to do so. That is a well-settled decision, and it has never been questioned; but it does not deal with this particular point. In the case of *In re Henry Pound, Son, & Hutchins* the facts are entirely different from those here. There the debenture-holders had, by the terms of their contract, a right to appoint their own receiver; and then, it having become necessary to appoint a receiver, they appointed one themselves under their powers. The receiver was not appointed by the court, and was in no sense an officer of the court. But a winding-up order having been made, the receiver could not touch the assets of the company, and the sanction of the court had therefore to be obtained to enable him to take possession as receiver, and an application was made for that purpose. Kay, J., thought that the application ought to be refused, and that the liquidator ought to be appointed receiver, but the Court of Appeal differed from him. In giving judgment on the appeal Cotton, L.J., shows the distinction very plainly between the case of a receiver appointed under a power given to the debenture-holders and the case of a receiver appointed by the court. [The Lord Justice read the passage in the judgment of Cotton, L.J. (42 Ch. D., at p. 419), beginning, "The argument has been this," and ending, "the powers conferred by the deed under which I claim," and continued:—] So that there Cotton, L.J., himself points out the distinction which exists between such a case as the present and that which was before him. Accordingly, in such a case as this, in the absence of any special evidence, I should think the court could, consistently with the decision in *In re Henry Pound, Son, & Hutchins*, accede to the liquidator's application. I do not think the observations of Giffard, L.J., in *Perry* v. *Oriental Hotels Co.* are in any way touched by the later authorities; and, therefore, in my opinion the court would, under ordinary circumstances, as I have intimated, be disposed to accede to such an application as this. But in this case there is this curious circumstance that makes the application of the rule unnecessary here—that there is practically nothing for the liquidator to do; that is to say, he has only to get in a sum of £180 from the shareholders. As Kekewich, J., has said, there is nothing in the circumstances to justify the court in displacing the receiver; and, under the circumstances, I am not prepared to disturb the order made by the learned judge in the exercise of his discretion. The appeal therefore fails.

KAY, L.J.—I am glad this case has come before the Court of Appeal, and that the court has had an opportunity of expressing its opinion that the two cases of *In re David Lloyd & Co.* and *In re Henry Pound, Son, & Hutchins* were not intended to alter, and have not altered, the rule of convenience which the court has adopted—namely, that where an application is made to the court to appoint a receiver, and another application is made to appoint a liquidator, the court

will take care, in order to avoid trouble and expense, that the receiver and the liquidator shall be the same person in every case where that can properly be done. That has been done in a great many cases noticed in the books, and I have no doubt in a still greater number of cases not noticed in the books; and the convenience of the rule is quite plain, for, supposing a receiver were appointed by the court on behalf of a mortgagee, and then there came a winding up with calls to be made and outstanding assets of that kind to be got in, although future calls were included in the mortgage, and although the debentures might be sufficiently large in terms to cover them, yet the receiver appointed by the court on behalf of the mortgagee would have no power to get in assets of that kind. Without the sanction of the court the receiver would have no right to bring an action or to take proceedings for the particular purpose he had in view; but in a winding up there is machinery provided which can be set in motion by the liquidator for the purpose of making calls in the liquidation and getting in outstanding assets of that kind through the simple and convenient method of what is very well known in chamber practice as a balance order against a shareholder. Now, if there is a large quantity of outstanding assets in the shape of capital not called up, and it therefore becomes necessary that this cheap and expeditious mode of getting in those assets should be put in action, then there would be very strong reasons for making the same person receiver and liquidator, because he is then armed with the power the official liquidator has of using this machinery for the benefit of the mortgagee. If this had been a case of that kind, I confess I should have been strongly inclined to interfere with the exercise by the learned judge below of his discretion; but it turns out that the only uncalled capital of this company consists of eighteen shares of £10 each, or a sum of £180 altogether, so that to suppose that there is anything special for the liquidator to do is out of the question, and therefore the only reason for displacing the receiver and appointing the liquidator in his place fails.

It appears that the receiver appointed on behalf of the mortgagee has been appointed also manager of the business, but we are told that there is no business to carry on at all. If there were any business to be carried on I confess that would be, to my mind, a strong reason for appointing the same person official liquidator and also receiver and manager. The official liquidator would be much more qualified to carry on the business than the mortgagee's receiver would be. The conclusion we come to is this: The receiver of the mortgagee has been appointed; he is in possession; there is no special reason for removing him. This is, in fact, an application for removing him and appointing the official liquidator in his place. One matter to be considered is, that in the exercise of the special powers vested in him, the liquidator might incur considerable costs, and if the two offices were combined it would be a question how much of those costs should be charged against the mortgagee. I should be loth to allow those costs without some strong reason. Upon the whole, I agree with what has been said by Lindley, L.J., that where the judge below has exercised his discretion, and there is no sufficient reason for interfering with that discretion as he has exercised it, this court ought not to interfere.

Accordingly, in my opinion, this appeal must be dismissed with costs.

Solicitors, *Henshall Fereday*, for *Reece, Harris, & Co.*, Birmingham; *Field, Roscoe, & Co.*, for *Smith, Pinsent, & Co.*, Birmingham; *Taylor, Hoare, & Box*, for *Horton, Lee, & Lee*, Birmingham.

High Court of Justice.

Chan. Div. } Stirling, J. } June 5.

In re S. A. JONES.
BULLIS *v.* JONES. (*a.*)

Practice—Order drawn up, but not passed and entered—Oversight—Order re-drawn nunc pro tunc.

Where an order had been drawn up, but never passed and entered, the Court allowed the order to be re-drawn up, passed, and entered nunc pro tunc.

Motion.

By an order of the 3rd of June, 1885, W. R. S. Thomas and W. D. Bullis were appointed trustees of certain estates settled by the will of S. A. Jones for the purposes of the Settled Land Act, 1882. The order was entered in the Registrar's book, and on the 12th of June the papers were left with the registrar for the order to be drawn up. The minutes of the order were settled by the Registrar, and the order was taken away and engrossed by the solicitor acting in the matter, but was never left to be passed and entered. By virtue of the order the trustees sold the settled estate and invested the proceeds in the purchase of other property. Thomas died on the 19th of February, 1886, and it was only recently discovered that the order had never been perfected. The solicitor in the matter had retired from practice, and the engrossment of the order could not be found.

Oswald, for the surviving trustee and the tenant for life of the settled estate, moved *ex parte* to have the order re-drawn up, passed, and entered *nunc pro tunc*, and cited *Lawrence* v. *Richmond*, 1 J. & W. 241; *Russell* v. *Tapping*, 3 W. R. 379; *Ex parte the Dean and Chapter of St. Paul's*, 18 W. R. 724; Daniell's Chancery Practice, 6th ed., p. 811, and Seton on Decrees, 4th ed., p. 154.

STIRLING, J., made the order as asked.

Solicitors, *Anderson & Sons*.

Chan. Div. } Stirling, J. } April 10.

JOHN MORLEY BUILDING CO. *v.* BARRAS. (*b.*)

Company—Directors—Validity of appointment—Practice—Motion to stay action—Costs—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 67; *Table A, arts.* 35, 52, 53, 58, 62, 71.

Article 58 *of Table A to the Companies Act*, 1862, *does not apply to mere* de facto *directors, nor to subscribers to the memorandum of association, who, by article* 53, *are "deemed to be directors," no directors having been appointed by them under article* 52; *but only to directors who have been duly appointed under the articles.*

Where no directors have been appointed by the subscribers to the memorandum of association, nor have they themselves acted as directors, persons who have constituted themselves directors de facto *cannot retire from office under article* 58, *and then continue in office as "vacating directors" under article* 62.

The power of appointing directors given to the sub-

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

(*b.*) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

scribers of the memorandum of association under article 52 remains in force until an appointment has been made, and reasonable notice only is required for calling a meeting of subscribers of the memorandum of association.

Motion.

The facts and arguments are sufficiently stated in the judgment of Stirling, J.

Hastings, Q.C., and *D. L. Alexander*, for the applicants.

Buckley, Q.C., and *Quin*, for the respondents.

STIRLING, J.—This is rather a peculiar motion; but it is founded upon the authority of *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong*, 28 W. R. 217, 13 Ch. D. 310, and the real question raised is, who are the directors of the company at the present moment?

An action has been brought in the name of the company against certain gentlemen, asking for an injunction to restrain them from holding themselves out or acting as directors, and from intermeddling with the affairs of the company or dealing with its funds. That has been met by the present motion, which is also in the name of the company and addressed to the solicitors who issued the writ and to the defendants, asking that all proceedings in the action may be stayed, on the ground that it has been instituted without the authority of the applicants, and that the solicitors may be ordered to pay the costs. The real applicants are, no doubt, the defendants in the action, and the question is, whether they have been duly appointed directors?

The company was incorporated under Table A of the Companies Act, 1862, article 52 of which provides that "the number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association." Article 53 provides that "until directors are appointed the subscribers of the memorandum shall be deemed to be directors," and article 58 provides that "at the first ordinary meeting after the registration of the company the whole of the directors shall retire from office."

The first ordinary meeting of the company was held on the 3rd of September, 1890, and the adjourned ordinary meeting on the 25th of September, 1890, but nothing was done at either meeting. In the meantime no directors had been appointed by the subscribers to the memorandum of association, nor had they acted as directors; but certain gentlemen appear to have constituted themselves directors and proceeded to act as such. Under article 71 of Table A and section 67 of the Companies Act, 1862, their Acts may possibly be binding, as regards strangers, upon the company; but in point of fact they were never duly appointed directors.

After a time a dispute arose, in which Mr. Rumney, one of these gentlemen, took one side, and Mr. J. H. Matthews, one of the subscribers to the memorandum and secretary to the company, took the other, and the present motion is the result of the quarrel. Mr. Matthews, on the 29th of December, 1890, being advised that the proper course was to hold a meeting of the subscribers to the memorandum, issued a circular calling a meeting for the 31st of December, 1890. That notice was sent to each subscriber, and a meeting was held at which, according to the evidence, ten out of the twelve subscribers were present. No business was transacted, and the meeting was adjourned for fourteen days.

Mr. Matthews says that in the meantime he received a letter from Mr. Rumney asking him to call a meeting of the subscribers. He accordingly, on the 10th of January, issued a circular calling a meeting of subscribers for the 12th of January. On the day fixed ten subscribers attended; two of them delivered a written protest and withdrew, but the rest remained, and, the number of subscribers being twelve, there was still a majority present. The defendants were then elected directors, and, if that meeting was duly constituted, were duly elected.

What was done by the other side—the gentlemen who have been called the *de facto* directors—was that they attempted to get themselves appointed directors by a document signed by only seven of the subscribers, and, therefore, insufficient within article 52. Further, three of the signatures were obtained in a way which seems to invalidate the appointment, but I need not decide that point, for, even if all the signatures were good, the document is not a valid appointment of the first directors.

Then, have these persons a title in any other way? Mr. Buckley says they were *de facto* directors down to the holding of the first meeting, that article 58 applies to them, and that as directors they then retired from office. Then he says that as no directors were then or at the adjourned meeting appointed in their places, article 62 applies to the *de facto* directors, and that as "vacating directors" they continue in office till the ordinary meeting in next year. But does that article apply to *de facto* directors at all? I think it only applies to those directors who have been validly appointed in pursuance of the articles; when no appointment at all has been made, the article either does not apply at all, or, if it does, it only provides that the vacating directors shall continue in office, and does not confer on them any better title than they had before. Therefore, the *de facto* directors do not derive any authority from that clause as against directors duly appointed.

Then it is said, if that is so, that under articles 53 and 62, the first ordinary meeting having passed without anything being done, the subscribers of the memorandum remain directors, and must continue as such till the first ordinary meeting in next year. That is not a good argument, because article 58 says that "at the first ordinary meeting after the registration of the company the whole of the directors shall retire from office," and article 53 says that "until directors are appointed the subscribers of the memorandum of association shall be deemed to be directors." The subscribers are not directors, but only to "be deemed" such; and I think that article 58, when construed with articles 53 and 62, means that the whole of the appointed directors shall retire, and has no application to the subscribers of the memorandum at all.

Then, have the subscribers now lost their power, under article 52, of determining who shall be the first directors, because the first general meeting has been held? I think not. Until an appointment of directors has been made, the power given by that article remains in force, and in January, 1891, the subscribers were the persons having the power to appoint directors.

Has the power under article 52 been validly exercised? It has been contended that proper notice was not given of the meeting of the 12th of January, because seven days' notice under article 35, as in the case of a general meeting, was not given the subscribers. But that article does not apply at all to meetings of the subscribers; it only applies to general meetings. There is no special provision in Table A as to convening meetings of subscribers, and, therefore, I must hold that reasonable notice was sufficient; and upon the evidence I think that the two days' notice given in this case was sufficient and reasonable.

I think, in the result, that the defendants were

duly elected directors of the company, and the motion succeeds. The order must go in the same form as in *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong.*

Solicitors, *J. C. F. Barfield; Hammond & Richards.*

Chan. Div. } Romer, J. } March 6, 7, 9, 23.

BARKER *v.* FURLONG. (*a.*)

Conversion—Wrongful conversion of chattels—Trustee—Possession by cestui que trust*—Auctioneers, under what circumstances liable—Practice—Calling opposite party as a witness when permitted.*

Trustees can maintain an action for wrongful conversion of chattels which were in possession of their cestui que trust *under the provisions of a trust instrument, his possession being in law their possession for this purpose. In such a case a defendant cannot set up, by way of defence, the title of a third person, who has not asserted or who has waived his claim to the chattels.*

A broker or auctioneer who only settles the price as between vendor and purchaser, receiving commission for so doing, is liable as for wrongful conversion if the vendor is not entitled to sell the goods. Secus, *if the broker or auctioneer receives the goods into his own custody, and, on selling them, delivers them to the purchaser with the intention of passing the property in them.*

Turner *v.* Hockey, 56 *L. J. Q. B.* 301, 35 *W. R. Dig.* 209, *commented on.*

After a defendant's case was closed, the defendant himself not having been called as a witness in support of it, an application by plaintiff's counsel to call him as a witness refused, it being admitted that plaintiff's counsel had not been led by any misrepresentation to suppose that the defendant would be called.

Trial of action.

This was an action claiming a declaration that the defendants were jointly and severally liable to account for and make good the value of certain furniture bequeathed by the will of Mrs. Shalless, deceased, which the plaintiffs alleged to have been wrongfully converted.

Mrs. Shalless was immediately before her marriage with the defendant Arthur Shalless entitled to certain furniture. On the marriage, which took place on the 2nd of November, 1876, a settlement was executed by which the furniture was assigned to trustees upon trust immediately after the marriage to sell at their discretion and invest the proceeds, and to hold the same upon such trusts and to and for such ends, intents, and purposes, and in such manner and form in all respects as Mrs. Shalless should, notwithstanding coverture, by deed, will, or testamentary writing appoint, and subject thereto upon trust as therein mentioned. There was a proviso in the settlement that, notwithstanding the trust for sale, the trustees should not sell the furniture so long as Mrs. Shalless was willing and able to retain the actual possession and personal enjoyment of the same, without her consent in writing, and that in the meantime they should stand possessed of the furniture, or such part or parts thereof as should be unsold, in trust for such person or persons, and in such manner as Mrs. Shalless should, notwithstanding coverture, by any writing with the written consent of the trustees or trustee from time to time or at any time appoint, and subject thereto upon trust to permit it to be used by Mrs. Shalless during her life for her separate use without power of anticipation.

From the marriage to her death, which occurred on the 8th of October, 1888, Mrs. Shalless remained in possession of the furniture, and for several years of that time she was living apart from her husband, who had left her. During the whole of that time the trustees never intervened or made any claim in respect of the furniture, except on one occasion when, the husband's creditors having claimed it, interpleader proceedings were taken in the name of Mrs. Shalless and her trustees, and the creditors abandoned their claim.

By her will, dated the 17th of August, 1888, Mrs. Shalless appointed the plaintiff Barker executor and trustee, and he, shortly after her death, proved the will. Another executor and trustee having renounced probate and disclaimed the trusts of the will, the plaintiff Baxter was, on the 31st of July, 1889, appointed trustee with Barker, in his place.

By her will Mrs. Shalless gave all her furniture and other household effects to her trustees upon trust to permit her husband and her infant son to have and enjoy the same during their joint lives and the life of the survivor, and after the death of the survivor she directed that the furniture and effects should fall into and form part of her residuary personal estate. In addition to the furniture and effects she was also entitled to a freehold house in which the furniture was and in which she lived, and by her will she devised her real and residuary personal estate to her trustees upon trust to sell and, after payment of her funeral and testamentary expenses and debts, to invest the residue as therein mentioned and to hold the same in trust to pay certain legacies, and subject thereto in trust to pay the income to her husband until her son should attain twenty-one, he maintaining and educating her said son, and on her son attaining twenty-one upon trust to pay him a legacy, and subject thereto to pay the income to her husband for life, and after his decease upon trust as therein mentioned.

Shortly after the death of Mrs. Shalless, Barker went to the house and had an inventory of the furniture taken, telling the servant who was in the service of Mrs. Shalless at the time of her death, that he was her executor, and directing the servant to look after the furniture, as it was to be held in trust. The servant remained in the house for a month after the death of Mrs. Shalless, and was paid by Barker as executor out of Mrs. Shalless' estate a quarter's salary, representing two months before and one month after the death, for which sum she gave Barker a receipt. Barker did not know of the settlement till some time afterwards, and he permitted Arthur Shalless to live in the house and to have the use of the furniture as beneficiary under the will. The servant above mentioned waited on him during the month, but it was stated in Barker's evidence that her duty was also to look after the house and furniture. On or about the 25th of September, 1889, Arthur Shalless, without the knowledge or consent of the plaintiffs, removed part of the furniture and sent it to London, whence it was subsequently sent to the saleroom of Furlong & Son, auctioneers, of Woolwich, who sold part of it for £121 6s. 6d. net, which they paid to Arthur Shalless, delivering the furniture sold to the purchaser and the remainder to Arthur Shalless, who appropriated it to his own use.

The trustees of the will thereupon brought this action against Arthur Shalless, his brother Henry Shalless, who acted as his agent, and the auctioneers, claiming from Arthur Shalless the full value of the furniture, and from the auctioneers and Henry Shalless the sum of £121 6s. 6d.

(*a.*) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

The trustees of the settlement never interfered or made any claim to the furniture, and after the commencement of the action disclaimed all interest therein.

The defendant Arthur Shalless put in a defence, but did not appear at the hearing.

It appeared on the evidence that the defendant Henry Shalless had been actively concerned as agent for his brother in the transactions complained of; that he had consigned the furniture to the auctioneers; and that the auctioneers sold under his instructions and after consultation with him as to the preparations for the sale, and dealt with him as his brother's agent. There was nothing, however, to show that he knew that his brother was acting improperly in selling.

The defendants Furlong & Son by their defence contended that the furniture did not belong either to Mrs. Shalless or the plaintiffs, but to the trustees of the settlement; or, in the alternative, that the plaintiff Barker, as executor, had assented to the bequest to the husband, who, they said, at the time of the alleged conversion, was entitled, both in his own right and as guardian of his son, to the sole possession of the furniture. They further insisted that they had acted *bonâ fide* on the request of Arthur Shalless and his brother. They also claimed, if found liable, to have a right of indemnity over against their co-defendants.

Haldane, Q.C., and *E. Ford*, for the plaintiffs.—Mrs. Shalless had a complete *jus disponendi*, and by the exercise of her power of appointment, and by appointing the plaintiff Barker as executor, has conferred on him the right to receive the goods, and, therefore, to maintain this action: *In re Hoskin's Trusts*, 25 W. R. 779, 5 Ch. D. 229, 6 Ch. D. 281, and *In re Philbrick*, 13 W. R. 570. The plaintiff Barker was in lawful possession, which confers on him a right of action, though the temporary occupation was in another; and the plaintiffs' right of action is not affected by any possibility of a right in the trustees of the settlement, which they never asserted, and have since expressly disclaimed: *Congreve* v. *Evetts*, 10 Ex. 298, 2 W. R. Dig. 162, and *Wooderman* v. *Baldock*, 8 Taunt. 676. The auctioneers are liable (*Hollins* v. *Fowler*, L. R. 7 H. L. 757, see pp. 787, 795, 23 W. R. Dig. 238), though acting innocently: *Adamson* v. *Jarvis*, 4 Bing. 66, and *McEntire* v. *Potter & Co.*, 37 W. R. 607, 22 Q. B. D. 438. *Turner* v. *Hockey*, 56 L. J. Q. B. 301, 35 W. R. Dig. 209, is not an authority, as it is in conflict with *Hollins* v. *Fowler*. Moreover, it is distinguishable from the present case.

As to the liability of Henry Shalless they referred to *Stephens* v. *Elwall*, 4 M. & S. 259; *Hardman* v. *Booth*, 11 W. R. 239, 1 H. & C. 803; and Pollock on Torts, 1st ed., p. 171.

Neville, Q.C., and *Mulligan*, for the defendants Furlong & Son.—Where constructive possession is relied on, as in the case of a bailee or *cestui que trust*, it is open to the person charged with conversion to show that the property is in a third person. The question here is whether the plaintiffs had the right of possession of the goods, as well as the property in them: *Bradley* v. *Copley*, 1 C. B. 685; *Armory* v. *Delamirie*, 1 Smith's L. C., 9th ed., p. 385; *Gordon* v. *Harper*, 7 T. R. 9; and Underhill on Torts, 5th ed., p. 269. The property in this case was in the trustees of the settlement, there being an absolute power of sale which was exercisable after Mrs. Shalless's death: *In re Tweedy and Miles*, 33 W. R. 133, 27 Ch. D. 315; her power of appointment being over the proceeds of sale. The auctioneers were not guilty of conversion, having received the goods from the person in actual possession of them through his agent: *Turner* v. *Hockey*; *Greenway* v. *Fisher*, 1 C. & P. 190; and *Fine Art Society* v. *Union Bank of London*, 35 W. R. 114, 17 Q. B. D. 705.

Johnston Edwards, for Henry Shalless, referred to the *dictum* of Blackburn, J., in *Hollins* v. *Fowler*, L. R. 7 H. L. 767; Selwyn's *Nisi Prius*, 13th ed., p. 1289; *Fenn* v. *Bittleston*, 7 Ex. 152; and *Lancashire Wagon Co.* v. *Fitzhugh*, 6 H. & N. 502, 9 W. R. C. L. Dig. 63; and as to want of title in the plaintiffs adopted the argument of counsel for the defendants Furlong & Son.

Haldane, Q.C., in reply, asked permission to call the defendant Henry Shalless, who had not given evidence on his own behalf, but the application was refused.

ROMER J., after stating the facts as reported above, continued:—As against the defendant Arthur Shalless, who does not appear, the action is practically undefended, and there must be judgment against him for the full amount stated in the statement of claim, namely, £228 14s. 11d., with costs.

As against Furlong & Son and Henry Shalless, they are sued for conversion of the goods. They raise two defences, first, that the plaintiffs not being at the date of the alleged conversion in actual possession they, the defendants, may set up *jus tertii*, and that, the property in the goods really being in the trustees of the settlement, the plaintiffs cannot maintain their action; and, secondly, that they (the defendants) never converted the goods.

As to the first point it seems clear that Mrs. Shalless's will passed the beneficial interest in the goods; that upon her death the plaintiff Barker as executor and trustee took possession of the furniture and house; and that he allowed A. Shalless to remain in occupation as a beneficiary under the will until the removal of the furniture. The occupation at the time of the removal of the furniture was by right of the possession of the plaintiff Barker, or of him and Baxter, who were at law entitled to possession. The plaintiffs had not only an immediate right of possession, but a good title to the chattels as against all the world, subject only to a possible claim on the part of the trustees of the settlement, which claim in fact was never made. This in my judgment gave the plaintiffs ample right to bring this action. When a *cestui que trust* is in occupation under a trust, the trustee has an immediate right to possession in the eye of the law, sufficient to enable him to bring an action for trover. This appears from the case of *White* v. *Morris*, 11 C. B. 1015. That case decided that where goods are assigned as security for an advance of money, upon trust to permit the assignor to remain in possession until default in payment at the time stipulated, and upon further trust to sell them on such default being made, the assignee has a sufficient possession to enable him to maintain an action of trespass against a wrongdoer. The facts were shortly these: Robinson and Storey assigned to White certain goods to hold to White upon trust to permit Robinson and Storey, the mortgagors, to hold the goods until payment of the money to become due under the deed should be demanded, and with power to White to sell in default of payment. Certain creditors of one of the mortgagors obtained judgment against him and issued execution, and seized and sold the goods before any demand had been made for payment of the mortgage money. In support of the case of the creditors *Bradley* v. *Copley* was cited. But that case is distinguished in *White* v. *Morris*, on the ground that the possession of the mortgagors was, by virtue of the trusts of the deed, the possession of the mortgagee, or, in other words, that the mortgagee had in law an immediate right to possession. Jervis, C.J., said

(11 C. B., at p. 1028) that counsel "had contended that no present possession of the goods in question passed to the plaintiff under the deed of assignment . . . sufficient to entitle him to maintain this action, and in support of this view he relied upon the cases of *Bradley* v. *Copley* and *Wheeler* v. *Montefiore*, 2 Q. B. 133. But a comparison of the deeds in those cases with the language of the deed here will show that they have no application. Here a right to the possession did pass to the plaintiff by the deed, though it was incumbered with a trust, but which trust is quite consistent with the right to the possession remaining in the plaintiff. In the cases cited, however, instead of a trust there was a proviso to the effect that until default made the assignors should have possession, and no right to the present possession passed to the assignees." And Maule, J., at p. 1030, says: "I am of the same opinion. As to the plaintiff's not being possessed, the distinction between this case and those relied on by counsel has been pointed out by the Lord Chief Justice in a manner quite satisfactory to my mind. The deed was one under which the plaintiff was bound to take possession of the goods assigned, for the purpose of enabling him to perform the trusts." The same view of the law is taken in *Wooderman* v. *Baldock*. And when there is a right of immediate possession coupled with a title to goods, though the title may not be perfect as against, or may even be liable to be defeated by, the claim of a third person, yet, if that third person has not intervened, a wrongdoer dealing with the chattels cannot set up the title of that third person as an answer to an action against him for his wrongdoing. In *Morgan* v. *Knight*, 12 W. R. 428, 15 C. B. N. S. 669, a man during his first bankruptcy acquired certain goods and fraudulently transferred them to his son, and on his again becoming bankrupt the assignee in the second bankruptcy sued the son for the value of the goods. The son set up as a defence the title of the assignee in the first bankruptcy. It was held no defence as against the assignee in the second bankruptcy, as the assignee in the first bankruptcy had not intervened, and the second bankruptcy was not void.

As regards the second point argued on behalf of the defendants, it is necessary to distinguish the case of Furlong & Son, the auctioneers, from that of H. Shalless. As to Furlong & Son, it is urged on their behalf that they have only acted as auctioneers, and that in so acting they have not been guilty of any conversion, and they rely on the case of *Turner* v. *Hockey*. Now, I agree that if an auctioneer or broker does nothing more than settle the price, as between a vendor and a purchaser of goods, and takes his commission, he is not liable for conversion should it turn out that the vendor was not entitled to sell. That is the case put by Lord Bramwell in *Cochrane* v. *Rymill*, 27 W. R. 777, as one where the auctioneer would act merely as a conduit pipe, and not be liable for a conversion. But where, as in the present case, the auctioneer receives the goods into his custody, and, on selling them, hands over the goods to the purchasers, with a view to passing the property in them, then I think that he, the auctioneer, has converted the goods and is liable accordingly. In support of this view I may refer to *Cochrane* v. *Rymill*; *Featherstonhaugh* v. *Johnston*, 8 Taunt. 237; and *Adamson* v. *Jarvis*, 4 Bing. 66. The general rule is, that where an agent takes part in transferring the property in a chattel, and it turns out that his principal has no title, the agent's ignorance of this fact affords him no protection. I was referred to the cases of a carrier and a packing agent as supporting the case of the auctioneers. But the carrier and packing agent are generally held not to have converted, because by their acts they merely purport to change the position of the goods, and not the property in them. In the case of *Hollins* v. *Fowler* I find statements supporting the views which I have stated. Blackburn, J., says (at p. 766): "I cannot find it anywhere distinctly laid down, but I submit to your lordships that, on principle, one who deals with goods at the request of the person who has the actual custody of them, in the *bonâ fide* belief that the custodian is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods, or intrusted with their custody," and, again, he says, (L. R. 7 H. L., at p. 767):—"Thus a warehouseman with whom goods have been deposited is guilty of no conversion by keeping them, or restoring them to the person who deposited them with him, though that person turns out to have had no authority from the true owner. . . . And the same principle would apply to the cases alluded to by my brother Hannen in his judgment in the court below, of persons 'acting in a subsidiary character, like that of a person who has the goods of a person employing him to carry them, or a caretaker, such as a wharfinger.' . . . It was said, 'Suppose that the defendant had sent the delivery order to Micholls, who had handed it to the railway company, requesting them by means of it to procure the goods in Liverpool and carry them to Stockport, and the railway company had done so, would the railway company have been guilty of conversion?' I apprehend the company would not, for merely to transfer the custody of goods from a warehouse at Liverpool to one at Stockport is *primâ facie* an act justifiable in anyone who has the lawful custody of the goods as a finder or bailee; and the railway company, in the case supposed, would be in complete ignorance that more was done. But if the railway company, in the case supposed, could have been fixed with knowledge that more was done than merely changing the custody, and knew that the company's servants were transferring the property from one who had it in fact to another who was going to use it up, the question would be nearly the same as that in the present case." Cleasby, B. (at p. 787), states the exact point which arises in this case. "How far," he says, "the intermeddling with the goods themselves by delivering them would do so"—that is, involve any responsibility to third persons—"admits of question, and was the subject of much argument at the bar, and might depend upon the extent to which the broker in each case could be regarded as having an independent possession of the goods and delivering them for the purpose of passing the property. For example, an auctioneer delivers possession for the purpose of passing the property, and it would not be disputed that he would be liable, as upon a conversion, to the real owner." Lord Chelmsford (at p. 795) says: "But to my mind the proposition which fits the case is, that any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion." Lord Cairns (at p. 797) deals with the case in substantially the same way. Lord O'Hagan says (at p. 799): "The defendants got possession of the plaintiffs' cotton. They had it conveyed to the railway station, and forwarded to the purchaser in Stockport, who paid for it, and made yarn of it. It seems to me that this state of facts entitles the plaintiffs to recover in an action of trover, which rests on a right of property, wrongfully interfered with, at the peril of the person interfering with it, and whether the interference be for his own use or that of anybody else." With

[illegible]

[illegible] Henry Shalless. The plaintiffs' counsel, [illegible] asked me to allow him to call this defendant as his witness, because he had assumed that this defendant would be called as a witness on his own behalf, although [illegible] evidence. I did not accede to the application for this reason. In reply to my question the plaintiffs' counsel admitted that he could [illegible] without calling the defendant he had not been misled or anything [illegible] from the other side, [illegible] that they would call him. It appeared to me therefore that the plaintiffs' counsel had in the exercise of his judgment preferred to close his case without calling the defendant, on the chance that the defendant would appear in the box to support his own case when he would be cross-examined without the risk attending his being called as one of the plaintiffs' witnesses, and it appeared to me that if I had granted the plaintiffs' application after the defendant's case had been argued and closed and a reply begun I should be making a precedent which would, if established, lead to an improper amount of laxity in the conduct of a plaintiff's case. But though I refused this application, I fully agree with what Mr. Haldane said, that I am entitled and bound under the circumstances of the defendant not appearing to support his case, though he was in court, to make every reasonable presumption against him; and, in this footing, having regard to the admissions made on behalf of this defendant in the course of the trial, I think that the plaintiffs have established their case against him. From the admitted correspondence of Henry Shalless with Furlong & Son, he appears to have been actively concerned in forwarding the chattels to the auctioneers; it appears, moreover, that the goods were under his control while being forwarded by the railway company; that the keys were sent by his directions, accompanied by letters containing instructions directed to him, care of the auctioneers, which he directed the auctioneers to open for instructions. What those instructions were does not appear; but it does appear that, following this forwarding of the chattels for the auctioneers to deal with according to instructions, they did in fact, as was previously admitted by Henry Shalless during the plaintiffs' opening, receive and sell certain of the chattels; and an admitted letter to Henry Shalless from Furlong & Son shows the auctioneers still consulting him about the preparation for sale of these chattels by the auctioneers after they have received them. Under these circumstances I think Henry Shalless must be taken to have sent the chattels to the auctioneers, and to have instructed the auctioneers to sell them as they did with the view of passing the property in the goods sold to the purchasers as against the true owners of the goods sold. This, in my opinion, amounted to a conversion according to the rules I have before referred to. In fact the case of Henry Shalless in this matter is far stronger as a conversion than that of the agent in *Stephens* v. *Elwall*, which has always been recognized as a binding authority, and is referred to with approval in *Hollins* v. *Fowler*. Under these circumstances there must be judgment for the plaintiffs against Furlong & Son and Henry Shalless for £121 6s. 6d., the price of the goods sold, and they must pay the costs of the action as against them.

On the question whether H. Shalless was liable to indemnify the auctioneers

Romer, J., said that no promise to indemnify could be implied. H. Shalless warranted that he was acting by the direction of A. Shalless, but he had in fact that authority. Furlong & Son knew that the goods were to be sold by the direction of A. Shalless given by H. Shalless. There was no direction by H. Shalless, except on behalf of A. Shalless; and Furlong & Son did not act on any such footing as that they were to receive an indemnity if any authority was exceeded. This claim of Furlong & Son failed, and they must pay the costs of it.

Solicitors, *McDiarmid & Teather*, for *J. D. & D. M. Macdonald*, Newcastle-on-Tyne; *E. W. Sampson*; *Edwin Shalless*.

Q. B. Div. (Denman and Wills, JJ.) June 5.

Hayward v. Mutual Reserve Fund Association. (a.)

Practice—Official referee—Jurisdiction to make an order for a commission to examine—Appeal—Rules of the Supreme Court, 1883, ord. 36, rr. 48–50—Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 14, 15.

The words in ord. 36, r. 50, of the Rules of the Supreme Court, 1883—"the referee shall have the same authority in the conduct of any reference or trial as a judge of the High Court"—must be construed as giving the referee a general control over the conduct of the cause or subject-matter referred to him, and are not limited to the conduct of the actual hearing of the cause. A referee, therefore, has power to hear interlocutory applications, such as for a commission to examine a witness in reference to the cause.

A referee being deemed by section 15 of the Arbitration Act, 1889, to be an "officer of the court," an application will lie to the judge at chambers from his decision on interlocutory matters.

Appeal from the refusal of Mr. Ridley, acting as official referee, to grant an order for a commission to issue, referred by Henn Collins, J., at chambers to the Divisional Court.

This action had been referred by an order of reference made under section 14 of the Arbitration Act, 1889, ordering the whole cause to be tried before the official referee, Mr. Ridley. Before the hearing of the reference, application was made to the referee by the defendants for an order to examine a witness on commission. The official referree refused the application. Upon appeal the judge at chambers doubted (1) whether there was any appeal from the referee, and (2) whether the referee had any jurisdiction to make the order, and referred both questions of jurisdiction to the court.

Bousey, for the defendants.—The official referee is, under section 15 of the Arbitration Act, 1889, made an officer of the court, and "shall have such authority and shall conduct the reference in such a manner as may be prescribed by rules of court." By R. S. C., 1883, ord. 36, rr. 48, 49, 50, the trial of a reference is regulated; and by rule 50 the referee "shall have the same authority with reference to discovery and production of documents and in the conduct of any reference or trial . . . as a judge of the High Court." The jurisdiction of the referee is analogous to

(a.) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

that of a master, and as such he could order a commission to issue for the examination of a witness abroad.

He cited *Richard* v. *Talbot*, 38 W. R. 478; *Byrne* v. *Brown*, 37 W. R. 592, 22 Q. B. D. 657: *In re Leigh*, 25 W. R. 56, 27 *Ibid.* 241, 4 Ch. D. 661.

Willes Chitty, for the plaintiff.—There is no power in the referee to make any order for a commission. His authority is confined to the trial of the subject-matter referred. Section 14 of the Arbitration Act, 1889, incorporates the repealed section 57 of the Judicature Act, 1873, and section 3 of the Common Law Procedure Act, 1842: the whole cause or any issue of fact may be tried before a referee, but a reference is confined to where a referee reports to the judge on some portion of a cause. There is nothing in the section or the ord. 36, rr. 48, &c., taking away the control of the court over the cause referred for trial only to the referee, nor do the rules give to referees the powers of masters except expressly as to discovery and production: *Danvillier* v. *Myers*, 29 W. R. 535, 17 Ch. D. 346. Assuming that the referee had jurisdiction, there is no appeal from his decision. The only appeal provided for is by rule 52, for questioning his report, but there is no appeal in interlocutory matters. If there is any appeal it must be to the Divisional Court: *Cooke* v. *The Newcastle Co.*, 10 Q. B. D. 332.

Bonsey replied.

DENMAN, J.—There is great difficulty undoubtedly in coming to a clear decision as to the meaning of ord. 36, r. 49, owing to its not very happy wording. "Subject to any order to be made by the court or judge ordering the same"; but I take it that the words must be interpreted as being antecedent, and "the same" must refer to the trial by a referee. The real question here turns upon the extent of the meaning of the subsequent words in rule 50, where it is stated that "subject to any such order as last aforesaid," *i.e.*, subject to any special order restricting the reference in any way, "the referee shall have the same authority with respect to discovery and production of documents and in the conduct of any reference or trial . . . as a judge of the High Court." The ordinary meaning of the words, "conduct of a trial" is more restricted, than the one we are, I think, bound here to put upon the phrase. It is technically taken to mean the actual hearing; but putting the words together in this order, "the conduct of the reference or trial," I think the meaning cannot be restricted to the actual hearing, nor do I think the word reference can be restricted as Mr. Chitty would have us believe. The words here embrace all that is commonly meant by a reference; it may be a reference of only one question, or subdivision of a case, or it may be a reference of the whole cause. In both cases the large sense of the word is implied, and the conduct of any reference in this larger sense means the conduct of any part of the cause or matter referred and of the whole or part of any of the subject-matter referred. If so, we cannot restrict the words to the hearing of the reference. The referee has powers with regard to discovery and production of documents specially given him under ord. 36, r. 50, for which, under the old rule, application was formerly necessary to the High Court.

It must be assumed from the wording of the rule that the referee is also to have all the ordinary powers of a judge in the conduct of a cause, subject to any order limiting such. If so, the official referee is an officer of the court, with the powers of the court delegated to him; but, being an officer of the High Court, if he makes a mistake, then, in accordance with the cases, it has been held that, where an officer of the court, having duties as such imposed on him, makes a mistake, parties have power to come to the court to have this set right. That is the application here, though it is nominally an appeal—it is an application to do what the referee declined to do. As to whether upon the merits this ought to be done, I understand that the parties are willing to go before the judge at chambers. On the question of jurisdiction, I think that parties, if they are dissatisfied with the decision of an officer of the court such as a referee, and show reasonable grounds for their dissatisfaction, are entitled to come to the court. I think, therefore, that the true construction of rule 50 of order 36 gives the larger sense to the terms "conduct of any reference or trial" than this technical meaning; that rule 48 regulates, but does not interfere with, the true construction of rule 50; and that the meaning of "the same" in rule 49 refers to the subject-matter of the sentence—viz., trial before a referee, and does not affect the question under rule 50.

WILLS, J.—The reference in this case was a reference of the whole cause under section 14 of the Arbitration Act, 1889. By section 15 of that Act the official or special referee in all cases referred is to act as an officer of the court. It was said by Mr. Chitty that the order here was not one of reference, but only an order for trial, and that the referee had no authority over the action except for the purpose of hearing the trial. But clearly this order in the ordinary form, and this section, covers all references made by order of the court, and the referee has such authority over the whole conduct of the action referred to him as a judge would have had it come before him, subject to any special directions which may have been made by the court referring the cause.

The rule in question (ord. 36, r. 50), dealing with the conduct of the reference, includes all things ancillary thereto in order to bring everything to a satisfactory termination. Under ord. 36, rr. 49, 50, it is difficult, no doubt, to construe the words "the same"; there seems to be no antecedent to those words; but taking the rules together, I suppose it does mean what my learned brother suggests, that, subject to any order limiting the reference, the referee is to have the same ample authority as a judge of the High Court would have had in the conduct of the action. This view is strengthened by section 16 of the Arbitration Act, 1889, and the conduct of a reference must include everything ancillary to it. I cannot understand why it should be supposed that powers to order discovery and production should be given to official referees and yet other powers be withheld. Such powers were probably only expressly given because they are by the rules reserved to the judge at chambers, but the referee is equally expressly endowed with all the other ordinary powers of a judge over the conduct of a cause. Is there, then, any appeal from the referee's exercise of such jurisdiction? Yes, if that jurisdiction has been improperly exercised. The referee is made an officer of the court, and as such he is subject to the control of the court in the exercise of that jurisdiction. The form of application is a review rather than an appeal, as in a review of taxation of costs. It is similar, I may say, to the control which, as a railway commissioner, I exercise over the registrar of that commission, to whom various duties of the court are delegated. That view of the control of the court over masters is confirmed by the old decisions under the Lands Clauses Acts, where the powers as to taxation of the costs of arbitration were specially exempt from appeal, on the ground that in those cases the masters of the Queen's Bench were not exercising powers

delegated to them as officers of the court, and analogously that the court would have had control over them had they been so acting.

Appeal allowed on point of jurisdiction, and referred on merits to judge at chambers.

Solicitor for the plaintiff, *F. W. Spencer.*

Solicitors for the defendants, *Foss & Ledsam.*

Court of Appeal.

From Q. B. Div. July 10.

REEVES *v.* BUTCHER. (*a.*)

Limitations, Statute of—Simple contract debt—Cause of action—Accruer of—21 Jac. 1, c. 16, s. 3.

By an agreement in writing, dated the 25th of April, 1880, the defendant, in consideration of a sum of money advanced by the plaintiff, stipulated to pay interest thereon by equal quarterly payments, and the plaintiff stipulated not to call in the principal sum for five years if the defendant should so long live and should duly pay the interest. The agreement contained a proviso that, if the defendant died before the expiration of the five years, it should be lawful for the plaintiff to call in the principal upon giving six months' notice to the defendants' executors; and a further proviso that, in case the defendant made default in any payment of interest for twenty-one days after the same became payable, the plaintiff, immediately upon the expiration of the twenty-one days, might call in the principal and all interest owing in respect thereof.

No payment, either of interest or principal, was ever made by the defendant. On the 13th of February, 1891, the plaintiff brought an action to recover the principal sum and also so much of the interest as had accrued thereon since the 13th of February, 1885 (being a period of six years before the issue of the writ). The defendant pleaded the Statute of Limitations (21 Jac. 1, c. 16), s. 3.

Held, that the cause of action arose on the expiration of twenty-one days from the 25th of July, 1880, the date when the first quarterly payment of interest became payable, and that the plaintiff's claim was, therefore, barred by the statute.

Hemp *v.* Garland, 4 *Q. B.* 519, *approved.*

Appeal from a divisional court (Day and Lawrance, JJ.) of the Queen's Bench Division.

This was an action instituted on the 13th of February, 1891, to recover a principal sum of £425 18s., with interest thereon at the rate of £7 per cent. per annum, claimed to be due to the plaintiff, Mrs. Harriet Elizabeth Reeves, by the defendant, Sarah Anne Butcher, under an agreement in writing dated the 25th of April, 1880. The defendant pleaded the Statute of Limitations (21 Jac. 1, c. 16), s. 3, as a bar to the claim both for principal and interest. The plaintiff, in reply, gave up any claim for interest accrued due prior to the 13th of February, 1885.

By the agreement of the 25th of April, 1880, the defendant, in consideration of the sum of £425 18s advanced to her by the plaintiff, agreed to duly and regularly pay interest on the said principal sum from the date thereof at the rate of £7 per cent. per annum, by equal quarterly payments; and the plaintiff thereby agreed not to call in the principal sum, or any part thereof, during the term of five years from the date of the agreement if the defendant should so long live, and should duly and regularly pay the said interest. Provided always that in case the defendant should die before the expiration of the said term it should be lawful for the plaintiff to call in the said principal sum upon giving to the executors or administrators of the defendant six months' previous notice in writing of her intention so to do; provided also that in case the defendant should make default in payment of any quarterly payment of interest for the period of twenty-one days next after the same should become payable, it should be lawful for the plaintiff immediately upon the expiration of such twenty-one days to call in and demand payment of the said principal sum and all interest then owing or accruing in respect thereof.

No payment in respect of principal or interest had ever been made by the defendant.

The Divisional Court held that the plaintiff's claim was barred by the Statute of Limitations (21 Jac. 1, c. 16), s. 3, which enacts that "all actions of debt grounded upon any contract without specialty shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions for debt, within six years next after the cause of such actions, and not after."

The plaintiff appealed.

McCall, Q.C., and *Morton Smith*, for the appellant.—The Divisional Court considered the case to be governed by *Hemp* v. *Garland*, 4 Q. B. 519. In the present case, however, the plaintiff under this agreement has two distinct causes of action, either of which she could exercise at her option; she might sue the defendant on the expiration of twenty-one days from the first default in payment of interest; or she might wait until the expiration of the five years from the date of the agreement and then sue for non-payment as agreed upon. The cause of action now sued upon did not arise till the 25th of April, 1885, which date is within six years of the date when the writ was issued.

They referred to *Hughes* v. *Palmer*, 13 W. R. 974, 19 C. B. N. S. 393.

Loehnis, for the respondent, was not called on.

LINDLEY, L.J.—It would be quite impossible for us to differ from the court below without altering what is well settled law. [The Lord Justice read the terms of the agreement, which are set forth above, and continued:—] The action is to recover the money lent, with interest thereon, under that agreement. The Statute of Limitations is relied on as a defence to the action. [His lordship read the words of section 3 of 21 Jac. 1, c. 16, and continued:—] The words "cause of such action" were the subject of judicial determination in 1848 in *Hemp* v. *Garland*, and it was held that the time at which the debt or money might be recovered, was the time at which the statute began to run.

FRY, L.J.—The agreement contains a stipulation by the lender not to call in the principal sum for a period of five years if the borrower should so long live and should duly and regularly pay interest thereon. That would imply a contract to repay the principal at once on the death of the borrower, or the moment default was made in the payment of interest, were it not for the last clause in the agreement. That clause implies a contract for the postponement of the repayment of principal in case of the death of the borrower until the lender has given six months' notice in writing to the executor of the borrower; and it also implies a postponement of the repayment of the principal in case of default in payment of interest

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

until a period of twenty-one days should have elapsed. Subject to these conditions the implied contract to pay the principal remains the same. In this case, therefore, the debt became payable twenty-one days after the 25th of July, 1880, when the first default in payment of interest was made, and therefore the Statute of Limitations applies.

LOPES, L.J.—The old form of the plea of the Statute of Limitations is "that the alleged cause of action did not accrue within six years before this suit." In this case the cause of action accrued on the expiration of twenty-one days from the 25th of July, 1880, the time when default was made in payment of the first quarterly payment of interest. *Hemp* v. *Garland* is a decision in accordance with the words of the statute, and is a clear authority in favour of the defendant. In my opinion that case is perfectly good law.

Appeal dismissed.

Solicitor for the appellant, *E. C. Goldring.*

Solicitors for the respondent, *Marsland, Hewitt, & Urquhart.*

From Chan. Div. July 15.

In re DAVIS.
EVANS *v.* MOORE. (*a.*)

Limitations, Statute of—Executor—Legacy—Assent of executor—Implied trust—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

The time for bringing an action or other proceeding to recover any legacy is limited by section 8 *of the Real Property Limitation Act,* 1874, *to a period of twelve years next after the accruer of a present right to receive the same; and neither the fact that the executor has assented to the legacy, or that the legacy is coupled with any implied trust, prevents the operation of the statute.*

Appeal from North, J.

Henry Davis, by his will, dated April 21, 1825, directed the income of his residuary personal estate to be accumulated until all his grandchildren should attain twenty-one or marry.

Henry Davis died on May 16, 1825, leaving Jane Davis, his widow, and several children, including T. H. Davis, him surviving.

Jane Davis, the widow, by her will, dated May 13, 1848, disposed of her residuary personal estate as follows:—One-third part thereof to her eldest son, the said T. H. Davis, absolutely; one-third to her second son; and the remaining one-third equally between her two grandchildren, Henry A. M. Evans and Mary Evans, the children of her son-in-law, John Evans, absolutely. And the testatrix declared that her son-in-law, John Evans, should from time to time regulate and direct the mode in which, during the minority of the testatrix's grandchildren, the shares bequeathed to them of the testatrix's residuary personal estate, and the income arising therefrom, should "be invested, applied, or accumulated; and that neither John Evans nor the testatrix's executor should be accountable for any loss which might arise in the investments."

The testatrix died on January 4, 1854, having appointed the said T. H. Davis her sole executor, by whom the will was proved on June 22, 1854.

On July 20, 1857, an order was made in an action (*Davis* v. *Stokes*) for administration of the estate of Henry Davis, whereby it was declared that the persons who would have been the next of kin of Henry Davis at the time of his death, if he had died intestate, or their respective estates, were entitled to the income, and to the accumulations thereof, which had accrued due on Henry Davis's residuary estate on May 16, 1846 (when a period of twenty-one years from the date of Henry Davis's death expired), and also to the income thereafter to accrue upon such residue and accumulations until the period for distribution of such residue as appointed by the will of Henry Davis should arrive; and the order further directed, *inter alia*, that one-third part of a certain sum when carried over to an account as therein directed should be paid to T. H. Davis as the legal personal representative of Jane Davis, widow, deceased; and that the amount of the dividends which should accrue on any sum of Consols from time to time standing in the name of the Accountant-General in *Davis* v. *Stokes* when carried over should be divided and paid each year, as to one-third part thereof, to T. H. Davis as the legal personal representative of Jane Davis, deceased.

Jane Davis, as the widow of Henry Davis, would have been entitled to one-third of his personal estate if he had died intestate, and the effect of the above order was that one-third of the accumulations accrued from May 16, 1846, to the date of the order, and one-third of the income to arise in the future on the residuary estate of Henry Davis until the period of distribution, was directed to be paid to T. H. Davis as the legal personal representative of Jane Davis.

Mary Evans and Henry A. M. Evans, the two above-mentioned grandchildren of Jane Davis, and who under her will were together entitled to one-third of her residuary personal estate, attained the age of twenty-one respectively in 1863 and 1866.

T. H. Davis died on July, 21, 1888, and appointed W. E. Moore his executor.

T. H. Davis, up to his death, received each year one-third part of the income of the fund in court as the legal personal representative of Jane Davis under the order of July 20, 1857, but never rendered any account or made any payment to Henry A. M. Evans or Mary Evans in respect of their share therein.

On January 15, 1891, an originating summons was taken out by Henry A. M. Evans and Mary Evans as plaintiffs, Moore, as the executor of T. H. Davis, being the defendant, and by it the plaintiffs claimed to have it declared that T. H. Davis was, and that his estate now is, liable to account for and make good to the plaintiffs one-third part of the dividends and income received by him as the legal personal representative of Jane Davis under and in accordance with the order of July 20, 1857.

On the hearing of the summons the defendant admitted liability to account, but contended that the account could only be claimed for twelve years prior to the date of the originating summons.

North, J., sitting in chambers, however, made an order directing an account of the dividends, interest, and income received by T. H. Davis, deceased, the executor of Jane Davis, under and in accordance with the order of July 20, 1857, and by the defendant Moore, the executor of T. H. Davis, since the death of T. H. Davis, or either of them; and also directing an inquiry in what manner T. H. Davis and the defendant applied such dividends and income so received.

The defendant appealed, and by his notice of appeal asked that the order might be limited to an account of the dividends, interest, and income received within twelve years prior to January 15, 1891 (the date of the originating summons), by T. H. Davis, executor of Jane Davis, under and in accordance with the order of July 20, 1857, and by the defendant, the executor

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

of T. H. Davis, since the death of T. H. Davis, or either of them.

Haldane, Q.C., and *Pauli*, for the appellant.—This is a proceeding to recover a legacy—viz., a share of residue under the will of Jane Davis—and by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8, "No action or other proceeding shall be brought to recover . . . any legacy, but within twelve years next after a present right to receive the same shall have accrued." There was no trust declared by the will of Jane Davis with respect to the plaintiffs' share of her residuary estate, nor did the order of July 20, 1857, create an express trust with respect to such share. No doubt T. H. Davis must be taken to have assented to the bequest to the plaintiffs of one-third of Jane Davis's residuary estate, but assent to a bequest does not constitute an executor a trustee of the legacy so as to prevent the statute operating: *In re Rowe, Jacobs* v. *Hind*, 58 L. J. Ch. 703, 37 W. R. Dig. 4. [FRY, L.J.—In the present case the executor assented to a legacy consisting of a share of residue, part of which was an accruing sum to be received, under an order of the court, by the executor, and by him only; when he received it, did he not become a trustee?] No; because the sum was received by him as executor, not as trustee. In *Phillipo* v. *Munnings*, 2 My. & Cr. 309, the executor was by the will expressly constituted a trustee of the legacy there in question. [LOPES, L.J., referred to *O'Reilly* v. *Walsh*, Ir. Rep. 6 Eq. 555, 21 W. R. Dig. 289.] Section 25, sub-section (2), of the Judicature Act, 1873, enacts that no claim of a *cestui que trust* against his trustee for any property held on an express trust shall be barred by any statute of limitations, but that does not touch a mere implied trust.

They referred also to *In re Johnson*, 33 W. R. 502, 29 Ch. D. 964, at p. 974.

Cozens-Hardy, Q.C., and *B. B. Rogers*, for the plaintiffs, the respondents.—The will of Jane Davis on its true construction creates an express trust of the share of the plaintiffs in her residuary estate. It amounts to a direction to T. H. Davis to invest one-third of the residue for the benefit of the plaintiffs, the then infant children of John Evans. *Phillipo* v. *Munnings* was not the case of an express trust. The defendant cannot claim the benefit of the Trustee Act, 1888, as his testator has received the money and converted it to his own use.

Haldane, Q.C., in reply.—T. H. Davis was not constituted a trustee of the residue by Jane Davis' will. The declaration in that will as to investment is, that John Evans, the father of the plaintiffs, might have directed an investment of the plaintiffs' share of the residue to be made, and that might have been done in John Evans' name, or the executor might have paid the infants' share into court under the Legacy Duty Act (36 Geo. 3, c. 52).

He also referred to 23 & 24 Vict. c. 38 (Intestate's Estate), s. 13.

LINDLEY, L.J.—The question raised is whether an order of North, J., directing an account against the executor of an executor ought to be left open as to time, or whether a limit of twelve years previous to the bringing of the action ought to be inserted in the order, having regard to the provisions of section 8 of the Real Property Limitation Act, 1874.

The real question is as to the liability of T. H. Davis, the immediate testator of the present defendant. The plaintiffs are claiming against his estate for what they say T. H. Davis received as executor of Jane Davis. Jane Davis had a fund, arising from accumulations, which was in court under an order which directed the income of the accumulated fund to be paid, as to one-third part thereof to T. H. Davis as the legal personal representative of his mother, Jane Davis, who was found to be entitled to one-third part of this fund. Jane Davis by her will disposed of her residuary personal estate as follows:—[The Lord Justice read the will as above set out, and continued:—] The will contained no clause expressly in terms directing the one-third of the residue bequeathed to her grandchildren to be invested; the clause only confers on John Evans, the father of the grandchildren, power to "regulate and direct the mode in which" the shares bequeathed to the grandchildren should "be invested, applied, or accumulated" during their minority, and declares that neither the father nor the executor shall be accountable for any loss which might arise in the investments. It was contended by Mr. Cozens-Hardy that on the true construction of this clause in the will, the executor became a trustee for the grandchildren and that it contained an express trust to invest their shares for their benefit. I cannot find it. I think Mr. Haldane was right in what he said on this point, and that the clause contains no express trust to invest, unless John Evans, the father of the grandchildren, directed an investment. But suppose he gave no directions, or suppose he died, where is there any clause directing T. H. Davis to invest? The position of T. H. Davis, then, would only be that of an executor having property to divide amongst infants.

In my opinion there is no express trust in this will. If so, what is the true nature of the claim of these grandchildren? Are they in a position to claim anything more than a legacy under this will? In my opinion they can only claim as for a legacy, and, that being so, they are brought within section 8 of the Act of 1874. I think Mr. Haldane is right in his contention as to that. But it was further contended by Mr. Hardy that T. H. Davis was constituted a trustee under the order of the 20th of July, 1857. The answer to that argument is clear. The Statute of Limitations excepts one class of trusts, and one only, viz., express trusts, and this order no more declares an express trust than does the will. An implied trust will not do, for a legacy does not cease to be a legacy because it is coupled with some implied trust. In one sense an executor is always a trustee. But the Statutes of Limitation cannot be got rid of by calling the executor a trustee, or by proving him to be a trustee. The only way of getting out of the Statute of Limitations is by proving an *express* trust. I think the statute applies in this case and the appeal must be allowed.

FRY, L.J.—The plaintiffs are each entitled to one-sixth share of the residuary estate of their grandmother, Jane Davis. Part of her residuary estate consisted of the dividends of a fund in court. The plaintiffs' action is *primâ facie* an action brought to recover their legacy, and section 8 of the Real Property Limitation Act, 1874, says that such an action can only be brought within twelve years. *Primâ facie*, therefore, the statute applies. But Mr. Cozens-Hardy says that the will of Jane Davis creates an express trust in favour of the plaintiffs, and therefore that the statute does not apply. That depends on the true construction of the clause in the will relating to the gift to the plaintiffs. [The Lord Justice read the clause, and continued:—] The clause only indicates "investment" as one of three modes in which the plaintiffs' share of residue was to be dealt with; the other modes being either accumulation, or application in some other way. The will therefore contains no trust as to investment, but only gives John Evans a power to regulate and direct in which of three modes the share of the plaintiffs was to be applied. In my

opinion the will contains no direction at all that the legacy to the plaintiffs should be invested unless John Evans directed investment; and therefore, in the absence of any direction by John Evans, T. H. Davis, the executor, could deal with the plaintiffs' legacy according to the ordinary law. In my opinion, therefore, there is no express trust to invest whatever.

Then arises the inquiry if there is any implied trust arising from the peculiar circumstances of the case, viz., the fund being in court and an order having been made by which the executor of Jane Davis, and he alone, could receive the dividends, and the fact of his assent. I do not wish to express any opinion as to whether these circumstances created an implied trust or not. But assuming that there was an implied trust, the fact that a legacy is coupled with an implied trust does not prevent the Statute of Limitations applying to an action brought to recover the legacy. An express trust is outside the statute.

LOPES, L.J.—I concur with the other Lords Justices. I am inclined to think that there was no trust at all, either express or implied, fixed on T. H. Davis.

Appeal allowed.

Solicitors for the appellant, *Wilde, Berger, & Wilde.*

Solicitors for the respondent, *Clayton, Son, & Fargus.*

Original motion. May 13.

JONES *v.* INSOLE. (*a.*)

Practice—Appeal—Final or interlocutory order—Extension of time—Special circumstances—R. S. C., 1883, *ord.* 25, *r.* 4; *ord.* 58, *r.* 15; *ord.* 64, *r.* 7.

After the expiration of twenty-one days from the date of the perfecting of an order made under ord. 25, *r.* 4, *dismissing an action on the ground that the statement of claim disclosed no reasonable cause of action, the plaintiff applied to the Court of Appeal for special leave to appeal from such order, alleging as a special circumstance that, until the decision in* Salaman *v.* Warner, ante, *p.* 547, [1891] 1 *Q. B.* 734, *it was doubtful whether such an order was an interlocutory or a final order, and although that case had decided that such an order was interlocutory, a report of it had not been published before the time for appealing had expired in the present case, and that the plaintiff's solicitor had acted in the belief that the plaintiff had a year within which to appeal from the order in question. The plaintiff had in fact already twice amended his pleadings, but had not asked for leave to re-amend at the time when the order now sought to be appealed from was made.*

The Court of Appeal (Lindley, Lopes, *and* Kay, L.JJ.) *refused to give special leave to appeal under the above circumstances.*

Salaman *v.* Warner, ante, *p.* 547, [1891] 1 *Q. B.* 734, *approved.*

Original motion.

This was an application by the plaintiff in the action for leave to appeal from an order made by Chitty, J., striking out the plaintiff's statement of claim and dismissing the action as against one of the defendants, on the ground that the claim disclosed no reasonable cause of action against that defendant.

The twenty-one days from the date on which the order in question was perfected, had expired on April 17, 1891.

It appeared that the plaintiff had twice amended his statement of claim, and that he did not ask for leave to amend when the order now sought to be appealed from, was made.

MacSwinney, for the applicant.—It was only quite recently decided by *Salaman* v. *Warner, ante,* p. 547, [1891] 1 Q. B. 734, that an order dismissing an action on the ground that the claim disclosed no cause of action, was an interlocutory, and not a final, order. That decision was not published until after the expiration of the twenty-one days from the perfecting of the order in the present case, and was not known to the plaintiff or his solicitor. Before that decision the point was doubtful, and the plaintiff's solicitor thought the plaintiff had a year within which to appeal. Further, my client was unwell and unable to attend to business for some time.

Christopher James, contrà.

The following cases were also cited: *Standard Discount Co.* v. *La Grange,* 26 W. R. 25, 3 C. P. D. 67; *McAndrew* v. *Barker,* 26 W. R. 317, 7 Ch. D. 701; *In re Blyth and Young,* 28 W. R. 266, 13 Ch. D. 416; *In re Manchester Economic Building Society,* 32 W. R. 325, 24 Ch. D. 488, 497; *In re New Callao (Limited),* 31 W. R. 185, 22 Ch. D. 484; *Trowell* v. *Shenton,* 26 W. R. 837, 8 Ch. D. 318, 321; R. S. C., 1883, ord. 58, r. 15; ord. 64, r. 7.

LINDLEY, L.J.—This is an application to extend the time for appealing against an order striking out the plaintiff's statement of claim and dismissing the action against one of the defendants. [His lordship read ord. 58, r. 15, and ord. 64, r. 7, and continued:—] Special circumstances are therefore required to be shown to induce the court to extend the time for appealing.

At first I thought that there had been a mere slip, and that justice would be done by giving the leave sought, on terms. But, having heard more of the case, I do not think that such leave ought to be granted. It appears that the plaintiff has already twice amended, and when the order was made in the court below dismissing the action the plaintiff did not then ask for leave to amend.

It is competent for him to take one of two courses, either to apply as he has done here for leave to appeal on terms, or else to issue a new writ.

It appears to me that in this case justice will be done by leaving the plaintiff to his remedy of issuing a fresh writ in the action. It is not a case in which the plaintiff is entitled to any indulgence. I agree with what was laid down in *Salaman* v. *Warner,* that an order striking out a statement of claim on the ground that it discloses no cause of action is an interlocutory and not a final order.

LOPES, L.J.—I think this case is not one in which we ought to exercise the power given us by ord. 64, r. 7. [His lordship read that rule, and continued:—] I think that the indulgence allowed by that rule ought not to be extended unless a strong case is shown. I do not think that here a strong case has been made out. The plaintiff's statement of claim was struck out as disclosing no cause of action and the action was dismissed. The plaintiff has already twice amended, and when the order now sought to be appealed from was made in the court below, the plaintiff did not ask for leave to amend his claim.

KAY, L.J.—I understand that in this case the action was brought against several defendants and was dismissed as against one defendant because it disclosed no cause of action as against him. We have been told that this is not the first attempt on the part of the plaintiff to sue this defendant. The plaintiff has twice amended his statement of claim, and when

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

[illegible]

[illegible] Lands Clauses Consolidation Act [illegible] May, [illegible] [illegible] Act and the incorporated [illegible] Lands Clauses Consolidation Act [illegible]

[illegible] the tenant for life applied [illegible] of the compensation money paid [illegible] on the ground that he would have worked [illegible] his lifetime, as at the date of the [illegible] only forty-two years of age, and the [illegible] could, as the evidence showed, have been [illegible] worked out in twenty years, and some of [illegible] in a much shorter time.

Butcher, for the tenant for life.—We are entitled to [illegible] compensation money: *In re Barrington, Camden v. Lyon*, 35 W. R. 164, 33 Ch. D. 523. The [illegible] on the other side to show we should not have worked out all the minerals. At the very least we are entitled to the amount we could have worked since we gave our notice in January, 1886, *i.e.*, a clear five years' working. I rely on sections 69 and 70 of the Lands Clauses Consolidation Act, 1845.

Stallard, for the remainderman and trustees, cited *Errington v. Metropolitan Railway Co.*, 30 W. R. 663, 19 Ch. D. 559.

Sargant, for the railway company.

Butcher replied.

CHITTY, J., stated the facts, and continued:—

Thus the result was a sale of these minerals by [illegible] power of [illegible] Act, 1845. Now [illegible] to me on behalf [illegible] reference has [illegible] the decision of Kay, J. [illegible] opinion neither [illegible] any application [illegible] taking land where [illegible] and it does not [illegible] does not fall [illegible] for me to make [illegible] except by [illegible] satisfied Kay, J., did not [illegible] meaning of the words [illegible] considered that the £136 would [illegible] reversion in the minerals [illegible] could have gotten between [illegible] of the reversion and the [illegible] Mr. Butcher lays hold of [illegible] that the learned judge [illegible] as at present advised I [illegible] on section 74 does not apply. [illegible] apportionment at all. I [illegible] affecting it would be [illegible] the value of such portion [illegible] as he could actually have worked [illegible] making the order, *i.e.*, to ascertain [illegible] in which the minerals could [illegible] and then give him his [illegible] the years he could have worked: [illegible] section 74 does not apply. The [illegible] sections 69 and 70. Section 69 [illegible] mentioning various ways [illegible] deposited in the bank can be applied. [illegible] purposes affect the inheritance [illegible] any particular interest, such as, for [illegible] any person under a purchase of [illegible] the same uses. It is the last clause [illegible] argument is founded, viz., "On payment [illegible] party becoming absolutely entitled to such [illegible] On the face of it, the section does not [illegible] apportionment, and where apportionment is [illegible] in a statute it is specially directed. Now [illegible] treats the whole money as belonging to [illegible] absolutely entitled, and it must be read with [illegible] sections. I am satisfied that no apportionment [illegible] directed. The argument is that if the [illegible] been taken the tenant for life would have [illegible] out, and during the period since he first [illegible] intention to work them he would have [illegible] the minerals to a certain proportion, [illegible] years he would have got a certain portion [illegible] therefore, he ought to have an apportionment [illegible] years paid him. But in my opinion he ought [illegible] that the statute directs apportionment. [illegible] were adverse proceedings, yet the sale was [illegible] ment, and the tenant for life must find [illegible] the power of sale under the settlement [illegible] the purchase-money. Where trustees have [illegible] to sell the minerals apart from the rest of the [illegible] the tenant for life takes no part of the [illegible] Similarly under the Settled Land Acts [illegible] minerals are sold separately the tenant for [illegible] though unimpeachable for waste, does not [illegible] purchase-money, nor in the case of a mining [illegible] whole rent. I think a special provision would [illegible] necessary to give him the purchase-money.

Finally, I may observe that, though the Act [illegible] been in operation forty-five years, I have never [illegible] of such an application before to-day. The [illegible] be invested and the income paid to the [illegible] life.

Solicitors, [illegible] *Murton*, for [illegible] *Beale & Co.*

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

. Div. }
y, J. } March 6, 7, 10.

In re WATSON & SONS (LIMITED). (*a.*)

ny—Voluntary liquidation—Committee of inspec- — Creditors—Restrictions imposed on voluntary dator—Companies Act, 1862, *ss.* 95, 96, 133 (*sub- m* 7), 149, 151—*Companies* (*Winding-up*) *Act*, , *ss.* 6, 9, 12.

court may impose the same restrictions upon a ry liquidator as a liquidator in a compulsory g up would be subject to, and also dispense with ions imposed upon a liquidator in a compulsory g up.

Companies (*Winding-up*) *Act*, 1890, *can be made by the court, by way of analogy, for the purpose of restrictions upon a voluntary liquidator's powers. n of order continuing a voluntary winding up upervision, subject to the control of a committee of ion.*

tion.

was a petition presented by a shareholder, as also a creditor, for winding up the above- company, which was incorporated in 1887, nominal capital of £100,000 divided into shares of £10 each, for the purpose of acquir- d carrying on the business of a general ware- nan, previously carried on by Messrs. Watson &

petition was presented on the 16th of February, nd on the 18th a resolution was passed by the rs that a committee of creditors should be ted, and that the creditors should bear rate- uch incidental expenses as should not be borne company or payable out of its assets.

eneral meeting of the creditors was convened bruary 24, to determine the course to be taken petition. At this meeting the following reso- was passed:—

at this meeting adopt and confirm the resolu- f the principal trade creditors on the 18th inst., hat, upon the information laid before it, this g is of opinion that it is advisable, in the its of the unsecured creditors, that the voluntary g up of the company should be continued under pervision of the court, with Mr. Miles as sole ator, provided that the committee of creditors, majority of it, be appointed by the court to ent the unsecured creditors in the winding up, he powers it would have if it were a committee pection under the Companies (Winding-up) Act, or that such other directions be obtained from urt as, in the opinion of the solicitor for the com- , will afford to the committee due facilities for senting and protecting the interests of the unse- creditors in all matters in the winding up ing them."

s resolution was approved by creditors for sums nting to £41,500.

February 25 an extraordinary resolution to wind e company voluntarily, with Mr. Miles as liqui- , was passed.

ne, Q.C., and *Eve*, for the petition, asked for a ulsory order.

rwell, Q.C., and *Jenkins*, for the creditors for 00, asked that the voluntary winding up might ontinued under supervision, with a committee gous to the committee of inspection provided for e Companies (Winding-up) Act, 1890, s. 9.

They referred to *In re London Quays and Warehouse Co.*, 16 W. R. 530, L. R. 3 Ch. App. 394; *In re Rochdale Property and General Finance Co.*, 12 Ch. D. 775, 27 W. R. Dig. 50.

Oswald, Alexander, Ribton, and *Micklem*, for the company and other creditors.

Byrne, Q.C., replied.

CHITTY, J.—It is plain in a question of this kind that the court may have regard, under the 149th section, to the wishes of the creditors, and I think I ought to give weight to the wishes of so large a majority as that which I have before me, asking for a voluntary winding up under supervision. It was said that the company has been carrying on its business at a loss (and this forms a staple of Mr. Oswald's argument) and, consequently, that there was a case of suspicion and a case requiring investigation. I am not satisfied that the affidavit filed in support of this contention does present any such case as Mr. Oswald attempted to raise in his argument at the bar. The company has been unfortunate, but it is not enough on this question of balancing the wishes of the majority and the minority of the creditors to say, "Inasmuch as there have been losses we have a suspicion there is something wrong"; that will not do, for although the court does not require a case of misfeasance or maladministration to be proved with the utmost strictness, it will not act, when balancing the wishes of one portion of the creditors against that of another, upon suspicion or upon a mere assertion that the affairs of the company require investigation. What is required is, that a strong *primâ facie* case should be made out, and although it is plain that under the Act of 1890 there are provisions whereby a more searching investigation can be made than there were in the Act of 1862, yet I think the Act of 1890 has made no alteration whatever in the principles upon which the court acts in reference to the matter which I am now considering. Therefore if I have jurisdiction, I think that on the facts it would be right to make such an order as is asked for by the majority. But Mr. Ribton argued that if that was done it would be a delegation of the powers of the court. I am of opinion that the order I propose to make, neither in form nor in substance, will amount to anything of the kind. I treat the case as if the Act of 1890 had not been passed, mentioning, by the way, that the 31st section of the Act shows that the Act does not apply to a winding up under the supervision of the court. Under the 151st section of the Act of 1862 it is provided that "where an order is made for winding up subject to the supervision of the court, the liquidators appointed to conduct such winding up may, subject to any restrictions imposed by the court, exercise all their powers without the sanction or intervention of the court, in the same manner as if the company were being wound up altogether voluntarily." That enables the court to impose restrictions upon the exercise of the liquidator's powers. The nature of the restrictions is not defined; apparently it is left entirely to the discretion of the court to say what the restrictions, if any, shall be. In *In re London Quays and Warehouses Co.* Cairns and Selwyn, L.JJ., imposed on the voluntary liquidator the same restrictions as an official liquidator would be subject to in a compulsory winding up, except so far as the court should think fit to dispense with those restrictions. That is an authority for the exercise of the jurisdiction imposing restriction. Now turning to the 133rd section I find, under sub-section 7, "The liquidators may, without the sanction of the court, exercise all powers by this Act given to the official liquidator." Turning to the 95th section, which con-

Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Chan. Div. North, J. June 2.

In re SHARPE.
In re BENNETT.
MASONIC AND GENERAL LIFE ASSURANCE CO. (LIMITED) *v.* SHARPE AND OTHERS. (*a.*)

Company—Winding up—Estate of deceased director—Misfeasance—Payment of dividend out of capital—Delay—Stale demand.

The articles of association of a limited company provided (1) *that interest at the rate of five per cent. per annum should be payable half-yearly on all money paid on the shares until otherwise determined by the directors, and* (2) *that no dividend or bonus should be payable except out of the profits arising from the business of the company, including the income arising from paid-up capital. No profits were ever earned by the company. From* 1869 *to* 1878, *when the Board of Trade interfered, the directors made half-yearly payments of interest or dividend at the rate of five per cent. per annum on the amount of shares paid up. These payments, which amounted to* £4,500, *were made out of capital. The company was ordered to be wound up in* 1886. *This action was commenced in* 1890 *against the representatives of two deceased directors. Certain moneys were recovered from the estate of one of the deceased directors under a compromise effected with the sanction of the court. Certain moneys had been also recovered from the surviving directors.*

Held, that the payments were made by way of dividend, and that the estate of a deceased director was liable to the liquidator for so much of the £4,500, *with interest at four per cent., as had not been already recovered.*

Held, that the delay was not such as to disentitle the liquidator to succeed.

Action.

This action was brought by the liquidator of the Masonic and General Life Assurance Co. (Limited), now in liquidation, against the representatives of two deceased directors, Captain H. A. Bennett and Mr. Sharpe, to recover from their estates certain sums of money alleged to have been improperly paid out of capital as interest or dividend when the company had earned no profits. The said directors were alleged to have been guilty of misfeasance or breach of trust. A compromise having been made with the executors of Mr. Sharpe with the leave of the court, the action proceeded against the representative of Captain Bennett alone. The company was formed in 1868, and was ordered to be wound up in 1886. Captain Bennett was appointed a director in 1869, and held that office until his death in 1883. No profit and loss account was ever made out, and, although the company never earned any profits, the directors made half-yearly payments at the rate of five per cent. per annum on the amount of the shares paid up, from July, 1869, to July, 1878, when the Board of Trade interfered, and the payments were discontinued. The moneys so paid amounted to more than £4,500. The liquidator had obtained payments from the surviving directors. Among the articles of association of the company were the following:—"(5) The capital of the company shall be allotted by the board when and as they think fit. Every applicant for shares shall pay £1 per share on application. Interest at the rate of five per cent. per annum shall be payable half-yearly on all moneys paid on the shares until otherwise determined by the directors. (116) No dividend or bonus shall be payable except out of the profits arising from the business of the company, including the income arising from the paid-up capital."

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the plaintiff.—The directors have distributed dividends when there were no profits, and without calling in professional assistance: *Rance's case*, 19 W. R. 291, L. R. 6 Ch. App. 104; *Leeds Estate Co.* v. *Shepherd*, 36 W. R. 322, 36 Ch. D. 787.

S. Hall, Q.C., and *Oswald*, for the representative of Captain Bennett.—The payments were made as for interest in accordance with article 5, and not as dividend. The demand is stale; twelve years have elapsed since the last payment: *In re Mammoth Copperopolis of Utah*, 50 L. J. Ch. 11, 29 W. R. Dig. 41; *Stringer's case, In re Mercantile Trading Co. (Limited)*, 17 W. R. 694, L. R. 4 Ch. App. 475.

NORTH, J.—I think the plaintiff must succeed. The half-yearly payments were made by way of dividend, although not only was no profit ever made, but there was no year or half-year in which the expenditure did not exceed the gross receipts. It is true the articles authorize the payment of interest, but they do not warrant these payments, which were made by the directors in pursuance of regular resolutions, and which were paid by cheques called dividend warrants, and clearly by way of dividend and not out of profits. In 1878 the Board of Trade interfered, and no further payments were made, except some small amounts which were due to persons who had not received sums to which they were entitled in respect of previous half-years. Further, no steps were taken which sometimes justify directors in thinking there are profits when there are not. There were no properly made up accounts. No profit and loss account was ever made up. It is clear there were no profits. This case is in line with *Rance's case* and the *Leeds Estate case*, and I am therefore of opinion that the directors are liable for these payments. I do not say anything impugning Captain Bennett's honesty, but these payments were all wrong. Again, ought I to decline to grant relief to the plaintiffs because this demand is stale? I think I ought not. The cases of *In re Mammoth Copperopolis* and *Stringer's case* have been quoted to show that delay is a bar. But in *In re the Alexandra Palace Co.*, 30 W. R. 771, 21 Ch. D. 149, Fry, J., distinguished those cases on the ground that the facts of the case then before him were such as resembled the present case. In his judgment his lordship said: "These dates do not differ materially from the dates in *In re Mammoth Copperopolis*, in which Vice-Chancellor Hall considered that the staleness of the demand was a sufficient answer to the application of the official liquidator. If the two cases had been precisely parallel I should have felt myself bound to follow that decision, but it appears to me that they are not. In that case the directors had declared a dividend upon the footing of a balance-sheet, which had been made up, and which, I think, according to the view of the Vice-Chancellor, was made up in a *bonâ fide* manner, although there might be grave questions as to the propriety of it. He considered that the liquidator's application was in fact an attempt to unravel the balance-sheets which had been passed and acted upon, and I observe that, in stating the considerations which led him to the conclusion that the demand was stale, he dwells in the first place on the nature of the demand. Similar observations apply to *Stringer's case*. There an attempt was made to compel a director to repay a dividend said to have been paid out of capital, by means of attacking three items in a balance-sheet which had been passed and acted upon. There, also, the court thought that the delay was a sufficient

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

answer. In the present case there is nothing of that sort. The transaction stands disclosed in the simplest way. There is no balance-sheet which it can be for a moment suggested induced the directors to come to the conclusion that there were divisible profits. It is a simple case in which the capital of the company or the moneys borrowed by the company were applied in the payment of that which, according to the plain terms of the articles of association, could be paid only out of profits."

Although here it is true the payments were made long ago, no material evidence has been lost by the delay, and, although Captain Bennett is dead, there is nothing to show that there would have been any defence available which is not now before the court. Again, this demand is not barred by any statute, and there is nothing else which can bar it. Even assuming that the liquidator has been dilatory, I do not see why the creditors are to lose their rights, although if I thought the parties proceeded against were prejudiced by the delay, I might relieve them, but it is not so here. The plaintiff is entitled to judgment for so much of the £4,500, with interest at 4 per cent., as has not been already recovered.

Solicitors for the plaintiff, *Hicklin, Washington, & Passmore.*

Solicitors for the defendants, *Smith, Stenning, & Croft; Johnson, Weatherall, & Johnson.*

Chan. Div. }
Kekewich, J. } June 26.

COCKSEDGE *v.* METROPOLITAN COAL CONSUMERS' ASSOCIATION (LIMITED). (*a.*)

Company—Action for rescission—Winding-up order—Practice—Statement of claim—Amendment after commencement of winding up.

In an action against a company for rescission of a contract to take shares, the plaintiff cannot, after the commencement of the winding up of the company, raise, by amendment of his statement of claim, a ground for relief distinct from those raised in his original statement of claim.

Point of law.

On the 7th of February, 1889, the defendants, the Metropolitan Coal Consumers' Association (Limited) and F. D. Leslie, the alleged promoter of the company, issued a prospectus inviting an application for shares. On the 11th of February, 1889, the plaintiff applied for shares, and on the 19th of February, 1889, the same were allotted to him. On the 18th of April, 1889, the plaintiff commenced proceedings against the defendants for rescission of the contract to take shares, and for rectification of the register of the members of the company, and on the 9th of August, 1889, delivered his statement of claim, and therein alleged that the prospectus contained certain misrepresentations of material facts, and that other material facts had been suppressed. On the 13th of November, 1889, a petition was presented to wind up the company. On the 2nd of December, 1889, the defendants delivered their statements of defence. On the 23rd of December, 1889, the plaintiff amended his statement of claim by adding an allegation that the allotment of shares to him was invalid, inasmuch as it had been made by persons not duly appointed and not having the powers of directors. On the 20th of January, 1890, an order was made to wind up the company. The defendant company subsequently amended their statement of defence, and submitted that, as to the matter alleged for the first time in the plaintiff's amended statement of claim, the plaintiff was not, having regard to the said order for winding up, entitled to any relief, and that the plaintiff had, as to such matter, lost all right to relief by his *laches* and delay.

The point of law thus raised by the defendant company now came on for hearing before the trial of the action upon the merits of the case.

Warmington, Q.C., and *H. Terrell*, for the defendant company.—The amendment is in the nature of a new and independent action, and cannot be maintained after the commencement of the winding up, since the rights of creditors have intervened: *Whitehouse's case*, 15 W. R. 892, L. R. 3 Eq. 790; *Oakes* v. *Turquand*, L. R. 2 H. L. 325, 16 W. R. H. L. Dig. 15; *Reese River Silver Mining Co.* v. *Smith*, 17 W. R. 1042, L. R. 4 H. L. 64.

Marten, Q.C., and *Ashton Cross*, for the plaintiff.—The directors had the power to cancel, and ought to have cancelled the allotment at the commencement of the action upon the ground for relief alleged by the plaintiff for the first time in his amended statement of claim. The plaintiff can rely on such ground although it was not alleged until after the commencement of the winding up: *Wright's case*, 20 W. R. 45, L. R. 7 Ch. App. 55.

KEKEWICH, J.—It is now settled, according to *Oakes* v. *Turquand* and other cases, including the case of *Reese River Silver Mining Co.* v. *Smith*, that a contributory—that is, the person whose name appears on the registered list of members of a company—cannot, after a winding-up order, when the rights of creditors for the first time intervene, assert, by legal proceedings, a title to be relieved from his liability on the ground of misrepresentation or on any other ground which, according to law, would avoid the contract. And it is also settled by the same authorities that, if he has commenced proceedings before the commencement of the winding up—before, in this case, the presentation of the petition—he is entitled to relief either by leave of the court in that action, or, if it may be more conveniently given, in the winding up; but he is entitled to that relief, notwithstanding the winding-up order, if he can prove the facts on which his title to relief depends.

A shareholder is entitled to relief if he institutes legal proceedings, having good grounds for them, before the commencement of the winding up. Does that mean that, as long as he issues a writ for the purpose of obtaining the relief, he is entitled to obtain that relief in the end, notwithstanding that there is no hint in the indorsement on his writ of the particular ground of complaint on which he ultimately is able to succeed, or, if the case has gone a step farther, notwithstanding that the statement of claim has not alleged that only ground for avoiding the contract which the court has eventually to decide?

It seems to me that when the House of Lords held, in *Oakes* v. *Turquand*, that a man may save his right by the institution of legal proceedings, it held that he may do it by claiming relief on the grounds put forward at the commencement of the action and persisted in to the end. If it were not so, there would be an encouragement to persons who thought the company in which they held shares was not in a safe condition, simply to issue a writ or to deliver a statement of claim, made as strong as circumstances permit, and then to take their chance of making it better and stronger afterwards; or, to put it in another way, the rights of creditors which, according

(*a.*) Reported by J. WINKFIELD, Esq., Barrister-at-Law.

to the settled law, are now protected against the claims of persons who bethink themselves of their rights after the commencement of the winding up, would be protected, not against them, but would be liable to be interfered with by persons who really had not discovered their rights at all, but were only perhaps grumblers up to that date, and unable to formulate their complaint in legal manner. "Legal proceedings" must, I think, mean legal proceedings based upon a precise foundation on which the claim to relief is built up and on which it eventually stands. I think the different allegations in any case of avoiding a contract must be treated as in all respects distinct. I think the test of that is this, that no amount of insufficient allegation will make one sufficient. If a man seeks to avoid a contract on five or six different grounds, one is obliged to take them separately. If he fails upon one, two, three, four, five, and six, he fails altogether; if he succeeds upon one, he succeeds at once, and the other five need not be tried; and the same applies to any one of the others. But no amount of approximate success on all six would justify the court in making a decree in his favour. That is another way of showing, I think, that the allegations must be regarded as distinct.

Here I have an allegation that the allotment was invalid, inasmuch as it was made by persons not duly appointed and not having the powers of directors. It is impossible, to my mind, to conceive any allegation more distinct than that is, from an allegation that the prospectus contained misrepresentations of fact. I think the plaintiff is introducing an entirely new ground for relief. To my mind *Wright's case*, upon which Mr. Marten has relied, has not assisted him. The *ratio decidendi* in that case was this, that before the commencement of the winding up the contract between the shareholder and the company had been determined—determined by the shareholder himself on one ground, and determined by the directors on another ground. It was impossible, said the Lord Chancellor, for him afterwards to claim to be a shareholder, although he had only determined the contract on one ground. Therefore he was at liberty to insist upon the determination of the contract on grounds which, though not known to him, had influenced the directors. That is a case of a peculiar character, and does not at all apply to a case like this, where there has been no determination of the contract before the commencement of the winding up. I think that the plaintiff is not entitled to any relief in respect of the ground which he has attempted to introduce by amending his statement of claim.

Solicitor for the plaintiff, *Edward Lawrance Boyer*.

Solicitors for the defendant company, *Lumley & Lumley*.

Q. B. Div. (Denman and Wills, JJ.) July 13, 20.

CLEAVER v. MUTUAL RESERVE FUND LIFE ASSOCIATION. (a.)

Insurance, life—Policy for benefit of wife of insured—Murder of insured by wife—Right of executors of insured to recover insurance moneys—Trust for wife—Public policy—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 11.

Where a man insures his life for the benefit of his wife, by virtue of section 11 *of the Married Women's Property Act,* 1882, *a trust is thereby created in favour of the wife, and the insurance moneys form no part of the estate of the insured. If, therefore, the wife murders the insured, his executors cannot maintain an action on the policy against the insurers, such an action being for the benefit of the wife, and it being contrary to public policy that she should profit by her crime. The question whether or not she knew of the existence of the policy before she committed the murder is immaterial.*

Fauntleroy's case (Amicable Society *v.* Bolland), 4 *Bligh N. R.* 194, *followed.*

Question of law stated for the opinion of the court under R. S. C., ord. 34, r. 2.

On the 3rd of October, 1888, James Maybrick effected an insurance upon his life with the defendants for £2,000 for the benefit of his wife, Florence E. Maybrick. The policy provided that, for the considerations therein mentioned, the association received James Maybrick as a member, and that "there shall be payable to Florence E. Maybrick, wife, if living at the time of the death of the said member, otherwise to the legal personal representatives of the said member, the sum of £2,000 sterling within ninety days after receipt of satisfactory evidence to the association of the death of the said member."

James Maybrick died on the 11th of May, 1889.

In August, 1889, at the Liverpool Assizes, Florence E. Maybrick was indicted for the wilful murder of James Maybrick, her husband, by the administration of poison to him, and was convicted.

Her sentence was afterwards commuted to one of penal servitude for life.

This action was brought to recover the moneys due under the policy, the plaintiffs being Richard Cleaver, who sued as assignee of the policy from Mrs. Maybrick, and as administrator of her property under the Act of 1870 "to Abolish Forfeitures for Treason and Felony" (33 & 34 Vict. c. 23), and Thomas and Michael Maybrick, who sued as executors under the will of James Maybrick.

The plaintiffs' case, so far as it rested upon the rights of Cleaver, was abandoned at the present hearing.

The question of law upon which the opinion of the court was desired was "whether, if it be proved that the said James Maybrick died from poison intentionally administered to him by the said Florence E. Maybrick, that would afford a defence to this action (c) as against the plaintiffs Thomas Maybrick and Michael Maybrick as executors of the said James Maybrick, deceased."

The Married Women's Property Act, 1882, s. 11, provides that "a policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife or of his children . . . . shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured or be subject to his debts. . . . . The insured may by the policy, or by any memorandum under his hand, appoint a trustee or trustees of the moneys payable under the policy. . . . . In default of any such appointment of a trustee such policy, immediately on its being effected, shall vest in the insured and his legal personal representatives in trust for the purposes aforesaid. . . . The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, the receipt of the legal personal representative of the insured, shall be a discharge to the office for the sum secured by the policy."

Sir Charles Russell, Q.C. (*Pickford* and *A. G. Steel* with him), for the plaintiffs.—Assuming that Mrs. Maybrick murdered her husband, that does not affect

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

the liability of the defendants to pay the amount due on the policy. The executors of the deceased are the persons who are entitled to receive the money and to give a valid discharge to the defendants under section 11 of the Married Women's Property Act, 1882. We are entitled to assume, in the absence of evidence to the contrary, that Mrs. Maybrick was not aware of the existence of the policy; that being so, she could not have murdered her husband with the object of obtaining the insurance money, and therefore the defendants cannot be relieved on the grounds of public policy. *Fauntleroy's case* (*Bolland* v. *Disney*), 3 Russ. 351, 4 Bligh N. R. 194, is no authority in the present case. There the assured himself had committed an act whereby the assurers were prejudiced; here the act was done by a person who was not aware that she would benefit by it, and in principle the case is the same as if Mr. Maybrick had been poisoned by a person who was a total stranger to the policy.

He also referred to *Clift* v. *Schwabe*, 3 C. B. 437; *Moore* v. *Woolsey*, 3 W. R. 66, 4 E. & B. 243; *Dufaur* v. *Professional Assurance Co.*, 25 Beav. 599, 7 W. R. Dig. 51, 56; *Prince of Wales Association Co.* v. *Palmer*, *ibid.* 605; *Horn* v. *Anglo-Australian Assurance Co.*, 9 W. R. 359, 7 Jur. N. S. 673.

Sir Edward Clarke, S.G. (*Hextall* with him), for the defendants.—The executors have no interest in the insurance money as representing the deceased, for by section 11 of the Married Women's Property Act, 1882, it forms no part of his estate. The only way in which the executors can claim is as trustees for Mrs. Maybrick, and their case is governed by *Fauntleroy's case*. [WILLS, J.—Section 11 says that the moneys shall not form part of the estate of the insured "so long as any object of the trust remains unperformed." Is not the object of the trust gone since Mrs. Maybrick is civilly dead?] Mrs. Maybrick's right (if any) arose immediately upon her husband's death; she did not become dead in law until her conviction, and there is no relation back. Assuming that she was not aware of the existence of the policy (which is very improbable), yet she cannot come into court to profit by her own wrong—to get £2,000 which has come to her because she committed a murder. It would be dangerous to say that a minute inquiry into the question of her knowledge is necessary. To allow her to succeed would be to remove a restraint against crime, and that is contrary to public policy: *per* Lord Lyndhurst, 4 Bligh N. R., at p. 211.

Pickford, in reply.—In *Fauntleroy's case* it is clear that Lord Lyndhurst attached importance to the fact of knowledge of the effect of the crime on the contract of the assurers. There is no such knowledge here, and this case is therefore outside Lord Lyndhurst's decision.

DENMAN, J.—In this case the question put to us must be answered in favour of the defendants. The action was brought by several plaintiffs, but counsel have argued it upon their strongest ground—that is, upon the case so far as it rests upon the rights of Thomas and Michael Maybrick, two of the plaintiffs, who are the legal personal representatives of James Maybrick. James Maybrick, we are to take it, was murdered by his wife, Florence E. Maybrick, in April, 1889. Now, these personal representatives bring this action, not in their capacity of personal representatives of the deceased and for the benefit of his estate, but because, by virtue of the Married Women's Property Act, 1882, they have become trustees of the moneys payable under this policy for the benefit of the wife. It requires no argument to show that such trustees are in no better position than their *cestui que trust*. I need not go through the provisions of the Married Women's Property Act on the subject except to say that these are the proper persons to sue under section 11. As regards public policy, the question is exactly the same whether she or they sue. The objection which is taken is that neither she nor they can sue upon this policy of assurance upon the life of the husband for the wife's benefit, when the wife has been convicted of the murder of her husband.

The only case which is really in point is that which appears in the court below as *Bolland* v. *Disney*, 3 Russ. 351, and in the House of Lords as *Amicable Society* v. *Bolland*, 4 Bligh N. R. 194. That was a curious case, and not in every respect like the present. There Fauntleroy had insured his life and had afterwards committed forgery, which was then a capital offence, and been executed. The action was brought by his assignees upon the policy. Sir John Leach, M.R., held that the action could be maintained. His decision went upon the narrow ground that "to avoid the obligation to pay the act of the party insured which produced the event must be done fraudulently for the purpose of producing the event," and Fauntleroy could not be supposed to have had that view in committing forgery, although it was a capital crime. But the House of Lords took a different view, and the real ground of their decision covers the present case. Some of the words of Lord Lyndhurst's judgment are worth quoting. He says, "It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against—that is, that the party insuring had agreed to pay a sum of money year by year, upon condition that, in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy?" No doubt Lord Lyndhurst was discussing the case before him, but I think that those remarks apply here also, and indeed that this is an *à fortiori* case. He goes on: "Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes—namely, the interest we have in the welfare and prosperity of our connections. Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which, if expressed in terms, would have rendered the policy, so far as that condition went at least, altogether void." Applying that reasoning here you would have to insert a condition in the policy that the wife or her trustees might sue on this policy even if the death of the insured had been caused by an act of murder on the part of the wife. Put that way, the case is really a stronger one than Fauntleroy's. Can these persons be allowed to sue when the death has been brought about by the person for whom they sue? I do not think that the law allows that. I think that Lord Lyndhurst's "short and plain ground" applies here, and that, upon that ground, this action fails.

WILLS, J.—I am of the same opinion. The proper way to look at this action is to regard it as having been brought the day after the death of James Maybrick, and we are to assume that his death was caused by his wife. The effect of a policy in this form is, by virtue of the Married Women's Property Act, 1882, to create a trust for Mrs. Maybrick. If the money had been paid to the executors immediately after the death there would have been a bare trust for her, and

she would have been entitled to have it handed over to her. The trusts imposed upon a curator or administrator under the Felon Act, 1870, only relate to property to which the felon is really entitled, and the provisions of that Act are, therefore, outside the question which we have to decide. This must be looked on as an action by trustees for Mrs. Maybrick's benefit. Is it a sufficient defence to say that she murdered her husband without also saying that she murdered him in order to obtain the policy moneys? I think it is sufficient. The case was, in my opinion, rightly defended upon the grounds of public policy. Is it possible to conceive a case to which considerations of public policy apply with greater force than the present? It is true that some of the observations of Lord Lyndhurst in *Fauntleroy's case*, where he is explaining why the claim was contrary to public policy, do not apply here, because in that case there was knowledge of the existence of the policy on the part of the assured, while in the present case we must assume that Mrs. Maybrick had no such knowledge. I do not think that the issue can depend upon whether she had that knowledge or not. It would be very dangerous, in my opinion, to allow that question to be raised. It would be almost impossible to ascertain how much or how little she knew. But the ground of public policy is wider than Sir Charles Russell contended. The proper way to state it here is that a person who commits murder shall not be allowed to benefit by his crime, and to say that that broad principle can be defeated by showing that the motive for the crime was not to obtain the money would be to greatly impair its efficacy. For these reasons I think that the defendants' contention is right.

Solicitors for the plaintiffs, *Sharpe, Parker, Pritchard, & Sharpe*, for *Cleaver, Holden, & Co.*, Liverpool.

Solicitors for the defendants, *Robinson & Stannard*.

Q. B. Div. (Day and Lawrance, JJ.) April 20.

BARLOW *v.* TERRETT. (*a.*)

Nuisance — Unsound meat — Order for destruction — Penalty on person to whom such meat belongs — Exposure for sale — Nuisances Removal Act, 1863 (26 & 27 *Vict. c.* 117), *s.* 2.

The appellant, a farmer in the country, sent meat which he knew to be unsound to a salesman in London for the purpose of being sold. The salesman never exposed the meat for sale, but showed it to the inspector of nuisances, who took it away and obtained a justice's order for its destruction.

Held, that, there having been no sale or exposure for sale, the appellant could not be convicted under section 2 *of the Nuisances Removal Act*, 1863.

Case stated under 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49, s. 33.

On the 7th of October, 1890, the appellant, who was a farmer in the country, sent some meat, which he knew to be unsound and unfit for human food, to a salesman in the London Central Meat Market, for the purpose of being sold. The salesman unpacked the meat, but never exposed it for sale, and early on the next morning he spoke to the respondent, the inspector of nuisances, and directed his attention to it. The inspector took the meat away, and on the same day an order was made by a justice that it should be destroyed.

The inspector then laid an information and took out a summons against the appellant, under section 2 of the Nuisances Removal Act, 1863, charging him with being the person to whom did belong the carcase of a lamb and two pieces of meat, to wit, veal, which were unlawfully deposited in the London Central Meat Market for the purpose of sale, and intended for the food of man, the same being diseased, unsound, unwholesome, and unfit for the food of man.

Section 2 of the Nuisances Removal Act, 1863, enacts that the inspector of nuisances may at all reasonable times inspect and examine any meat "exposed for sale, or deposited in any place for the purpose of sale or of preparation for sale, and intended for the food of man"; and in case any such meat shall appear to him to be diseased, or unsound, or unwholesome, or unfit for the food of man, he may take it away and obtain a justice's order for its destruction; and "the person to whom such . . . meat . . . belongs or did belong at the time of sale or of exposure for sale, or in whose possession or on whose premises the same is found," shall be liable to a fine or imprisonment.

The summons was heard before an alderman of the City of London, who convicted the appellant and stated this case.

Toller, for the appellant.—The conviction is wrong. The owner of unsound meat, as distinguished from the person on whose premises it is found, cannot be convicted under this section unless there has been a sale or an exposure for sale. In *Mallinson* v. *Carr*, *ante*, p. 270, [1891] 1 Q. B. 48, a case under the corresponding provision of the Public Health Act, 1875, the proceedings were taken against the person on whose premises the meat was found. That case does not govern this: see *Vinter* v. *Hind*, 31 W. R. 198, 10 Q. B. D. 63.

G. M. Freeman, for the respondent.—It is not necessary that there should be an exposure for sale. Here the meat was, by the appellant's orders, deposited in the salesman's shop for the purpose of being sold. The section in its first part says that meat so deposited may, if it is unsound, be seized and destroyed. And the second part of the section provides that the owner of such meat may be punished.

DAY, J.—I regret that I do not see my way to uphold this conviction, because it is against the public interest that a person in the country, who knowingly sends unsound meat up to the London market, should escape punishment merely because there has not been an exposure for sale. But the distinction between selling and exposing for sale and depositing for sale is well known to the Legislature, and it occurs in this section. An inspector of nuisances may seize meat which is exposed for sale or deposited for sale, and obtain a magistrate's order for its destruction. But the owner of such meat, if he has deposited it for sale anywhere except on his own premises, cannot be punished under this section unless there has been a sale or an exposure for sale; the words providing for the punishment of the owner omit all reference to depositing for sale. Unless there has been a sale or an exposure for sale the owner is not liable to any punishment except the loss of the meat. The offence here charged does not come within the section, and the conviction must be quashed.

LAWRANCE, J., concurred.

Conviction quashed.

Solicitors for the appellant, *Brownlow & Howe*, for *Harding*, Leicester.

Solicitor for the respondent, *E. A. Baylis*.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

House of Lords.

From C. A. (England). Dec. 15.

TREDEGAR IRON AND COAL CO. *v.* OWNERS OF STEAMSHIP "CALLIOPE."
"THE CALLIOPE." (*a.*)

Ship—Wharfinger—Obstruction in navigable river—Negligence.

Where there is nothing foreign or strange in the condition of the bed of a river, other than what results from its normal use, wharfingers on the bank are under no obligation to remove such impediments to navigation.

A ship, attempting to approach a wharf to which safe access was a mere matter of time, and outside of which ridges of mud had been formed by the action of the river and the vessels stranding alongside, suffered damage.

Held, that, the river being in its normal state, and the nature of the river known to those in charge of the ship, the wharfingers were not guilty of negligence.

Decision of the Court of Appeal *reversed.*

This was an appeal by the defendants in the action, the Tredegar Iron and Coal Co., from an order of the Court of Appeal (Lord Esher, M.R., Cotton and Lindley, L.JJ.) reversing a decree of Butt, J., reported 38 W. R. 155, 14 P. D. 138.

The facts are set out in the judgment of Lord Watson.

Finlay, Q.C. (*Joseph Walton* and *Adams* with him), for the appellants.

Gorell Barnes, Q.C., and *W. S. Robson* (*H. Holman* with them), for the respondents.

The Moorcock, 37 W. R. 439, 14 P. D. 64, and *Curling* v. *Wood*, 16 M. & W. 628, were cited.

Lord HALSBURY, L.C.—I cannot help thinking that this case affords a somewhat important illustration of the necessity of calling upon litigants to place in some written form of pleading the precise cause of action upon which they rely, for I think that the time during which your lordships have been occupied, and the time which has been occupied in the courts below, has to a considerable extent been the result of an oscillation in the minds of the advisers of the plaintiffs as to what was their cause of action.

I cannot entertain a doubt, when I look at the form of the statement of claim as it originally stood, that the cause of action was originally founded upon the notion that this vessel was invited to a berth, in the strict and proper sense of that word, at which it was unfit for a vessel under any circumstances to lie, and that, by reason of the inequality and unfitness of the berth, the vessel, being brought there, was strained and injured. If that had been the complexion of the case, I certainly entertain no doubt that the law, as laid down in the earlier cases and in the later case of *The Moorcock*, would have been applicable to that state of things. In this case the wharfinger, who happened to be the consignee, invites the vessel to a particular place to unload. If, as it is said, to his knowledge the place for unloading was improper and likely to injure the vessel he certainly ought to have adopted one of these alternatives; either he ought not to have invited the vessel, or he ought to have informed the vessel what the condition of things was when she was invited, so that the injury might have been avoided.

But gradually, as the case proceeded, it apparently occurred to the parties that that ground could not be maintained, and that the vessel, if it had got there, would have been perfectly well able to lie there in a fit and proper place for unloading, and no injury would have resulted; and then came an application to amend, to which the learned judge acceded. The amendment is of this character, that the persons who were in charge of the operation of bringing the vessel to the berth were guilty of negligence. Who those persons were I will say in a moment. The nature of the negligence alleged is this, that in the ordinary condition of things a vessel of that draught could not properly get to that berth at the particular time of the tide, and a Mr. Griffiths is alleged to have misled the pilot and the captain as to the safety with which that vessel might get there to lie there.

Now let us see what the meaning of this contention is, and upon what ground it is suggested that the wharfinger and consignee was guilty of the negligence imputed to him. He in the first instance, as he had a right to do, gave a direction that the vessel should come and unload at that wharf. If under no circumstances and at no time the vessel could have gone to that wharf, though in that case, as I think, a serious question would arise as to whether it is not for the captain or the pilot as representing the shipowners to make up his mind whether he can safely get to that place or not, and to make his election whether he will or will not attempt to do so with a view to safety—still, if under no circumstances the vessel could with safety have gone there, and if he had relied upon that statement for the purpose of getting there, a different question would have arisen. But the facts do not raise that case, because, as I understand the facts relied upon, there is given in the letter the draught of water which, under ordinary circumstances, may be expected at the particular time, and at the same time as that direction is given the writer says, "But your pilot will tell you what to do." What is the meaning of such a phrase as that? What is the suggestion when the person to whom the direction is given is told to rely upon the pilot? What does a pilot do? What is a pilot's duty? It is impossible to doubt that under ordinary circumstances that would mean this: This is information which I give you for the purpose of forming your own judgment whether you can come there or not—that is to say, this is the height of water which may be expected at such and such a time, but you, the person in charge of the navigation of the vessel, the captain or the pilot, must form your own judgment upon the matter, and you must not expect me to give you a warranty that that height of water will exist, but you, the captain or the pilot, must form your own judgment upon it, and must act accordingly.

Under the particular circumstances of this case it appears that the utmost amount of water which could possibly be expected at the top of the tide was 18 feet 9 inches, and that depended upon a comparison between the Bathurst Basin at Bristol and this Tredegar Wharf, between which there was said to be, under the ordinary condition of things, a difference of two feet in favour of the Tredegar Wharf. The vessel in question was drawing aft 18 feet 3 inches; and at the top of the tide, therefore, assuming everything to be normal in the condition of things with which the parties were dealing, there would be six inches to spare, and that was all. The facts appear to be that about an hour and a half before the top of the tide the vessel attempted to get in. I think it is idle to say that she was there for the purpose of attempting to get in at the top of the tide. It is manifest to me from the evidence that she attempted to get in long before the state of the tide would have justified her doing so, and it was as

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

absolutely certain as any calculation could make it, not only that she was likely to ground, but that she must ground if she attempted it. And she did attempt it.

Then it is said that Mr. Griffiths encouraged the pilot and the captain to come in, and in fact the phrase is used that he "gave orders." I think in the course of the argument it has been sufficiently pointed out that the use of those words is inaccurate if understood in the sense that Mr. Barnes has relied on. That a foreman, who is concerned with the regulation and management of the wharf, in a certain sense "gives orders" is true enough. He has a right to assume that the captain and the pilot who are navigating the vessel alongside the wharf, will navigate her safely; but when it comes to a question of what particular position alongside the wharf, or what berth the vessel is to occupy with reference to the loading and unloading of the goods, the person on the wharf is the person to give directions at what particular part of the wharf, and how, the vessel shall be moored; because with reference to the cranes and other machinery at the wharf for loading and unloading the vessel it may be important that the person in charge of the wharf should give such directions, and accordingly Mr. Griffiths appears to have given such directions. But is it contended for a moment that either the captain or the pilot would understand that Mr. Griffiths' position there was such that he was in a position to give orders to the captain or the pilot with reference to the approach of the vessel, or information as to the water she would draw? The absurdity of such a proposition is at once apparent when it is remembered that this question not only depends upon the absolute depth of the water either at the top of the tide or an hour and a half before it, but also has relation to the draught of the vessel, with which the captain and the pilot may be supposed to be perfectly familiar, but which would be totally unknown to Mr. Griffiths on the wharf.

That words which appeared to resemble orders may have been used by Mr. Griffiths when once the difficulty had arisen, and it was found that the vessel was incapable of reaching the wharf, is exceedingly likely. I should concur with Butt, J., in the opinion that, while each side, perhaps, has given a colour to the particular language used, it is extremely likely that Mr. Griffiths used words which, understood literally, and without reference to the relations existing between Mr. Griffiths and the captain or the pilot, might in one sense be described as orders; but that he gave orders in the sense of a command in relation to the approach of the vessel to the side of the wharf, or that they so understood it or placed any reliance upon his words as being orders, I certainly do not believe.

But we are not left without guidance upon the subject, because the captain and the pilot themselves give, to my mind, an absolutely overwhelming proof that they knew perfectly well that what they were doing was an operation attended with risk, for the pilot himself said that he would not undertake the risk, because he knew that he might lose his certificate, and that if it was done it must be done upon the responsibility of the captain. Now what does that disclose? In the first place, it discloses an absolute intention not to rely upon any "orders" supposed to have been given to them, and in the second place it also shows that they knew that the operation was one which was attended with danger.

That brings me to the next point, What was the danger? The danger was a danger which has in fact been recognized by the pilot in the very first part of his evidence. He knew there were these inequalities in the bed of the river, inequalities owing to the nature of the river, to the nature of the soil of the bed of the river, and incident to the ordinary user of the bed of the river. Under those circumstances it is suggested that there was some duty, before any vessel came in, that this particular berth should be scraped even, so that the vessel should lie on an even keel the moment that she got up to within—I do not know that I am able to give verbal expression exactly to what is suggested—but to within some reasonable distance of the wharf, within what I think Mr. Robson called "the sphere of their operations." I am not quite certain that was not a phrase which was very adroitly used, because it would comprehend something that was so vague that one cannot quite grasp it. The berth itself is admitted now to have been perfectly proper to be in, and how far this alleged responsibility for the approach to the berth extends I really do not know. I suppose, to put it most in favour of the respondents, it would be suggested that it extends as far as vessels coming in and lying at this wharf, and by lying there, raising the ridge upon which so much has been said. Now upon that subject, whenever it does arise, I hope I shall keep my mind perfectly free to have it discussed; but it is absolutely new to me to find that there is by law a responsibility or an obligation upon everybody using the river in a natural and normal way, and by lying on mud flats, raising, by the operation described, some of these inequalities, so that another vessel coming in and lying there transversely might suffer injury.

Then, the accident having happened in this way, the contention is that this obligation exists, and that, to put it plainly, there was a hard substance left in front of this berth which ought to have been cleared away, and that by reason of its not having been cleared away this accident happened.

With regard to that, which is in plain terms the contention which has been made, all I shall say upon that part of the case is that I do not know whether that is so or not, but one difficulty is that there is no evidence. That this vessel was injured by lying in the place where she did lie is certain, but neither shipowner nor wharfinger ever intended that she should lie there. The mode in which she got stuck originally I have already referred to, but if it is said that that was not the normal condition of the bank in that place, all I can say is I have no evidence that that was so. There is the theoretic evidence (I admit) that whenever two vessels lie there they raise this ridge; but I do not know when two vessels did lie there; certainly there is no evidence of that sort before us. If two vessels did lie there, I do not know that the ridge that was raised by their lying there has not been scraped away.

Then it is said, "Well, but that lies within the knowledge of the defendants." In one sense that is quite true. There is no pretence of it on the other side; and it is part of the case for the plaintiffs that that amount of negligence is in the management of the wharf. That is part of the evidence which the plaintiffs ought to give, and the plaintiffs have given no such evidence. I do not know when they last scraped the place, and I do not know that two vessels ever did lie there before this vessel after the last scraping.

In the result, it appears to me that, putting it upon the grounds upon which this case was originally put, there is a complete answer to it; and putting it upon the grounds which have been gradually brought forward in lieu of those originally insisted upon, the whole case is left absolutely without evidence. The only explanation that I can give of that is, that the particular cause of action had not occurred originally to the advisers of the plaintiffs. Much as I respect any judgment of the Court of Appeal (particularly on such a case as this) when presided over by the

Master of the Rolls, when I look to see the grounds upon which the judgment of the Court of Appeal proceeded in this case it appears to me that they have assumed a state of facts without evidence to support it, and one which, for my own part, I am unable to affirm.

I therefore move your lordships that this appeal be allowed, and that the respondents pay to the appellants their costs both here and below, and that there be a return of the £1,000 paid as a condition of this appeal.

Lord WATSON.—Upon the facts proved, this appears to me to be a very plain case.

The cargo of *The Calliope*, consisting of iron ore, was deliverable at Newport to the appellant company, who were indorsees of the bill of lading. They were also in the occupation of a tidal wharf within the limits of the port of delivery known as the Tredegar Wharf.

On the arrival of *The Calliope* at Newport about 2.30 p.m. on Saturday, the 29th of January, 1886, the captain received instructions from the appellants to bring her alongside the Tredegar Wharf for discharge. The vessel, which drew 18 feet 3 inches aft, and 14 feet 7 inches forward, did not then proceed to the wharf, because the pilot advised that the depth of water at the next tide would be insufficient. On the afternoon of the same day the captain received a note from Griffiths, traffic foreman to the company, in these terms: "You can bring your steamer s.s. *Calliope* to the Tredegar Wharf Monday morning's tide, as we have two feet more water than at Bathurst Basin. Pilot will tell you what to do." The spring tides were just beginning, and it was, in my opinion, a matter left entirely to the pilot, who knew the draft and trim of the vessel, to judge whether she could be safely berthed on the Monday morning, or must wait for the tide of Monday afternoon or Tuesday morning. The captain, who was naturally anxious to avoid delay, read Griffiths' communication to the pilot. He admits that the pilot at once said that he did not think there would be water enough on Monday morning. The pilot says that he not only expressed that opinion, but distinctly told the captain that, inasmuch as he would incur the risk of losing his certificate, he would not take the vessel to Tredegar Wharf on Monday morning upon his own account, although he was willing to make the attempt if the captain would undertake responsibility for the consequences. The captain denies that such a statement was made to him, but the pilot's evidence is corroborated by two witnesses who were present on the occasion.

There are two berths at the Tredegar Wharf, one alongside the quay, and another just outside it, in which vessels lie when stranded by the receding tide. *The Calliope* was destined to the inner berth, and it is not now disputed that if she had got there she would have lain in perfect safety. At that part of the river Usk the foreshore is chiefly composed of mud, varying in consistency, becoming harder and harder as it approaches the underlying rock.

A loaded vessel when stranded presses upward the mud on either side of it, and when two vessels are lying side by side that pressure tends to form a ridge of mud between them, which remains after they leave. From the action of the river a deposit of muddy silt rapidly accumulates upon the foreshore.

The appellant company are neither owners nor lessees of the foreshore upon which their wharf abuts, they have no rights except as members of the public; although their position as occupiers of riparian land gives them a use of the river and its adjacent *solum* for the purpose of loading and unloading craft which the members of the public cannot enjoy without their permission. They cannot interfere with the natural condition of the foreshore in any way which could possibly affect the flow of the river or its navigation; and such innocent operations as they may venture upon are only protected by the tacit consent of the owners of the *solum*. It appears that the appellant company and other wharfingers upon the Usk are in the habit, at intervals of ten days or a fortnight, of removing from their berths the mud deposit, because it impedes the floating of vessels with the rise of the tide, and also of scraping down the ridge or mud bank between the berths.

On the Monday morning *The Calliope* was taken up the river under steam until she passed the Tredegar Wharf. She was then turned round to port and her course directed straight to the wharf. When her stem had got within a few feet of the lower end of the quay her stern took the mud, and attempts made to berth her by warping her stern towards the upper end of the quay proved unsuccessful. The time at which she attempted to reach the berth was shortly after 4 a.m., more than an hour before full flood. She did not float at the top of the tide, and at low water her stem and stern were fast in mud, whilst amidships she rested upon, and was partly sunk into, the ridge already described, which had been scraped down, as usual, about a fortnight previously. In that position her hull suffered damage, for which her owners are now seeking to make the appellants responsible.

The sole cause of action disclosed in the respondents' statement of claim was that the berth which the appellants directed *The Calliope* to occupy was unfit for that purpose, being "in an uneven and dangerous and defective condition." Had it been shown that such was the fact, and that the injuries sustained by *The Calliope* were due to that cause, the present case would have been within the principle followed both by the Admiralty judge and the Court of Appeal in *The Moorcock*, 14 P. D. 64. In the course of the trial before Butt, J., the respondents put forward two new grounds of action, and asked leave to amend their pleadings, in order to introduce them. One amendment was allowed by the learned judge, "in order to raise the question of negligence on the part of Griffiths, upon the assumption that he was intrusted with the authority to bring this ship in; and that his acts were the acts of the defendants." The second amendment proposed, to the effect that the statement in Griffiths' note as to the excess of water at the wharf beyond its depth at Bathurst Basin was a material misrepresentation, by which the captain and pilot were misled, was reserved for consideration after the evidence was completed.

So far as concerns the amendment allowed, it is obvious that Butt, J., did not attach implicit credence to the account of Griffiths' actions given by *The Calliope* witnesses, which was contradicted by Griffiths himself and other witnesses for the appellants. But assuming that account to be true, it falls far short of showing that Griffiths was either intrusted with or exercised authority in bringing the vessel to the wharf. The fair inference to be derived from it is, in my opinion, that the whole charge of navigating the vessel and of bringing her alongside the quay was from first to last in the hands of her officers and pilot, and that Griffiths did and said no more than might naturally have been expected of a wharfinger's servant who was assisting to warp and moor her.

The other amendment, which was not expressly allowed, but was dealt with by Butt, J., in the course of his judgment, is equally without foundation in fact. I think with Butt, J., that the representation made by Griffiths was substantially true. According to the register kept from actual observation, at Bathurst

Basin the extreme depth of water there on the morning in question was 16 feet; adding 2 feet that would only give 18 feet at Tredegar Wharf, whereas the after part of *The Calliope* was drawing 18 feet 3 inches.

For these reasons Butt, J., dismissed the suit. On appeal his judgment was reversed by Lord Esher, M.R., with Cotton and Lindley, L.JJ., who condemned the present appellants in costs and damages. Their lordships did not deal with any of the questions raised in the court below, but rested their decision on the ground that the appellants were lessees of a portion of the river bed *ex adverso* of their wharf, including the space between the berths, and that they had failed in their duty to those in charge of *The Calliope* by neglecting either to remove the ridge or to warn *The Calliope* of its existence.

In their argument at your lordships' bar the respondents mainly relied upon the cause of action which has been affirmed by the Court of Appeal. I hesitate to affirm the principle that a court of review ought to entertain a new ground of action of which the defendant had no previous notice, based upon inferences of fact derived from evidence directed to other points—inferences which the defendant might possibly have been able to explain away or contradict if he had been required to lead proof with reference to them. But in the present case I am satisfied that the inferences which the Court of Appeal has drawn are not warranted by the evidence.

The assumption that the appellants were lessees of the river bed is expressly negatived by the only passage in the depositions to which the respondents were able to refer. Yet it seems to have been regarded as an important factor in the case, and Lindley, L.J., says that "the learned judge in the court below failed to attribute sufficient weight to the fact that the ship was injured by grounding on the ground of the defendants."

I do not doubt that there is a duty incumbent upon wharfingers in the position of the appellants, towards vessels which they invite to use their berthage for the purpose of loading from or unloading upon their wharf; they are in a position to see, and are in my opinion bound to see, whether the berths themselves and the approaches to them are in an ordinary and reasonable condition of safety for vessels coming to and lying at the wharf. If the approach to the berth is impeded by an unusual obstruction, they must either remove it, or, if that cannot be done, they must give due notice of it to ships coming there to use their quay. I think it would be altogether unreasonable to hold that the river bed in front of the Tredegar Wharf was not in an ordinary condition of safety unless it was kept as level as a billiard table; the evidence shows that in the river Usk the stranding of a vessel necessarily occasions a certain rise of the mud above the adjacent level, that the creation of such a ridge as that between the appellants' berths is incidental to all the wharves on the river, as well as theirs, and also that the scraping down of such ridges at intervals of time is the usual and only method which has been followed, at all these places, for enabling vessels to enter the inner berth in safety. It is proved that the appellants had not neglected to take the usual precautions for reducing the ridge; and it is not even suggested in the evidence that on the occasion when *The Calliope* stranded upon it the ridge had attained greater dimensions or height than it usually did before the process of scraping came to be repeated in course.

In these circumstances I find it impossible to impute negligence to the appellants. I do not think that a seaman of ordinary skill would have experienced difficulty in ascertaining when the tide would be of sufficient depth to carry *The Calliope* safely into the inner berth; and I can hardly conceive conduct more reckless than that of the persons intrusted with the duty of taking her there. They knew that safe access was a mere question of time, and that by waiting for high water on the Monday afternoon, or Tuesday morning at farthest, it could be secured. The pilot did not think that there would be enough water; he knew that the attempt to take her in would put him in peril of losing his certificate; and the captain, who seems to have had no personal knowledge of the locality, was aware of the pilot's opinion. Both were in fault, and it is unnecessary to consider the proportion of blame attaching to either, because the present case is between ship and wharf, and the ship must be answerable for what they did either singly or jointly.

One other observation occurs to me upon the facts of this case. I think it is clearly proved that the existence of the ridge was not the cause which prevented the vessel from getting into berth. It has never been suggested that the muddy *solum* upon which her sternmost part rested was in an abnormal or unsafe condition, either as regards level or otherwise. According to the captain, whose evidence on the point is uncontradicted, her stern only was aground until after the tide began to ebb, when for the first time she grounded amidships; so that until she grounded on the ebb her midships must have been afloat above the ridge for the period of an hour at least. During that period efforts were made to warp her into the berth; and it is plain that these were defeated, not by the ridge, but by the fact that her stern was too fast in the mud. If the grounding of her stern was due to the negligence of those in charge of *The Calliope* I cannot understand upon what principle the appellants could be made responsible for her being held fast by the stern in such a position that she stranded upon and was injured by the ridge when the tide ebbed.

I therefore concur in the judgment proposed by the Lord Chancellor.

Lord HERSCHELL.—I am of the same opinion. I think, as my noble and learned friend has pointed out, that there was some misapprehension on the part of the learned judges in the court below which influenced their decision, and led, to some extent at all events, to their differing from the learned judge whose judgment they were reviewing. What I conceive to have been the misapprehension is put most pointedly in the judgment of Lindley, L.J., who says that he thinks "sufficient weight was not given by the learned judge in the court below to the fact that this ship was injured by grounding on the land of the defendants." and later on he speaks of them "as occupiers of the place and having control of the bed of the river," and says that this "was not sufficiently attended to by the learned judge in the court below."

Both the Master of the Rolls and Cotton, L.J., speak of the defendants having been lessees of the particular part of the bed of the river where the accident occurred. Now the learned counsel for the respondents, being pressed upon this point, have entirely failed to show the slightest foundation for any such allegation. I do not understand that the appellants had in any way whatsoever a control of this part of the river; nor do I think it is accurate to say, as was said by Cotton, L.J., that the unevenness of the bed of the river was caused by the appellants mooring, for their own purposes, vessels opposite their wharf.

The real position of things I take to be this. Persons navigating the river with vessels have a right to discharge those vessels at any convenient and suit-

able wharf along its course; and when a vessel grounds and lies near a wharf for the purpose of discharging, that is as much a natural use by the vessel of the river as is her use in being water-borne to the place where she is to discharge; and when she is in that position for the purpose of discharging, her situation there and the discharge are as much a matter of her concern as they are of the wharfinger's, and are as essentially a part of the mode of using the river for the purposes of navigation as any other. Therefore I approach the case from an entirely different standpoint, with all respect to the learned judges in the court below. It appears to me that these ridges or elevations in the bed of the river were caused by the use of the river, by vessels navigating it, in one of the ordinary modes in which a river is used; and to attribute them to the wharfinger, to speak of them as if they were his work and the result of acts done by him is in my judgment, with all respect, to misapprehend the real state of things and the relations of the parties. No doubt it is to his advantage that ships should discharge at his wharf. On the other hand, it is an advantage to the ships that they should go to the place of discharge where commercially the products which they carry are required.

Therefore I am by no means prepared to say that there was any legal obligation on the part of the appellants, when vessels had been lying at their wharf, to remove all unevenness from the bed of the river in order that it might become a perfectly level surface again, any more than there was an obligation on the ships which had caused the elevation to remove that elevation themselves. I will deal in a moment with the duties which might, under certain circumstances, conceivably arise to cast an obligation upon the wharfinger; but I am only saying that the mere fact that vessels so lie and cause a difference of elevation in different parts of the river does not in itself appear to me to involve necessarily any such obligation as is suggested.

Now I do not for a moment deny that there is a duty on the part of the owner of the wharf to those whom he invites to come alongside that wharf, and a duty in which the condition of the bed of the river adjoining that wharf may be involved. But in the present case we are not dealing, as were the learned judges in the cases which have been cited to us, with a condition of the bed of the river in itself dangerous—that is to say, which is such as necessarily to involve danger to a vessel coming to use the wharf in the ordinary way—and we are not dealing with the case of what I may call an abnormal obstruction in the river—some foreign substance or some condition not arising from the ordinary course of navigation. If the mischief had arisen from the bed of the river adjoining the wharf being in such a condition that a vessel invited there could not, even if she had come in at the most fitting and proper time of tide, have lain there in safety, it may well be that there would have been a cause of action. But the peculiarity of the present case is that it was all a matter of time and degree; whether it was safe to come or not depended upon a variety of elements. There was no necessarily inherent danger in the condition of the bed of the river. If this vessel had been of a somewhat lighter draught she might have come safely to this wharf when she did, and, having got safely in, have remained uninjured. If, on the other hand, being of the draught that she was, she had waited for a later time of tide, she might equally have come in safely and have discharged her cargo absolutely uninjured. But the mischief arose from the fact that, being of the draught she was, she came at the time she did, and attempted then to do that which she might safely have done later, or that which a vessel of a lighter draught or a more even keel might have done at that time.

Now, under those circumstances, apart from the question of representation, with which I shall deal in a moment, can it be said that there was a breach of duty on the part of the appellants? What was their duty? Was it to keep the bed of the river adjoining their wharf in such a condition as that, at all tides, any ship, however heavy her draught, might come in? Such a proposition, surely, can hardly be contended for. Then, why was there an obligation in respect of this ship at that particular time, or at any particular time, indeed, that could be named? (I mean, of course, apart from the alleged representation). That I am wholly unable to see. Therefore that proves that this case differs altogether from any of those which have been cited, because here the accident, such as it was, arose entirely from the circumstance of a vessel with this draught coming in on this particular tide.

I have said that, if the obstruction which created the difficulty in the approach of this vessel to the wharf at this particular tide, had been one caused by some unusual and extraordinary circumstance, which those navigating the river would have no right to anticipate, but known to the wharfinger, then I quite agree that some duty on his part would arise towards them, and, in the absence of warning, it may be that he would be under some responsibility. But the truth is, that the pilot knew perfectly well that these inequalities did arise at all the berths in the river from time to time, owing to vessels lying there. No doubt, from time to time, at different places, some scraping took place for the purpose of lowering the level of these elevations. I have already expressed my doubt whether, although that work was undertaken by the wharfingers, it was in pursuance of any duty incumbent upon them. It was perfectly natural, of course, that they should undertake it in their own interest, because, of course, if these elevations were allowed to increase it would render access to their wharves more difficult. The witness called for the defendants on this part of the case explained that it was for this reason that they did scrape from time to time, in order that the access to their wharf might not be interrupted to the extent that it would otherwise be, but it may be doubted whether it was not in their interest rather than in the discharge of an obligation that they from time to time scraped these elevations. I would say this, that it was not by reason of their having any control over this part of the river in any peculiar sense, or having any superior right to that of any other member of the public that they undertook this work, or would be able or entitled to undertake it. I mean any other member of the public who was, as they were, a riparian proprietor. I apprehend that, being riparian proprietors, they would have a right to execute such work in the neighbourhood for the purpose of improving the access to their wharves as they might be advised to execute, provided that in so doing they did not prejudicially affect or interfere with the rights of any third persons or the rights of the public. Subject to the rights of the public, and subject to the rights of any third persons not being interfered with, I do not suppose that they could be in any way rendered liable for thus dealing with the bed of the river in the neighbourhood of their wharf.

Now, as I have said, this is not a case of anything foreign or strange in the condition of the bed of the river. It is one of the results of the normal use of the river; and all that can be said is that the wharfingers may not on this occasion have done as much as they had previously done to remove the elevations caused by that use of the river; but certainly it is to

my mind impossible to say that, even if they did to some extent omit to do what they had done on previous occasions (and all the evidence as to that is of the vaguest description), they failed in their duty towards those who were about to approach their wharf.

That, to my mind, apart from the question of the letter and the representation which came in the letter, is sufficient to dispose of the case. One observation I may make, although it is to some extent connected with the representation which the appellants made—it is this, that if on the one hand the condition of the bed of the river may be said to have been a matter peculiarly within the knowledge of the appellants, on the other hand the draught of the vessel, which was of at least as great importance in determining whether the vessel could have approached the wharf or not, was peculiarly within the knowledge of the respondents; and to say that the respondents, who had this knowledge, which they would know would not in the ordinary course be in the possession of the appellants, were entitled to rely upon a statement made to them by the appellants as to their being able to get safely to the wharf at a particular time, appears to me a somewhat startling proposition. No doubt the letter of Griffiths does represent that in his opinion (and there is no reason to doubt that it was honestly his opinion) the captain could bring the steamer to the Tredegar Wharf on Monday morning's tide. But surely that could not absolve the shipowners, or those who were in charge of the ship, from the responsibility of considering for themselves whether it was possible. As I say, presumably the man who gave that information would not know, as they would, the draught of the ship and her trim, because if this ship had been of the same draught, but that draught had been on a different trim, it would very likely have been the case that the vessel would have made her way in with safety. Therefore I do not think that this letter can be taken as an invitation to come in under all circumstances, or an assertion that they can come in under all circumstances, but it must be taken merely as a general statement of what the condition of the water at the wharf was in comparison with the berth at Bathurst Basin, and what, therefore, they would have a reasonable right to expect under ordinary circumstances, of course assuming that those who were navigating the ship would know that they must make sufficient allowance, because the bed of the river in the neighbourhood of the wharf might not be in a perfectly even condition. It seems to me to be out of the question to suppose that it is a right and proper thing to run the matter so fine that if you have six inches of elevation at any particular point near the wharf above the surface of the bottom of the berth itself you will have too little water. I cannot think that it was really a prudent thing to run it so fine as that, and I think that a greater margin ought to have been left in order to insure reasonable safety.

With regard to the representation, it is not alleged as a deceit, it cannot be put as a warranty—the utmost the plaintiffs can allege appears to be a representation by the foreman in charge of the wharf of his belief, he being ignorant of that which those on board knew, namely, the draught of water of the vessel, on which depended the possibility or not of getting this ship on to the berth.

Under these circumstances I am unable to see any breach of duty on the part of the appellants rendering them liable to this action, and I concur with the motion which has been made.

Lord MORRIS.—I concur.

Order of the Court of Appeal reversed and decree of Butt, J., restored with costs; cause remitted to the Admiralty Division.

Solicitors for the appellants, *Pritchard & Sons*, for *Vaughan & Hornby*, Newport, Mon.

Solicitors for the respondents, *Downing, Holman, & Co.*

Court of Appeal

From Chan. Div. March 9, 10, 13.

INDIGO CO. v. OGILVY. (a.)

Practice — Jurisdiction — Amending writ — Adding foreign firm as defendants—Some members of foreign firm resident within the jurisdiction — Introducing fresh causes of action in respect of transactions out of the jurisdiction—R. S. C., 1883, *ord.* 11, *r.* 1 (g)—*Service out of the jurisdiction.*

The plaintiffs, an English company, entered into certain agreements in India with an Indian firm relative to the manufacture of indigo and the sale and disposal of the proceeds of the indigo so manufactured. The agents in England of the Indian firm were an English firm, consisting of five out of the six members of the Indian firm, several of whom were resident in India. The Indian firm consigned the indigo to the English firm as their agents, on behalf of the plaintiff company, and drew bills against it on the latter, who, upon such bills being presented, dishonoured them, on the ground of their exceeding the amount authorized. The English agents having then taken up the bills and sold the indigo, the plaintiff company commenced an action against them claiming the indigo and other relief, and all the members of the English firm appeared to the writ. On a motion for an interlocutory injunction, the plaintiff company introduced charges of fraud against the native servants of the Indian firm. The plaintiff company subsequently obtained leave ex parte *to amend their writ by adding the Indian firm as defendants and by making consequential amendments, and to issue a concurrent writ for service out of the jurisdiction, but on that application they did not go into the question of fraud. They then amended their writ, and added a claim against the new defendants, the Indian firm, which raised entirely fresh causes of action arising out of alleged breaches in India by the Indian firm of the agreements. The Indian firm then moved to discharge the order which had been obtained* ex parte, *and* North, J., *granted the application.*

Held, by the Court of Appeal, *that the order giving leave to amend was rightly discharged, but that, under the circumstances, the plaintiffs ought to be allowed to amend their original writ by substituting the names of the individual members of both firms who were resident within the jurisdiction for the name of the English firm, and by adding a claim for relief in respect of breaches of the agreements, and that the members of both firms who were resident out of the jurisdiction ought to be allowed to set aside their appearances, and that the order to be made must be without prejudice to any application by the plaintiffs for leave to add as parties all or any of the members of the said firms so resident out of the jurisdiction, and to serve them with the amended, or a concurrent, writ.*

Western National Bank of New York *v.* Perez, ante, *p.* 245, [1891] 1 *Q. B.* 304, *followed.**

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* See R. S. C., June, 1891 (35 SOLICITORS' JOURNAL, 589), ord. 48A, rr. 1—11, as to actions by and against firms.

(a.) Reported by R. H. DEANE, Esq., Barrister-at-Law.

Appeal from North, J.

The Indigo Co. (Limited) was an English company whose business was the working in India of a certain patent for the manufacture of indigo by a particular process.

It appeared that the plaintiff company had entered into certain contracts in writing with Messrs. Gillanders, Arbuthnot, & Co., a Calcutta firm, who were managers and part proprietors of some indigo estates in India. These contracts, which were respectively executed at Calcutta on the 9th of May, 1887, and the 30th of May, 1888, contained provisions for the manufacture of indigo by the patent process on the aforesaid Indian estates of Messrs. Gillanders, Arbuthnot, & Co., and for the sale at Calcutta of the indigo so manufactured. Messrs. Ogilvy, Gillanders, & Co., an English firm, were the London agents and correspondents of Gillanders, Arbuthnot, & Co., and the latter firm consisted of six persons, five of whom constituted the English firm, some of the members of both firms being resident in India.

The plaintiff company being dissatisfied with the prices obtained for the indigo in Calcutta, wrote the following letter, in January, 1890, to Ogilvy, Gillanders, & Co.:—"In consideration of your telegraphing to your Calcutta firm to ship the patent indigo made at Begumserai and Khan Mirzapore factories to this market instead of selling at Calcutta at the very low valuation of Rs.120 named, we hereby undertake to accept on presentation draft or drafts of your Calcutta firm, Messrs. Gillanders, Arbuthnot, & Co., for the amount due to the proprietors of Begumserai and Khan Mirzapore factories, plus Messrs. Gillanders, Arbuthnot, & Co.'s disbursements for freight, insurance, and shipping charged at 90 d/s with document attached, for payment, and to pay the same at maturity."

In consequence of that communication the Indian firm shipped to England 410 chests of the indigo, consigned to Ogilvy, Gillanders, & Co., for the plaintiff company, and drew bills against it on the latter for more then £17,000, which they negotiated in Calcutta. When the bills came to the plaintiffs they refused to accept them, on the ground that they were in excess of the amount authorized, and the bills were then taken up by Ogilvy, Gillanders, & Co.

The plaintiff company issued their writ of summons against the English firm of Ogilvy, Gillanders, & Co. only in October, 1890. The indorsement on that writ was:—"The plaintiffs' claim is (1) for a declaration that they are entitled to certain goods in the possession of the defendants, to wit, 410 cases of indigo shipped by Gillanders, Arbuthnot, & Co. from India to the defendants, or the proceeds thereof, and alleged by the plaintiffs to have been shipped for or on their account; (2) for an order directing the defendants to deliver the said goods, or their proceeds, to the plaintiffs; (3) for an injunction restraining the defendants, their brokers or agents, from selling or disposing of the said goods, or any of them, or from receiving or dealing with the proceeds of any sale or disposition thereof; and (4) for damages for the wrongful conversion and detention by the defendants of the said goods."

All the members of the English firm entered an appearance, including those residing in India.

The indigo having been sold by Messrs. Ogilvy, Gillanders, & Co.'s brokers, the latter were afterwards added as defendants.

The next step in the proceedings was a motion on behalf of the plaintiff company to restrain the defendants from parting with the indigo. From the affidavits filed in support of that motion it appeared that the company claimed to be entitled to damages from the Indian firm for frauds alleged to have been committed by their native employés at the factories, with the object and effect of increasing the amounts chargeable against the plaintiff company in respect of indigo manufactured under their process. However, as the result of an arrangement between the parties as to the disposal of the proceeds, the injunction was allowed to stand over till the trial.

In December, 1890, the company applied *ex parte* to the judge in chambers for leave to amend their writ by adding the Indian firm as defendants, "and by making such amendments in the indorsement of the said writ as may be necessary in consequence of the joinder of the said Gillanders, Arbuthnot, & Co. as defendants," and for leave to issue a concurrent writ for service out of the jurisdiction. This application, which was supported by an affidavit not referring to the alleged frauds, having been granted by the judge, the company proceeded to amend their writ by adding the Indian firm as defendants, and by adding to the indorsement on the writ a claim for £5,000 "for money received by them to and for the use of the plaintiffs, and for damages for breach by them of two agreements in writing, dated respectively the 9th of May, 1887, and the 30th of May, 1888."

The response to this was a motion on behalf of the Indian firm to discharge the order obtained *ex parte* granting the company leave to add the Indian firm as defendants, &c., unless the company would undertake to confine themselves in the action to such breaches of the contracts as took place within the jurisdiction, because, as the Indian firm alleged in their notice, the substantial dispute, as far as they were concerned, related to matters and alleged breaches outside the jurisdiction of the English court.

This motion came on for hearing before North, J., on the 13th of February, 1891.

North, J., acceded to the application and discharged the order obtained *ex parte* by the plaintiffs.

The plaintiffs appealed.

Napier Higgins, Q.C., and *W. S. Robson*, for the appellants.—The learned judge was wrong in discharging the order which gave us leave to add the Indian firm as defendants. At all events, we ought not to be debarred from proceeding against those members of that firm who reside in this country. All the members of the English firm, including those resident in India, appeared to the original writ, and that includes five out of six of the Indian firm, and they ought not to be allowed practically to set aside their appearances. But our contention is that, there having been a breach of contract within the jurisdiction, it was right to add the Indian firm as defendants: R. S. C., 1883, ord. 11, r. 1 (*e*) (*g*); *Reynolds* v. *Coleman*, 35 W. R. 813, 36 Ch. D. 453; *Western National Bank of New York* v. *Perez*, *ante*, p. 245, [1891] 1 Q. B. 304; *Massey* v. *Heynes*, 36 W. R. 834, 21 Q. B. D. 330.

Cozens-Hardy, Q.C., and *Cababé*, for the respondents.—The claim for £5,000 added by the amendment does not affect the defendants who are within the jurisdiction at all, and ought not to be tried here. The order of the learned judge was right. The order to amend obtained *ex parte* could only have been allowed to stand upon terms of the plaintiffs undertaking to confine the action to such of the alleged breaches as took place within the jurisdiction: *Thomas* v. *Duchess of Hamilton*, 35 W. R. 22, 17 Q. B. D. 592. The only substantial question in the action is as to the alleged frauds, but nothing was made of that on the *ex parte* application. An action, which should properly be brought in India, ought not to be allowed to be brought here by a side wind. There is nothing between the parties that could not be settled in five minutes except the so-called Indian frauds. We say

(1) there was no breach; (2) if there was any breach, it was out of the jurisdiction; (3) even if there was a breach within the jurisdiction, there is no damage. The question of the Indian frauds ought to be tried in India, not in England. They took place in India, and the witnesses are resident there.

They referred to *Massey* v. *Heynes*.

Higgins, Q.C., in reply.—[LINDLEY, L.J.—The objection seems to be that you are seeking in substance to add an entirely new cause of action to your claim.] The original order which was discharged was a perfectly proper one, and ought not to have been discharged, and certainly not on the grounds on which it was discharged. All the confusion seems to have arisen from suing the firms instead of the individuals. [LINDLEY, L.J.—Yes; and that was your fault. KAY, L.J.—The English firm seem to have had nothing to do with the alleged breaches.] In substance the firms are identical. The distinction between them is purely technical. The learned judge, at most, ought to have struck out the amendments actually made, not discharged the order giving leave to amend. There are not two causes of action. They are substantially the same. The matter is so complicated that practically it is one cause of action only.

He referred to *Massey* v. *Heynes*.

Cur. adv. vult.

March 13. — LINDLEY, L.J. — This action was brought by a limited company in this country against the firm of Ogilvy, Gillanders, & Co., and according to the indorsement on the original writ it appears to be neither more nor less than an action of trover. Some of the partners in Ogilvy, Gillanders, & Co. do not reside in this country, and the plaintiffs, therefore, were wrong in issuing their writ, without leave, against that firm. There is no order which justifies it at all. The plaintiffs ought to have applied for leave to serve the partners who are abroad. But then, we are told, those members of the firm who are abroad have appeared, and if there had been nothing more in it there would be no reason why that appearance should be in any way disturbed. But the plaintiffs obtained an order *ex parte* whereby it was ordered that they should be at liberty to amend the writ of summons by adding Gillanders, Arbuthnot, & Co., of Calcutta, in the Empire of India, as defendants, and by making such consequential amendments in the indorsement of the writ as might be thereby necessitated; and then it was ordered that the plaintiffs should be at liberty to issue a concurrent writ, and so on. After that an application was made on behalf of the Calcutta firm to discharge that order. In the interval the plaintiffs had availed themselves of the order by amending their writ, adding the name of the Calcutta firm and introducing a new cause of action altogether, suing now both firms for breaches of two agreements entered into as I will presently mention. North, J., on consideration of the matter came to the conclusion that the liberty given by the order I have just referred to was confined, and intentionally confined, merely to this—to adding the Calcutta firm for the purpose of obtaining relief against the English firm according to the claim on the writ—for there is no statement of claim yet—and he considered that it was going beyond what was intended by that order, and beyond what was reasonable and proper, to recast the whole case and add the Calcutta firm with a view to the case so made, and he accordingly discharged the order. From that the plaintiffs appeal.

Now it appears to me that there have been misconceptions on both sides in this matter. In the first place I take it to be now settled, after the discussion which this matter has undergone in the case of the *Western National Bank of New York* v. *Perez*, that you cannot sue a firm some members of which are abroad, at all events without leave; that if you can sue them at all in the firm name, which seems to be doubtful, you must at all events obtain leave. Therefore, when this writ was issued it was all wrong so far as the foreigners were concerned. That being so, the addition of the Calcutta firm did not make it more right. That was wrong too; and, therefore, the order of North, J., giving the plaintiffs liberty to amend, by adding another firm to a defective writ, was wrong, and that order ought to be discharged and put right—in other words, the appeal ought to fail.

But then comes the question what ought we now to do. It is not right for this court, or any court, to play battledore and shuttlecock with suitors, and North, J., ought, it appears to me, to have given the plaintiffs liberty to amend their writ in such a way as was possible without doing injustice to the defendants; and I propose now to state the order which we think he ought to have made, and to make that order.

But before doing that I will make one or two remarks about the cause of action here. The real cause of action arises from alleged breaches of two contracts made in Calcutta between the Calcutta firm and the plaintiffs. Some of the alleged breaches were in Calcutta and some in this country. But the plaintiffs' rights are based entirely on those contracts. There are two firms, one consisting of five partners, and the other of six. All the members of the English firm are members of the Calcutta firm; but there is one member of the Calcutta firm who is not a member of the English firm. Now if partners abroad, who have partners resident here, enter into any agreement as such with a person here, the partners resident here can be sued for any breach of that agreement whether the breach is in this country or abroad. I apprehend there is no doubt at all about that, and the struggle to prevent the plaintiffs here from suing the partners here for breaches abroad appears to me to be almost futile. It can be done in some way or another, but I do not say it can be done in the shape in which the plaintiffs have attempted to do it. On the other hand, the plaintiffs have got into a hopeless confusion, and I do not think it would be right to leave them in that state, in which no good can accrue to them, and no good to the defendants, when there is a very serious matter in controversy between them.

In order to do justice, therefore, it appears to me that North, J., ought to have done this; and we propose to do it. First of all we dismiss this appeal with costs, because the form is all wrong; and we set aside the amended writ. The plaintiffs are to be at liberty to amend their original writ by substituting for the name of the firm, Ogilvy, Gillanders, & Co. (that is, the name on the original writ), the names of the members thereof, and the names of the members of the firm of Gillanders, Arbuthnot, & Co., who are in this country; and to amend the writ by adding a claim for relief in respect of any illegal breaches of the contracts of May, 1887, and May, 1888. Now if we stopped there that would hardly be fair, because some members of the firm of Ogilvy, Gillanders, & Co. are resident abroad, and they have appeared, and it would not be right, I think, to put them to their appearance to the amended writ, which disclosed a totally new cause of action; and I do not know that they would have appeared to that. Therefore what we propose to do is this. The members of the above firms who reside abroad, and who have appeared to the original writ, are to be at liberty to set aside their appearances. That will leave as defendants those members of the two firms who are in this country. Of course they must appear and meet any

cause of action which the plaintiffs can have against them. Then we propose to add this, which may or may not be necessary—and I do not know whether it will or not—"and this order is to be without prejudice to any application which the plaintiffs may make to add as parties to such amended writ all or any of the co-partners of the said defendants who are not resident in this country, and to serve them with such amended writ, or a concurrent writ, as the plaintiffs may be advised." There are two reasons why we do not now give them liberty to do that. In the first place, I do not know that it is necessary; and, in the next place, if it should become necessary, there may, for anything I know, be reasons which the defendants can show against their being joined. I think, therefore, it would not be fair to the defendants to go so far as to give the plaintiffs liberty to do it now; but inasmuch as, by striking out those two firms, this order may very seriously embarrass the plaintiffs, we propose to put it in that form—that the order is to be without prejudice to any application which they may make, if they find it necessary; although, so far as I can see, they will not find it necessary.

KAY, L.J.—I assent to the proposed order, and I will shortly state my view of the matter. The writ as originally framed asked for a declaration against the persons who are now defendants to it, who were named by the name of the firm, Ogilvy, Gillanders, & Co., that the plaintiffs were entitled to certain goods in the possession of the defendants; and, secondly, for an order directing the defendants to deliver those goods, or their proceeds, to the plaintiffs; and, thirdly, for an injunction to prevent them disposing of the goods in any other way; and, fourthly, damages for wrongful conversion and detention by the defendants of the said goods. That is all that appears on the writ, and the effect of that is a suggestion that there are certain goods in the possession of the firm, who were defendants, in this country, to which the plaintiffs have a right, and what practically they seek is to recover those goods.

Well, that firm, it appears, was entirely an English partnership, and some of the members were actually in England, others of the members of that firm were not in England, but were in India; but they all appeared to the writ, so that, so far as any claim was asserted against the specific goods in the possession of the firm in England, there was a complete action. However, the plaintiffs were not satisfied with that. They wanted to add a firm who are, in fact, an Indian firm, and carry on business in Calcutta. That Indian firm is composed of all the members of the English firm, and one additional member, so that it is a separate firm; and the plaintiffs obtained, under an *ex parte* order, leave to add that firm, and to amend their writ; and then they amended their writ by adding that Indian firm also, by the name of Gillanders, Arbuthnot, & Co., not making any of the individuals, either of the English or foreign firm, parties to the writ; and then they added to the writ this claim—"And the plaintiffs also claim against the defendants Gillanders, Arbuthnot, & Co. £5,000 for money received by them to and for the use of the plaintiffs, and for damages for the breach by them of two agreements in writing, dated respectively the 9th of May, 1887, and the 30th of May, 1888." Now that is the first mention of those agreements in the writ, and the effect of that writ, as amended, is to ask all the original relief, not only against the English firm, but also against the Indian firm, and to add certain special relief against the Indian firm which is, in point of fact, alternative, and probably inconsistent, relief.

The facts, as now appears, are these: There were two agreements between the plaintiffs and the Indian firm, the English firm not being party to either of those agreements. They were altogether agreements with the Indian firm, and those agreements were practically for the use by the Indian firm of certain patent processes of the plaintiffs in preparing indigo; and it is claimed (I am not at all wishing to indicate any opinion of my own as to the real meaning) that by virtue of one or other of those agreements the Indian firm were bound to consign to this country indigo so prepared; and the plaintiffs' claim is that when the indigo so prepared was consigned to this country they had a right to that specific indigo. But under this amendment of the writ they are not merely claiming the specific indigo which is being transmitted to this country, but they want damages against the Indian firm for breaches of those two contracts. Now, that relief is alternative relief; or, at least, it is relief which is not in the least degree involved in the writ as originally framed; and under it the defendants state that they are apprehensive that claims may be made against the Indian firm for breaches of these two contracts, or one of them, which occurred in India. Now it is quite clear that an original writ for breaches of these contracts, which breaches occurred in India, would not be allowed to issue in this country against people resident abroad. If the defendants against whom that sort of relief was asked were resident abroad, the answer to any application to allow a writ to be issued against them in this country would be this: "Your cause of action, the breach of the agreement, is abroad. It does not come within the terms of the orders at all. You must sue them in the country in which the breach occurred." I take it that is very clear indeed; and what the defendants say is this: "The plaintiffs are now trying, under guise of an amendment of their writ, and by reason of the leave they obtained *ex parte*, to add the foreign firm as parties in order to obtain against that foreign firm relief which, unless they had joined them in this way, they would not have been allowed to obtain in this country at all." That I understand to be the main difficulty which the defendants raise.

Now, certainly one case, *Massey* v. *Heynes*, which was referred to has gone very far. In that case the Divisional Court, and afterwards the Court of Appeal, did allow the addition by amendment of persons resident abroad to an action commenced against persons resident in this country, and allowed the plaintiffs to ask against the persons resident abroad alternative relief, which could not have been obtained upon an original writ against those persons alone, because the cause of action was not a cause of action in this country, and did not come within the rule. Wills, J., in a very careful and well-considered judgment, says this:—"The brokers made a charter-party with the plaintiffs which had to be performed in the Mediterranean, and was there broken. On complaint made to the defendants abroad, they answered that the brokers in England had exceeded their authority in effecting the charter-party in the terms which it contained, and, therefore, that the foreign firm was not liable. Thus two sets of persons were involved in the transaction, against whom the plaintiffs had no joint remedy or joint cause of action, but in respect of each of whom the suggested cause of action against one excluded that against the other, for if the firm abroad had given authority to the brokers in London to make this charter-party, no action would lie against the brokers; if, on the other hand, the firm had not given authority to the brokers, no action would lie against the Austrian firm, but an action would lie against the brokers for breach of their implied warrant of authority. So that perhaps no case could be put in which the ob-

jections which have been raised to the service out of the jurisdiction would be more strikingly illustrated. The Austrian firm certainly could not have been served alone, because under none of the sub-sections of ord. 11, r. 1, would a case for service out of the jurisdiction against them arise. Also, if the action succeeded against the foreign firm, it would be on the ground that the English defendants were not liable, and, therefore, in one sense, ought not to have been sued." But the result of that case was this—that both the Divisional Court and the Court of Appeal agreed that the claims against the persons resident in England and the foreign firm arose out of the same transaction, and, therefore, there being a *bonâ fide* claim against the persons resident in England, it was proper in that case to allow the foreign firm to be joined on alternative relief sought against the foreign firm, which could not have been obtained in an action against the foreign firm alone, because they could not have been served. The case certainly is a very strong one, and Wills, J., says, in a further part of his judgment:—"If there was the least ground for saying the action was brought against the brokers in this country *malâ fide*, and with the knowledge that they were not liable, simply to try in England a case which otherwise could not be tried here, then, although the action was against a person in this country, it would not be 'properly' brought." In the circumstances supposed, he held that leave to add the foreign firm and serve them abroad could not have been given. But I do not think that case properly applies to what has been done here, for in the first place there would be the difficulty, which Lindley, L.J., has pointed out, in the frame of the original action. It was not right to frame this original action by making the English firm defendants simply in the name of the firm. The proper way would have been to make the partners in that firm parties by their individual names, and, then, if it was a proper case, leave might be obtained to serve those who were abroad. Or another mode of proceeding would have been merely to have made those members of the English firm who were actually resident in this country parties, and not to have added those members who were resident abroad. But the plaintiffs did not do that, and no doubt they were justified in saying that any defect of that kind was cured by the fact that the partners in that firm, though resident abroad, put in an appearance. However, they are now seeking to deal with the foreign firm in the same kind of way. They do not make the individual members of that foreign firm parties at all, but they have made the firm parties by the name of their firm only, without naming any of the individual members. It seems to me that that is wrong, and I cannot divest myself of the notion that the plaintiffs have really found out that their cause, as the writ was originally framed against the English firm, is a weak one, or at any rate, that it does not raise the real point they want to try, as they really want to try a question of breaches of these contracts abroad by the foreign firm, and, therefore, I am not quite convinced that this was a *bonâ fide* case of bringing the foreign firm before the court, and I rather think the case comes within those last observations of Wills, J., which I have read.

But now what is to be done? Supposing this writ were altogether set aside, and the action were stayed or dismissed, still it is quite clear that the plaintiffs might sue any of the members, either of the English or foreign firm, whom they happen to find in this country, and there are such members here. There are partners here who are members both of the English and of the foreign firm, and if the plaintiffs choose to bring an action against those members alone nobody could prevent them, and it would be no answer to say, "You are bringing an action against a member of a foreign firm in respect of a breach of contract in that foreign country." They have a right to do it if they find him here; they have a right to assert their remedy against a defendant who is in this country in respect of a breach of contract which occurred abroad. Therefore, in considering what is the proper course for the court now to take, it seems to me it is not right that we should simply affirm the order of North, J., without putting the parties, as far as may be proper now, in a position which they might clearly put themselves in if they liked without any authority of the court. I therefore quite assent to the order which Lindley, L.J., has stated. It enables the parties, if they please, to put their writ in a right form, and in a form which the court could not prevent their putting it in; and it obviates the necessity of issuing a new writ by giving them leave to amend this writ, and to utilize the proceedings which have been taken up to this point, if they please, for the purpose of the action which they contemplate bringing. More than that at present, I agree, it would not be well to do; but I have been considering the case very anxiously with a view, if possible, of preventing our having this fight, which was a somewhat prolonged one, considering the matter involved, all over again in court—a danger which, I am afraid, we have not altogether obviated.

Appeal dismissed. Order varied.

The minutes of the order were drawn up in the following form:—

Dismiss the appeal with costs, and set aside the amended writ; but the plaintiffs are to be at liberty to amend their original writ by substituting for the name of the firm Ogilvy, Gillanders, & Co. the names of the members thereof and of the firm Gillanders, Arbuthnot, & Co. who are in this country, and to amend the said writ by adding a claim for relief in respect of any alleged breaches of the contracts of May, 1887, and May, 1888; and the members of the above firms who reside abroad, and who have appeared to the original writ, are to be at liberty to set aside their appearances. And this order is to be without prejudice to any application which the plaintiffs may make to add as parties to such amended writ all or any of the co-partners of the said defendants who are not resident in this country, and to serve them with such amended writ or a concurrent writ as the plaintiffs may be advised.

Solicitors, *E. W. & R. Oliver; Slade & Munk.*

High Court of Justice.

Chan. Div. }
Stirling, J. } April 24.

KENSINGTON AND KNIGHTSBRIDGE ELECTRIC LIGHTING CO. (LIMITED) v. LANE FOX ELECTRICAL CO. (LIMITED). (a.)

Patent—Injunction—Threats—Alleged infringement—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.

The registered owner of an invention had agreed to assign it to a company, and had commenced an action against another company for infringing it, and the

(a.) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

company to whom the patent was agreed to be assigned had threatened the other company and their customers with legal proceedings in respect of the alleged infringement.

Held, that, under section 32 of the Patents, &c., Act, 1883, the latter company were persons aggrieved and entitled to obtain an injunction to restrain such threats; and that, the action for the infringement not having been brought by the company who had made the threats, but by the legal owner of the patent, they were not within the proviso in section 32 that the section should not apply.

Motion.

St. George Lane Fox, by an agreement dated July 31, 1890, agreed to assign to the defendants, the Lane Fox Electrical Co. (Limited) a patent for certain improvements in electric lighting, of which he was the registered owner, upon terms not disclosed by the evidence.

The nominal capital of the defendant company was £100 divided into 100 shares of £1 each, and on March 10, 1891, Lane Fox held seventy-three shares, and was the managing director of the company.

On November 15, 1890, Lane Fox commenced an action against the plaintiffs, the Kensington and Knightsbridge Electrical Lighting Co. (Limited) to restrain them from infringing his patent, and this action was still pending.

On February 21, 1891, the defendant company sent the following letter to Messrs. John Barker & Co., of Kensington, who were being supplied with electricity by the plaintiff company:—

"We understand that your house is being supplied with electric light by the Kensington and Knightsbridge Electric Supply Co., which company, as you are doubtless aware, is now being sued for damages for infringement of our patented system of electric distribution. We have been advised that you, as one of the users of the said system, are liable for the infringement. We beg, therefore, to caution you of the fact, and to offer you an indemnity upon the terms contained in the enclosed circular. These terms, however, are to be considered as withdrawn if not accepted by the 28th inst."

The circular referred to in this letter stated that "The Lane Fox Electrical Co. (Limited) by whom all Mr. Lane Fox's patents for his system of electric light distribution are now held, are prepared to grant licences for the use of this system on the following terms, provided they are accepted without delay." It then stated the terms, and ended with a short description of the Lane Fox system.

Similar communications had been received by other customers of the plaintiff company.

The present action was commenced on March 4, 1891, by which the plaintiffs claimed "an injunction to restrain the defendants from threatening any persons with legal proceedings and liability in respect of any alleged infringement of" the Lane Fox patent, and damages; and this was a motion to restrain the defendants from such threats until the trial of the action or further order.

Graham Hastings, Q.C., and *R. Wallace*, for the plaintiff.—We are entitled to an injunction to restrain these threats under section 32 of the Patents, Designs, and Trade-Marks Act, 1883. The evidence shows that there is no substance in the Lane Fox patents, so that there can be no infringement of it.

J. C. Graham, for the defendants.—If the threats had been uttered in the name of Lane Fox we would clearly have been within the proviso of section 32, for he has commenced an action for infringement of his patent: *Barrett* v. *Day*, 38 W. R. 362, 43 Ch. D. 435. The threats having been made by the defendant company, to whom the patent in equity belongs, cannot make any difference to the plaintiffs. The object of the section is that the questions of validity and infringement shall be tried, and the *onus* lies on the plaintiffs to establish their case: *Challender* v. *Royle*, 36 W. R. 357, 36 Ch. D. 425. Here they have failed to do so; the evidence simply amounting to a conflict of opinion.

STIRLING, J.—This is a motion made under section 32 of the Patents, Designs, and Trade-Marks Act, 1883, which is in these terms:—"Where any person claiming to be the patentee of an invention by circulars, advertisement, or otherwise threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale, or purchase of the invention any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats." Then there is this proviso:—"Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent."

The action is brought to restrain threats, of which a sample has been put in evidence in a letter, dated the 21st of February, 1891. [His lordship then read the letter.] I think, upon the construction of that letter, there is no doubt that it contains a threat. [His lordship then read the circular enclosed with the letter, and continued:—] Upon that it seems to me that the defendant company, who there describe themselves as now holding all Mr. Lane Fox's patents for his system of electric light distribution, and, therefore, according to the definition of "patentee" within section 46 of this Act, claim to be the persons "for the time being entitled to the benefit of a patent," claim to be the patentees of this invention within the meaning of section 32.

Then by that section, these defendants claiming to be patentees and threatening legal proceedings by circular, any person aggrieved may bring an action against them. Are the plaintiffs such persons? They are engaged in operations for supplying various persons within a particular district of London with the electric light, and upon the evidence there is no doubt at all that these threats interfere with their operations and prevent them from being so effectively conducted as they ought to be. The plaintiffs are therefore persons aggrieved, and they can bring an action and obtain an injunction "if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats." Have the defendants, who make the threats in this case, any legal rights to prevent the infringement of this patent, whether it be good or bad?

The only light which was thrown upon that was by the affidavit of Mr. Lane Fox, who says that he is the inventor of the invention referred to in this action, and is still the registered owner thereof, though he has, by an agreement dated the 31st of July, 1890, agreed to assign the said patent to the defendant company. Therefore, so far as appears at the present time, the defendants, the persons making the threats, are not the owners of the patent or entitled to the benefit of it, but are simply entitled to the benefit of an agreement for the assignment of it to themselves upon some terms, the nature of which is not disclosed. It is perfectly clear that the defendants have obtained no such legal assignment as could enable them to sue, from

the fact that Mr. Lane Fox has brought an action in his own name for the infringement of the patent.

Now it appears from the evidence that the defendant company is somewhat remarkable in its constitution. Its nominal capital consists of £100, divided into 100 shares of £1 each. On the 30th of June, 1890, all these shares had been taken up; there had been called up on those shares *nil;* and there was "considered as paid" on each of these shares £1. One can understand that Mr. Lane Fox may have very good reason for not being eager to clothe that company with the legal title to sue for an infringement of the patent. At all events, there is no evidence that he has done so, and I think I ought, upon the evidence before me, to arrive at the conclusion that the company have no legal title, but are simply entitled to such an equity as is referred to in the concluding sentence of section 37 of the Act, which provides that "any equities" in respect of a patent "may be enforced in like manner as in respect of any other personal property"—that is to say, if they desire to enforce their rights they must bring an action against Mr. Lane Fox, and make him complete the contract to which he refers as having been made on the 31st of July, 1890. It appears to me, therefore, that the defendants, "the persons," in the language of the Act, "making the threats," have no legal rights of which the acts of the plaintiffs can be any infringement.

Then, does the proviso in section 32 apply? [His lordship read it.] Now "the person making such threats" is the defendant company, and they have commenced no action for infringement. It is true such an action has been commenced, but this has been done by Mr. Lane Fox, the legal owner of the patent, who is not the person making the threats; so that, if any damages are at the trial proved to have been occasioned to the present plaintiffs by the threats which have been used, those damages will not be recovered from Mr. Lane Fox, the person suing for the infringement, at all, but from this company, with a nominal capital of £100, which is to be considered as fully paid up.

I think, under these circumstances, that the plaintiffs bring themselves within the section, and that, without entering into the question of the validity or invalidity of the patent, or whether the acts of the plaintiffs are such as would entitle the legal owner of the patent to complain, the plaintiffs are entitled to an injunction to restrain the defendant company, their officers and servants, from threatening the above-named plaintiffs, or any of their customers, or other person or persons within the district of the plaintiff company.

Solicitors, *Deacon, Gibson, & Medcalf; Sydney Morse.*

Q. B. Div. (Cave and Vaughan Williams, JJ.) Jan. 26; May 14.

METROPOLITAN RAILWAY CO. *v.* FOWLER AND OTHERS. (*a.*)

Land tax—Liability—Railway company—Tunnel under roadway—Ownership of the soil—38 Geo. 3, c. 5, s. 4.

Section 4 of 38 Geo. 3, c. 5 makes "all and every manors, messuages, lands, and tenements, . . . and all hereditaments, of what nature or kind soever they be," assessable towards payment of the land tax.

A railway company, under the powers of their special Act, constructed a tunnel under a roadway without purchasing the land or paying any rent therefor.

Held, by Cave, J. (Vaughan Williams, J., *dissenting*), *that the rights of the company in the soil occupied by their tunnel amounted to ownership, and that they were assessable to land tax in respect thereof.*

Chelsea Waterworks Co. *v.* Bowley, 17 *Q. B.* 358, *distinguished.*

Special case stated under Rules of the Supreme Court, ord. 34, r. 1.

The material portions of the case stated as follows:—

By 38 Geo. 3, c. 5 (hereinafter referred to as the Land Tax Act) it was, by section 4, enacted that "all and every manors, messuages, lands, and tenements, and also all quarries, mines of coal, tin, &c., and all fishings, tithes, tolls, annuities, and all other yearly profits, and all hereditaments of what nature or kind soever they be, situate, lying, and being, happening or arising" within England or Wales or Berwick-upon-Tweed should be assessable towards payment of the land tax.

By the Metropolitan and District Railways (City Lines and Extensions) Act, 1879 (42 & 43 Vict. c. ccl.), s. 5, the plaintiff company, in conjunction with the Metropolitan District Railway Co., were authorized to make and maintain certain railways, a new street, and other works in the said Act described, with all proper stations, sidings, approaches, works, and conveniences connected therewith respectively, and to enter upon, take, and use such of the lands delineated upon the deposited plans therein referred to as might be required for that purpose. Among the railways authorized by the said Act was a line therein described as "railway No. 1," effecting a junction between the lines of the Metropolitan District Railway Co at their Mansion House Station and the lines of the plaintiff company at their Aldgate Station.

By section 2 of the last-mentioned Act, the Land Clauses Consolidation Acts, 1845, 1860, and 1869, the Railways Clauses Consolidation Act, 1845, with certain other parts of Acts in the said section named, are, except where expressly varied by the Act, incorporated with and to form part of the said Act, and are to be applicable to each of the two companies. Amongst other sections conferring power on the said two companies with reference to lands are the following:—

Section 16.—"With respect to any lands which the two companies are, by the provisions of this Act, authorized to enter on, take, and use for purposes of the railways, new street, and works, and which are in or under the roadway or footway of any street, road, or highway, the two companies shall not be required, wholly to take those lands or any part of the surface thereof, or any cellar, vault, or any other construction therein or thereunder held or connected with any house in any such street, road, or highway, but the two companies may appropriate and use the sub-soil and undersurface of any such roadway or footway, and if need be they may purchase, take, and use, and the owners of and other persons interested in any such vault, cellar, or arches shall sell, the same for the purposes of the railways, new street, and works, or any of them; and the purchase of any such cellar, vault, or construction shall not in any case be deemed the purchase of a part of a house or other building, or manufactory within section 92 of the Lands Clauses Consolidation Act, 1845."

Section 17.—"Nothing contained in the section of this Act with respect to underpinning or otherwise strengthening houses near the railways, or in the section of this Act authorizing the two companies to

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

acquire easements only under roads, &c., and purchase cellars, &c., nor any dealing with the lands in pursuance of those sections, or either of them, shall relieve the two companies from the liability to compensation under the 68th section of the Lands Clauses Consolidation Act, 1845, or under any other Act."

By the Metropolitan Railway Act, 1881 (44 & 45 Vict. c. xxv.), s. 5, the plaintiff company alone were authorized, subject to such of the provisions of the Act 42 & 43 Vict. c. cci. as should be applicable, to make a certain part of the projected railway No. 1 above mentioned, and such part was described in the deposited plans as passing across or under a public street or highway, consisting both of foot and roadway, known as the Crescent, Minories, in the City of London.

The plaintiff company proceeded to make the said railway, and in course thereof, and in the proper exercise of their powers under the Act 42 & 43 Vict. c. cci. above stated, and during construction, disturbed the surface, and entered, appropriated, and used the surface, subsoil, and undersurface of so much of the said public street or highway as was necessary for the due construction of the said railway, and after removing the same they duly made their line below and across the said street or highway in the space thus created in the manner hereinafter described. The plaintiff company did not purchase nor, except for the purpose of and whilst making the arched tunnel or way as hereinafter mentioned, take or use any portion of the surface of the said street or highway, nor did they purchase, take, or use any cellar, vault, or other construction therein or hereunder held or connected with any house in the said street or highway. The portion of the plaintiff's railway passing under the said street or highway occupies solely the position of the subsoil removed for the purpose of its construction. The said railway was completed and opened for traffic upon the 25th of September, 1882, and has since been used by the plaintiff company. The said railway was constructed through the said land by entering into possession of the surface for the purposes of and during construction, and then by a system known as the "cut and cover" system—viz., the cutting or excavating the soil and by arching or building an arch in brickwork of a thickness of 4 to 5 ft. over the said excavation or cutting to enclose the company's railway, which arched tunnel or railway is about 28 ft. wide and 6 ft. high. The said arch is then covered with soil. The foundation or abutment of the said arched brickwork is permanently built in the soil. The company have entered into a contract for letting the use of the railway to a firm of advertisement contractors, without excepting parts of the railway which lie under the streets or highways. The company also affix lamps, notice boards, and other fixtures thereto. The company have laid mains for the supply of gas and water (but for the purposes of their railway only) in the said arched railway, and under the soil thereof; sleepers and rails have also been laid by them throughout the said arched railway on the surface of the soil at the bottom of the same.

The plaintiff company do not pay, and never have paid or agreed to pay, any rent, or any other sum of money, whether by way of compensation under the Lands Clauses Act, or otherwise, for or in respect of the entry upon, appropriation, use, and removal of the subsoil of the said street or highway as aforesaid, or in respect of the occupation by their line and works of the space thus created, or in respect of the user thereof for the purposes of their undertaking, or otherwise in respect of the passage or working of their railway under the said street or highway.

The plaintiff company do not receive any tolls or yearly profits in respect of the portion of their railway under the said street or highway otherwise than by means of the fares paid to them for the carriage of passengers and goods in the trains of the company passing over the same. The said railway has never been nor is it now worked at a profit.

On the 13th of December, 1882, the assessors for the land tax acting under the statutes 38 Geo. 3, c. 5 and 38 Geo. 3, c. 60 for the division of the City of London, by their certificate of assessment, assessed the plaintiff company at £3 6s. 8d. in respect of the portion of their railway underneath the street or highway above mentioned.

The plaintiff company refused payment of the said assessment, and, under protest, appealed from the said assessment to the commissioners, who dismissed the appeal. The defendant Barton thereupon, acting under the authority of the commissioners, distrained in respect of the said assessment by seizing certain of the goods of the plaintiff company upon the said portion of their line. The plaintiff company then brought this action against the commissioners and Barton, claiming damages for wrongful entry upon their premises, and wrongful seizure of their goods, and the parties agreed to state the questions of law arising in the said action in the form of this case in accordance with order 34 of the Rules of Court, 1883.

The question for the opinion of the court was: Whether the plaintiff company are liable to be assessed towards the payment of land tax in respect of the portion of their railway described in the said assessment under the circumstances set forth?

Balfour Browne, Q.C. (*Lawson Walton, Q.C.*, with him), for the plaintiffs.—We admit that where we have purchased land we are assessable, but here we have no interest in the soil which can be brought under any of the words of section 1 of the Land Tax Act. Our takings for the carriage of passengers are not "tolls," and as to "profits," the case states that we have made none. The word "hereditaments" only sums up the preceding expressions. The company have no greater rights in the land occupied by the tunnel than a waterworks company have in the land occupied by their pipes, and they are therefore not assessable: *Chelsea Waterworks Co.* v. *Bowley*, 17 Q. B. 358.

They also referred to *Vauxhall Bridge Co.* v. *Sawyer*, 6 Ex. 504; and *Charing Cross Bridge Co.* v. *Mitchell*, 3 W. R. 182, 378, 4 E. & B. 549.

Sir Horace Davey, Q.C. (*Scrutton* with him), for the defendants.—The decision in the waterworks case went upon the view taken by the court that the pipe was a mere chattel. But here the brick tunnel is a part of the soil for every purpose, and the company have a perpetual right in it which is assessable: *Reg.* v. *East London Waterworks Co.*, 18 Q. B. 705, at p. 716; *Waterloo Bridge Co.* v. *Cull*, 7 W. R. 87, 1 E. & E. 213, at p. 242. It is a right which partakes of the characters of a corporeal and of an incorporeal hereditament, and is created by the company's Act. Such a right is covered by the word "hereditaments" in the Land Tax Act.

Balfour Browne, Q.C., in reply, cited *Metropolitan Board of Works* v. *Metropolitan Railway Co.*, 17 W. R. 416, L. R. 4 C. P. 192.

Cur. adv. vult.

May 14.—VAUGHAN WILLIAMS, J.—The question in this case is whether the Metropolitan Railway Co. are liable to be assessed towards the payment of land tax in respect of the portion of their railway described in the assessment under the circumstances set forth in the case. The validity of the present assessment depends on the 4th section of the statute 38 Geo.

3, c. 5, whereby it is enacted that all bodies corporate having or holding any lands and tenements shall be charged to the land tax. The first question is, therefore, do the railway company have or hold any lands or hereditaments by reason of their appropriation and user, under the powers of the special Act, of the subsoil and undersurface of the roadway?

It appears by section 17 of the special Act that what the company acquire by this appropriation and user is an easement only under the road. Now it seems to me that, according to the judgment of Lord Campbell in *Chelsea Waterworks Co.* v. *Bowley*, an easement is not a hereditament within the meaning of 38 Geo. 3, c. 5. It is quite true that in the *Chelsea Waterworks case* the easement was very different in many respects from the easement in the present case, but Lord Campbell in his judgment does not deal with the particular easement conferred by the special Act on the water company, but with easements generally. He seems to me to say that the Land Tax Acts, in speaking of lands and hereditaments, contemplate property to be let by a landlord to a tenant, and goes on to say that the company are not the owners of the land where the pipes lie, nor are they the tenants of the land. It is to be observed that Lord Campbell is here dealing with the attempt to assess the water company as occupiers of land by reason of their user of the land under their easements, and he reads section 4 as dealing first with manors, messuages, lands, and tenements, and then with hereditaments of what nature or kind soever they be—*i.e.*, hereditaments other than land—which has already been dealt with in the former part of the section—*e.g.*, tolls granted by an Act of Parliament: see *Charing Cross Bridge Co.* v. *Mitchell*. And when, in a former part of his judgment, Lord Campbell speaks of the right of the water company as a right "in the nature of an easement, and neither land nor hereditament," he did not, as Sir Horace Davey in his argument suggested, speak in ignorance that an easement in gross was or might be a hereditament, but merely asserted that an easement was not land within the former part of the section, or a hereditament within the latter part. It seems to me that Lord Campbell's construction of the section is right, because if the catalogue is looked at beginning "and also all quarries, mines," &c., it is plain that these words are introduced into the section to prevent in the enumerated cases any argument that the taxation of the mine would involve a double land tax on the same piece of land; whereas, if the word "hereditaments" is intended to cover any possible grant of an assignable right to use land—*e.g.*, of a mining sett, or of the right to enter and work mines within a given area and take away the minerals there found—the enumeration of mines in the catalogue would have been unnecessary. The same argument seems to me to apply even if, disregarding the natural meaning of the words of the 16th and 17th sections of the company's special Act, one treats the right of the company as a right to the underground land itself, because the land is *primâ facie* assessable to the land tax in respect of the surface, and one would, if one held the underground land assessable, be imposing a double tax on land in a case not falling within the enumeration in the section. In my opinion, however, no part of the land has passed to the company, and *quâcunque viâ* I think that the plaintiff company are not liable to be assessed to the land tax.

CAVE, J.—In this case I am of opinion that our judgment should be for the defendants. The question is whether the plaintiff company is liable for land tax on a part of their line constructed under a public road under the authority of their Act. The Act gives them power to purchase, take, and use land for a tunnel under private property, and also to appropriate and use the land in question, which is under a street, for the same purpose. The plaintiffs contend that their Act gives them an easement only, through the land in question, and that, on the authority of *Chelsea Waterworks Co.* v. *Bowley*, they are not liable to pay land tax on such an easement. I am of opinion, however, that the effect of the Act is to give them a legal interest as owners of so much of the soil under the road as is required for the formation of the tunnel. It is admitted that they are liable for land tax in respect of so much of their line as passes under land the surface of which is occupied by private individuals, and I think the Act gives them the same interest in the tunnel under the road as they have in the other parts of the tunnel. I cannot see what rights there are which are reserved to the owner of the soil under the roadway, and which are taken away from the owners of the soil under which the other portions of the railway are made. Ownership is a convenient name for a bundle of undefined rights comprising all the rights which a subject may exercise over land. When these rights are separated and divided among different persons, the person who has some special right allotted to him is said to have an easement, while the person who retains the residue of the bundle of rights is said to be the owner of the land subject to the easement. In this case, what rights has the owner of the soil under the roadway over the brick tunnel and the space therein included? I am unable to see that he has any. He could not, I think, use the tunnel for any purpose, whether consistent or inconsistent with the use of it as a railway. He could not, I think, get access to the interior of the tunnel by boring through the wall from his adjoining land, nor, when he had so bored, could he let the use of the inside of the wall, for instance, to other people for the purpose of affixing advertisements to the wall of the tunnel, although such a user might be consistent with the use of the tunnel by the railway company for the purpose of passing their trains through it. It is true that if minerals were discovered under the tunnel he might, subject to the obligation of not letting down the roadway, work and get those minerals if the railway company, on proper notice being given them, refused to purchase the minerals, but that right the owners of the subsoil enjoy with respect to every part of the company's line. If the company elected to buy the minerals, they would become the owners of them, and it would be a strange position if they could become the owners of the minerals which supported the tunnel and yet not the owners of the tunnel supported.

Counsel for the plaintiffs relied mainly on the language of section 17 of the company's Act, 1879, in which the section authorizing the company to appropriate and use the subsoil and undersurface of any roadway is spoken of as the section authorizing the company to acquire easements only under roads, &c. Now the right in question is certainly not an easement in the strict sense of that term, and as I think that the Legislature intended to give the company an exclusive right to the use of the tunnel, the word easement must be taken to refer to the kind of user by the company which the Legislature had mainly in contemplation, and not to qualify the right of the company to an exclusive user. Even assuming that the company has an easement only through the tunnel and nothing more, the case of *Chelsea Waterworks Co.* v. *Bowley* is distinguishable, for the court there held that under the peculiar phraseology of that Act the company had no legal interest in the soil in which their pipes were laid (see *per* Lord Campbell in *Reg.* v. *East London Waterworks Co.*, 18 Q. B. 705, at

p. 716), and even so they found a difficulty in distinguishing the cases in which it has been held that water companies are rateable to the relief of the poor as occupiers of the soil in which their pipes are laid. Moreover, in *Chelsea Waterworks Co.* v. *Bowley* the court referred to the inapplicability of the clauses for the redemption of the land tax to an occupation which they regarded as essentially of a temporary character. Here no such difficulty exists, as the tunnel is of a permanent character, and the possibility that it might cease to be used for railway purposes would only affect its value for the purposes of contribution to the share of the land tax apportioned on the parish in which it exists. In *Chelsea Waterworks Co.* v. *Bowley* the right possessed by the company was said by the court to be a right in the nature of an easement, and apparently they regarded it as less than an easement, or, as Lord Campbell said in *Reg.* v. *East London Waterworks Co.*, it was a right giving the company "no interest in the land." Here the right, if it is to be said to be in the nature of an easement, seems to be greater than an easement, as giving the company more extensive rights of user by themselves, and of interference with the user by the owner of the surrounding land, than a mere easement would give. Moreover, the court in *Chelsea Waterworks Co.* v. *Bowley* nowhere laid it down that an easement is not a hereditament under the Act, but only that the right there given was of such a temporary character as not to amount to an interest in the land. In this case I come to the conclusion that the company are assessable to the land tax, on the ground that their Act gives them something which, however it may be described popularly, cannot in law be distinguished from the ownership of the soil which is occupied by their tunnel, and, consequently, that the *ratio decidendi* of the *Chelsea Waterworks* case does not apply.

VAUGHAN WILLIAMS, J., as junior judge, withdrew his judgment, and judgment was given for the defendants.

Solicitors for the plaintiffs, *Fowler, Perks, Hopkinson, & Co.*

Solicitor for the defendants, *H. R. T. Alexander.*

Q. B. Div. (A. L. Smith and Grantham, JJ.) April 14.

FLETCHER *v.* FIELDS. (*a.*)

Metropolis—Street traffic—Unloading coke during prohibited hours—Traffic Regulation (Metropolis) Act, 1867 (30 & 31 *Vict. c.* 134), *s.* 15.

Section 15 *of the Traffic Regulation (Metropolis) Act,* 1867, *prohibits the loading or unloading of coal on or across any footway during certain hours.*

Held, that a person who had unloaded coke on a footway during the prohibited hours was not guilty of an offence under this section.

Special case stated by a metropolitan police magistrate.

The appellant was a carman employed by the Gas Light and Coke Co., and it was proved before the magistrate that he had unloaded a quantity of coke on the footway betweeen the hours of 10 a.m. and 6 p.m. within the limits of the Traffic Regulation (Metropolis) Act, which provides as follows:—

Section 15: "Between the hours of ten o'clock in the morning and six o'clock in the evening no coal shall be loaded or unloaded on or across any footway within the special limits of this Act, and between the same hours and within the same limits no casks, whether empty or full (wine or spirits in cask excepted), shall be lowered or drawn up by means of ropes, chains, or other machinery passing across the footway or any part thereof. Any person doing any act in contravention of this section shall be liable for each offence to a penalty not exceeding forty shillings."

The magistrate convicted and fined the appellant, and stated this case for the opinion of the court, the question being whether the unloading of coke as distinguished from coal was an offence within the section.

Horace Avory, for the appellant.

T. E. Scrutton, for the respondent.

A. L. SMITH, J.—In this appeal the question is a very small one, and it turns upon the construction of section 15 of the Traffic Regulation (Metropolis) Act, 1867. Before considering that section I wish to refer to section 6, which provides that "no goods or other articles shall be allowed to rest on any footway or other part of a street within the general limits of this Act, or be otherwise allowed to cause obstruction or inconvenience to the passage of the public, for a longer time than may be absolutely necessary for loading or unloading such goods or other articles."

By that section it is attempted to prevent obstruction in a street by any kind of goods, but when we come to section 15 it is clear that obstruction by two kinds of goods, and two only, is prohibited. During the hours mentioned no coal is to be loaded or unloaded, and no casks are to be lowered or drawn up. Now coke is a product of coal which was perfectly well known when the Act was passed, and it would have been quite easy to specify it in the section. Why are we to stretch the section so as to include another article which is not specified in it? It is admitted by counsel for the respondent that another product of coal—cinders—is not included, and I am of opinion that the magistrate was wrong in holding that the section applies to coke. This may appear to be a narrow view, but as a matter of construction it is clear.

GRANTHAM, J.—I am of the same opinion. The Legislature has prohibited two specific things, and if it had intended to include any other articles it would have said so. Coke is not coal, but is a manufactured product, viz., coal out of which the gas has been forced.

Conviction quashed.

Solicitors for the appellant, *Bedford, Monier-Williams, & Robinson.*

Solicitors for the respondent, *Wontner & Sons.*

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) July 3.

In re PROCTER. (*a.*)

Costs—Solicitor—Small bankruptcy—Costs out of the estate—Lower scale—Bankruptcy Rules, 1886, *r.* 112 *—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 55.

On application by the trustee in the bankruptcy for leave to disclaim a lease, the landlord appeared and

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

opposed the application, but leave was given to the trustee to disclaim, with costs both of the landlord and of the trustee out of the estate. The costs of the trustee's solicitor were allowed at £21, but an objection to this sum was taken by the Board of Trade, on the ground that, the assets of the bankrupt being under £300, the costs ought to be allowed on the lower scale, under rule 112 of the Bankruptcy Rules, 1886.

Held, that rule 112 *applied, and that the solicitor was only entitled to three-fifths of the ordinary charges.*

Reference by the taxing master on a review of the taxation of solicitor's bill of costs.

Application was made by the trustee in the bankruptcy under section 55 of the Bankruptcy Act, 1883, for leave to disclaim a lease.

The landlord appeared and opposed the application, but leave was given to the trustee to disclaim, the costs of the landlord and the trustee being allowed out of the estate.

The costs of the landlord were taxed by the county court registrar at £5 5s., and no objection was raised in respect of them, but a question was raised as to the costs of the solicitor for the trustee, which were allowed at £21.

The assets of the bankrupt were certified to be under £300, and a review of the taxation by a taxing master of the High Court was required by the Board of Trade, it being contended that, under such circumstances, the costs of the solicitor ought to be allowed on the lower scale, under rule 112 of the Bankruptcy Rules, 1886, which provides that "where the estimated assets of the debtor do not exceed the sum of three hundred pounds, a lower scale of solicitor's costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate, namely, three-fifths of the charges ordinarily allowed, disbursements being added."

The taxing master was of the contrary opinion, that rule 112 did not apply by reason of the fact that, although the costs were costs of proceedings under the Act, and were payable out of the estate, yet the court had a discretion to refuse to allow the trustee his costs out of the estate, although it might be a discretion which would only be exercised on very rare occasions.

At the request of the Board of Trade, and with the consent of all parties, the question was now referred to the bankruptcy judge for decision.

Muir Mackenzie, for the Board of Trade.—The proceeding here was clearly a proceeding under the Act. The trustee applied for leave to disclaim and get rid of the liability under a lease. The object of the trustee's application was to free the bankrupt and his estate and himself from liability. The costs are payable out of the estate, but the taxing master appears to have thought that rule 112 does not apply, inasmuch as the court has a discretion to refuse the trustee his costs out of the estate—as, for instance, if he had neglected his duty. The taxing master has really misapprehended the two previous decisions on this rule: *Ex parte Board of Trade, In re Parfitt*, 37 W. R. 751, 23 Q. B. D. 40; *Ex parte Jaynes, In re Dowson*, 36 W. R. 864, 21 Q. B. D. 417.

Stevenson, for the trustee.—Where an application comes before the judge in the form of an opposed motion, and he makes an order on the motion and gives costs, the judge having exercised his discretion, the costs are not payable under the Act, but are payable under the order. That is the case here, and rule 112 does not apply.

CAVE, J.—I am of opinion that the contention of the Board of Trade is the right one. The rule provides that where the estimated assets of the debtor do not exceed the sum of £300, a lower scale of solicitor's costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate, namely, three-fifths of the ordinary charges. Now it seems to me that this case fulfils all these provisions. This was a proceeding under the Act, rendered necessary and contemplated by the Act. The costs of that proceeding would be payable out of the estate and the solicitor employed would look to the estate for his costs. The case of *In re Dowson* is not applicable, because it dealt with the costs of a third party. The case of *In re Parfitt* dealt with conveyancing costs, and not with costs contemplated by the scale of solicitors' costs which is set out by the rules. Here we have a case which comes entirely within the language of the rule. I have no doubt the rule was intended to apply to such a case as this, and the solicitor must be content with three-fifths.

Order accordingly.

Solicitor for the Board of Trade, *The Solicitor to the Board of Trade.*

Solicitors for the trustee, *Clinton & Co.*

Q. B. Div. (Cave and Charles, JJ.) May 27.

Ex parte POWELL.
In re POWELL. (*a.*)

Bankruptcy—Act of bankruptcy—Non-compliance with bankruptcy notice—Payment of judgment debt—Right of another creditor to present petition—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g).

The act of bankruptcy committed by a debtor by reason of his non-compliance with the requirements of a bankruptcy notice duly served on him under section 4, *sub-section* 1 (g), *of the Bankruptcy Act,* 1883, *is not put an end to by payment of the judgment debt; but a bankruptcy petition founded on that act of bankruptcy may be presented by another creditor, although the debt of the creditor by whom the bankruptcy notice was served has been paid.*

Ex parte Wier, In re Wier, 19 *W. R.* 1042, *L. R.* 8 *Ch. App.* 875, *has no application to an act of bankruptcy committed under the Bankruptcy Act,* 1883.

Appeal from a receiving order made against the debtor by the registrar of the Swindon County Court.

On the 29th of January, 1891, a bankruptcy notice was served upon the debtor by Messrs. Brown, Gould, & Co., judgment creditors, with the requirements of which the debtor did not comply, and on the 4th of March, 1891, a bankruptcy petition was presented against him by Messrs. Brown, Gould, & Co.

On the same day another petition was presented against the debtor by the respondents to the present appeal, founded on the act of bankruptcy committed by the debtor by reason of his non-compliance with the bankruptcy notice served on him by Messrs. Brown, Gould, & Co.

The debt of Messrs. Brown, Gould, & Co. was subsequently paid in full, and on the 13th of April, 1891, their petition was dismissed, but on the 20th of April, 1891, a receiving order was made against the debtor on the petition of the present respondents.

The debtor appealed.

Radcliffe, for the debtor.—The only ground of the appeal is that prior to the receiving order the debt in respect of which the bankruptcy notice was served had been extinguished by payment. The receiving

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

order was made a week after the act of bankruptcy had been satisfied. It must be admitted that since the decision in *Ex parte Dearle, In re Hastings*, 33 W. R. 440, 14 Q. B. D. 184, any creditor can present a petition on a bankruptcy notice served by another creditor. But when the judgment debt is satisfied the act of bankruptcy committed by the failure to comply with the notice is gone, and no person can afterwards proceed upon it. The case comes within the decision in *Ex parte Wier, In re Wier*, 19 W. R. 1042, L. R. 6 Ch. App. 875, where it was laid down that the act of bankruptcy by non-payment on a debtor's summons under the Bankruptcy Act, 1869, might be purged by payment before adjudication.

F. C. Willis, for the petitioning creditors.—No one could take advantage of a debtor's summons as an act of bankruptcy except the creditor who issued it. It was a personal act of bankruptcy. Any creditor can take advantage of a bankruptcy notice, and that makes all the difference.

CAVE, J.—I am of opinion that the contention of the respondents is correct, and that the Bankruptcy Act, 1883, has made such a difference in the position of a debtor who has committed an act of bankruptcy by the non-compliance with a bankruptcy notice as to make the rule laid down in *Ex parte Wier* inapplicable. For the first time the Act of 1883 has made this an act of bankruptcy available by any creditor, and, that being so, the moment the act of bankruptcy arises for any creditor to present a petition, how can it be that that act of bankruptcy alone, of all those specified in section 4 of the Bankruptcy Act, 1883, can be put an end to by the debtor going and paying the creditor issuing the summons? So long as that creditor who issued a judgment summons could alone found a petition upon it, the fact that he had received payment subsequent to the time limited in the summons was held to do away with the act of bankruptcy. The act of bankruptcy enured for the benefit of that creditor only, and that creditor having taken the money from the debtor it would be wrong to say that he could do that and yet preserve his right to make the man a bankrupt. But when any creditor can present a petition the matter stands on an entirely different footing.

CHARLES, J.—I am of the same opinion. I do not think that the case of *Ex parte Wier* has any application to an act of bankruptcy committed under the Bankruptcy Act, 1883. It has been decided under the Bankruptcy Act, 1883, that where the act of bankruptcy is the failure to comply with the requirements of a bankruptcy notice that act of bankruptcy can be taken advantage of by any creditor. That makes all the difference between the act of bankruptcy now and the act of bankruptcy under the Bankruptcy Act, 1869, by failing to comply with a debtor's summons.

Appeal dismissed.

Solicitor for the appellant, *F. Ridley*, for *A. W. Boodle*, Swindon.

Solicitors for the respondents, *Hamlin, Grammer, & Hamlin*, for *C. Dunn*, Leeds.

House of Lords.

From C. A. (England). March 5.

BANK OF ENGLAND *v.* VAGLIANO BROTHERS. (*a.*)

Bill of exchange—Banker—Forgery of name of payee—Negligence—Payee "a fictitious or non-existing person"—Knowledge of acceptor—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 7, *sub-section* 3.

A clerk in the service of the respondents forged numerous bills to a large amount, purporting to be drawn upon the respondents by one of their correspondents to the order of another, and he also forged letters of advice as to these bills. The respondents accepted these bills, payable at the appellants' bank, and the clerk then forged the indorsement of the person named as payee, and received payment in cash across the counter to himself.

Held, by Lord Halsbury, L.C., *and* Lords Watson, Herschell, Macnaghten, *and* Morris (Lords Bramwell *and* Field *dissenting*), *that the payee was "a fictitious or non-existing person" within the meaning of section* 7, *sub-section* 3, *of the Bills of Exchange Act*, 1882, *so as to make the bills payable to bearer, and that, consequently, the appellants were entitled to debit the respondents with the amount of the bills.*

Also by Lord Halsbury, L.C., *and by the* Earl of Selborne *and* Lords Watson *and* Macnaghten (Lords Bramwell *and* Field *dissenting*), *because of the conduct of the parties.*

Decision of the Court of Appeal (37 *W. R.* 640, 23 *Q. B. D.* 243) *reversed.*

This was an appeal from a decision of the Court of Appeal (Cotton, Lindley, Bowen, Fry, and Lopes, L.JJ., Lord Esher, M.R., dissenting), affirming a judgment of Charles, J., in favour of the respondents, and reported 37 W. R. 640, 23 Q. B. D. 243. The facts are set out in the report in the court below. The arguments sufficiently appear in the judgments.

Sir R. Webster, A.G., and *H. D. Greene, Q.C.* (*E. H. Pollard* and *R. M. Bray* with them), for the appellants.

Sir Charles Russell, Q.C., and *Finlay, Q.C.* (*Hollams* with them), for the respondents.

The following cases were referred to:—*Robarts* v. *Tucker*, L. R. 16 Q. B. 560; *Stone* v. *Freeland*, 1 H. Bl. 316n; *Bank of Ireland* v. *Evans*, 3 W. R. 573, 5 H. L. Cas. 389, 408, 413; *Swan* v. *North British Australasian Co.*, 11 W. R. 862, 2 H. & C. 175; *Baxendale* v. *Bennett*, 26 W. R. 899, 3 Q. B. D. 525; *Arnold* v. *Cheque Bank*, 24 W. R. 759, 1 C. P. D. 578; *Young* v. *Grote*, 4 Bing. 253; *Halifax Union* v. *Wheelwright*, 23 W. R. 704, L. R. 10 Ex. 183; *Orr* v. *Union Bank of Scotland*, 1 Macq. 513, 3 W. R. C. L. Dig. 143; *Ireland* v. *Livingston*, L. R. 5 H. L. 395; *Gibson* v. *Hunter*, 2 H. Bl. 288; *Collis* v. *Emett*, 1 H. Bl. 313; *Gibson* v. *Minet*, 1 H. Bl. 569, 589; *Mead* v. *Young*, 4 T. R. 28; *Cooper* v. *Meyer*, 10 B. & C. 468; *London and South-Western Bank* v. *Wentworth*, 28 W. R. 516, 5 Ex. D. 96; *Bennett* v. *Farnell*, 1 Camp. 130, 133n, 180c; *Price* v. *Neale*, 3 Burr. 1354; *Phillips* v. *Im Thurn*, 14 W. R. 653, 18 C. B. N. S. 400, L. R. 1 C. P. 463; *Merchants of the Staple of England* v. *Bank of England*, 21 Q. B. D. 160, 36 W. R. Dig. 78.

The House took time for consideration.

March 5.—Lord HALSBURY, L.C.—The simple question in this case is whether the plaintiffs' bankers

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

have paid away the plaintiffs' money under such circumstances as enable the plaintiffs to refuse to acknowledge the payments as made on their behalf. Each of the parties is innocent of any wilful default. They are both free from any suspicion of bad faith; but the banker has paid away and placed to the debit of his customer a sum of £71,500, while the customer was not conscious of, and certainly never intended to authorize, the payment of that sum on his behalf.

The authority to pay, which was relied upon by the bankers as justifying the payments, was written documents in the form of bills of exchange, and, though they were not really bills of exchange at all, it is important to bear in mind what a real bill of exchange would import to the mind of a person to whom it was sent for payment.

Now, apart from the particular machinery by which this transaction was effected, it will not be denied that a principal who has misled his agent into doing something on his behalf which the agent has honestly done, would not be entitled to claim against the agent in respect of the act so done; and, upon this branch of the case, the question is whether the agent was misled into doing the act by the default of the principal.

I will treat the transaction, for the sake of clearness, as if it were a single payment. Could it be doubted that if the two parties met, and by word of mouth the customer had said to his banker, "There is a bill coming due to-morrow of such and such an amount; it is drawn on me by a customer of mine, named Vucina, and will be presented for payment at your bank to-morrow," that such a statement was calculated to put the banker off his guard, and be likely to induce him to act as he did act. Does it make any difference that the words were not spoken, but upon its face the document, reaching the banker's hands by the act of the customer—in which phrase I include the course of Vagliano's business—said this as plainly as if the words had been spoken? Vucina, in fact, had not drawn any such bill. There was no transaction between Vagliano and Vucina such as the instrument in question purported to effect, and yet this was the written statement which, upon the face of the instrument, Vagliano made to the bank.

Further, by a separate and independent writing, Vagliano told the bank that such a bill of exchange for such an amount was becoming due, and would have to be paid out of his account. No such bill of exchange existed, although a false document corresponding in all particulars was accredited by Vagliano in writing his acceptance upon it.

In estimating the effect upon an agent's mind, it must of course be remembered that, though I have here for clearness spoken of it as a single transaction, it is a transaction repeated forty-three times, and spread over a considerable period. The false documents were paid, duly debited to the customer, and duly entered in his pass-book, and, so far as the banker could know or conjecture, brought to his knowledge on every occasion upon which the payment was made and the bills returned. Further, on each occasion when these false documents were, by what I have called the act of the customer, permitted to reach the bank for payment, they were accompanied with a considerable number of other genuine bills of exchange, many of them drawn by Vucina, and regularly entered in the notice of bills about to become due, together with the false documents in question.

It seems to me impossible to dispute that this was, in fact, a misleading of the bankers. I pass by for the moment the question whose default it was, for the purpose of considering the proposition which has found favour with one of your lordships, and which I will not dispute, that the carelessness of the customer, or neglect of the customer to take precautions unconnected with the act itself, cannot be put forward by the banker as justifying his own default. In order to make the cases of *The Merchants of the Staple of England* v. *Bank of England*, and *Bank of Ireland* v. *Evans* authorities in this case it would be necessary to assume that the plaintiffs in those cases had, by some voluntary act of their own, given credit and the appearance of genuineness to the particular powers of attorney which were forged in those cases, and, if they had, I very much doubt whether the decision would have been what it was; but no such fact appeared; all the parties, whose negligence was relied on had done, was to leave their seal carelessly in the custody of the person who abused his trust. These decisions, therefore, do not seem to me to touch this case.

But how can it be said in this case that the default is unconnected with the act? The very thing which the banker does is induced by the fault of the customer. Was not the customer bound to know the genuineness of Vucina's draft? Was not the customer bound to know whether there was any real transaction between himself and Vucina effected by the instrument in question? Was not the customer bound to know the contents of his own pass-book? Was not the customer bound to know the state of his account with Vucina? It certainly is very strange that it should be suggested that, without any responsibility on his part, he should be entitled to accredit forty-three documents to his bankers as genuine bills when he had the means of knowledge I have indicated that no one of them was a bill of exchange at all, or represented any transaction between Vucina and himself.

The bankers paid upon these documents, and they paid a person who was not entitled to receive the money. There was no person entitled to receive it. The fact that it reached their hands as representing a mercantile transaction in which somebody was to be paid was itself a misleading of them; and that it did reach their hands purporting to represent such a transaction arose from the mode in which Mr. Vagliano's business was conducted by those responsible for it.

I have designedly avoided calling these documents bills of exchange. They were nothing of the sort. But if they had got into the hands of an innocent owner for value without notice, Vagliano would undoubtedly have been responsible upon them, for he had given them a genuineness as against himself by accepting them.

Now, when it is insisted that the bankers are responsible, because they did not pay the person indicated as payee, one is induced to inquire whether Mr. Vagliano or any other merchant would have expected that any inquiry should be made as to the genuineness of Petridi's signature. Suppose they had been genuine signatures of Petridi, and the bills had been dishonoured while the bankers were making inquiries, would not Mr. Vagliano have had grave ground for complaint against the bankers who had allowed his credit to be thus disturbed? I think each of the parties to the transaction must be taken to have known the ordinary course of mercantile affairs, and it is manifest that no banker could hesitate to pay such bills as came to him, so accredited as they were by Mr. Vagliano's acceptance, without throwing the whole mercantile world into confusion.

I am not intending to throw any doubt upon the propriety of the decision in *Robarts* v. *Tucker*, nor am I prepared to assent to the proposition that it is a harsh decision. A customer tells his banker to pay a particular person; the banker pays someone else, and it would seem to follow as a perfectly just result that

the banker should be called upon to make good the amount he has so erroneously paid. But what relations has such decision to a case where a thing which bears the form and semblance of a known commercial document, like a bill of exchange, gets, by the act of the customer, into the hands of the banker, where there is no real drawer, no real transaction between himself and the supposed drawer, and where, as a matter of fact, there is no person who, in the proper and ordinary sense of the word, is a payee at all?

It seems to me that if all these circumstances, acting upon and inducing the bankers to make the payments they did make, are acts which are the fault of the customer, it is the customer, and not the banker, who ought to bear the loss. I think, under these circumstances, the banker did what was usual and customary with bankers, and what both customer and banker knew to be usual and customary with bankers, as far as the payment, without inquiry as to the genuineness of the indorsement by Petridi & Co., was concerned. But I propose to deal separately with the alleged negligence of the bankers, or, at all events, the unusual course pursued by the bankers, in cashing these bills across the counter and paying to the person presenting the document for payment without inquiry.

I do not know what is the usual course among bankers, and I should doubt whether, in such a matter, it would be possible to affirm that any particular course was either usual or unusual, in the sense that there is some particular course to be pursued when circumstances occur necessarily giving rise to suspicion. I can well imagine that, on a person presenting himself, whose appearance and demeanour was calculated to raise a suspicion that he was not likely to be entrusted with a valuable document, for which he was to receive payment in cash, I should think it would be extremely probable that, whether the document were a cheque payable to bearer for a large amount, or a bill, the counter-clerk and banker alike would hesitate very much before making payment. However, I will assume the course pursued in this case to be somewhat unusual, and that this is proved by the bankers themselves, though the counter-clerk gives a different reason why the clerk called the attention of their immediate superior to the circumstances, and he, in his turn, called the attention of Mr. Vagliano's representative. In doing so, it appears to me to have relieved the bankers from any accusation of having hastily or carelessly paid these bills. What could the bankers know of the particular transactions of Messrs. Vagliano? But Mr. Vagliano, when it was communicated to him, or to his representative, would be surely the best person to judge whether there was anything calculated to give rise to suspicion in the facts to which I have referred.

It has been sought to minimize the effect of that communication to Mr. Vagliano's representative, first, by treating him as a clerk to whom such a communication ought not to have been made, and, secondly, by suggesting that Mr. Ziffo possibly indicated that he was a person not fit to be trusted, since he took a very strange view of what was or was not calculated to cause suspicion and enforce inquiry as to these bills. But what had the bankers to do with Mr. Ziffo's capacity for business? He was Mr. Vagliano's confidential clerk, duly accredited as such. After one or two of the bills had been presented and paid in the manner I have referred to, Mr. Disney thinks it right to call the attention of Mr. Ziffo to the fact, and Mr. Ziffo replies to the information that they are presented over the counter and invariably taken in bank notes: "I suppose if they are properly advised you must pay them." Here is information given of the very fact relied on to the confidential representative of Mr. Vagliano, and it is suggested to be negligence in the bank that, after receiving the answer I refer to, they continued to pay these bills when properly advised by Mr. Vagliano himself.

I must add here that I think that the witness truly explained his inadvertent use of the word "indorsed" and meant to say "advised." Now, it appears to me that whatever case might be suggested against the bank is completely answered by the bank having communicated these facts to a person occupying such a position in Mr. Vagliano's house, and that his answer was such as to allay any suspicion or uneasiness on the part of the bank.

I have not stopped to examine minutely the contrast between Mr. Ziffo's evidence and that of the bank official, Mr. Disney, because, if one comes to examine it carefully, there is no real contradiction. One witness is positive as to communications actually made, and the other only meets that positive assertion by alleging a want of memory of any such communication.

One other point has been made at your lordships' bar, but I think under circumstances which do not entitle it to consideration. It is said that the course of post ought to have been known to the bankers, and that the date of the indorsements ought of itself to have raised suspicion. Possibly if there was evidence sufficient to prove exactly what the facts are as to the course of post (and notwithstanding the evidence of one witness, I am not satisfied that we have the facts accurately as to the course of post), a serious doubt might arise, but it is enough to say for the purposes of this case that that point appears neither to have been pressed nor argued at a time when, by proper evidence, the matter could have been left beyond doubt, and the circumstances of excuse for not observing the dates, if such excuses existed, could have been properly determined. I can find no evidence that that point was really pressed. It is not noticed in any of the judgments, and though to my mind it is a singular argument coming from the mouth of Mr. Vagliano, whose suspicion one would have thought would have been aroused by the dates found on the documents afterwards appearing, it is enough for me to say that I decline to consider a topic which has been neither really argued nor properly fortified by evidence as a material circumstance to consider in this case.

I should be content to rest my judgment here and to express my opinion that for these reasons the judgment of the court below should be reversed, although I regret to say that on this branch of the case my view is at variance with that of all the learned judges who have hitherto treated this question.

I have hesitated long before I was able to acquiesce in the view of my noble friend Lord Herschell and that of the Master of the Rolls, that the same conclusion could be arrived at by a consideration of the Bills of Exchange Act, 1882.

One difficulty I have had in the determination of that question is in applying to the instruments with which I have been dealing an enactment which deals with bills of exchange. For reasons I have already given, it seems to me difficult to treat them as bills of exchange at all; but as against the person now insisting on their possessing the quality of such instruments, and remembering that it was his act by which they were put into circulation in that character, it does not seem unreasonable that, applying the doctrine of estoppel to him, one may consider whether as against him they may not possess qualities which, in their inception, they did not possess.

The 7th section, upon two of the sub-sections of which this question turns, commences thus:—"(1) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty." And the third sub-section, "(3)

Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer."

Now, in the first instance, before dealing with the application of these sub-sections to the facts in debate, I must say that I cannot acquiesce in the view which the majority of the Court of Appeal appear to have entertained, that they were at liberty to import into that third sub-section that it was a condition of its application that the acceptor should be aware that the payee was a fictitious or non-existing person.

It seems to me that construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that where a statute is expressly said to codify the law you are at liberty to go outside the code so created, because before the existence of that code another law prevailed.

To return to the construction of the language of the two sub-sections, for I think both should be read together, it seems to me that what the Legislature was enacting was in substance this:—That were a bill was not payable to bearer the person to whom payment was intended to be made was to be named or otherwise indicated upon the face of the instrument with reasonable certainty, but where there was no real payee the bill might be treated as payable to bearer.

The language which the Legislature has employed to express this law has been subjected to very minute verbal criticism. If the substance of the matter is looked at, and it is remembered that what the Legislature was dealing with was what was to appear upon the face of the instrument, and contemplated the case of there being no one to whom payment could properly be made, no person on the face of the instrument having any rights under the bill, no person, therefore, capable of giving a discharge to the acceptor for having paid at the demand of the drawer, it would seem that the reason of the thing would apply equally to a real person whose name was forged as to a person who had no existence.

In truth, if strictly construed, the words "fictitious person" are a contradiction. One may pretend there is a person when there is not. One may assume a character which does not belong to one, but to satisfy the word "fictitious" as applicable to a person, is assuming in one part of the proposition what is denied in the other. Some of the characters in Sir Walter Scott's novels may be fictitious in the sense that no persons so named ever lived; but if real names are taken, and events and conduct and character attributed by the writer to those real names, are the characters less "fictitious" because persons of those names identified with a totally different history and different qualities did, in point of fact, exist at one time?

One singular result of treating the section in the way that the Court of Appeal has adopted, would be that one must dive into the mind of the hypothetical forger to determine whether the character be fictitious or not; and this may be done, though it is not necessary to find the forger's intention from the language or anything that appears upon the face of the instrument itself, but you may judge from previous commercial transactions of the party who was likely to be meant as giving plausibility to the forgery. But if it can be alleged (as it can be here) that the forger selected a name which would give plausibility to his forgery, and be likely to deceive those into whose hands his forged instrument should come, that is not the name of a fictitious person, although that person had no power to deal with the bill, and was not in any respect the real payee, any more than if the name had been selected of a person, who had never been heard of or existed before; whereas, if it is pure imagination, then it is the name of a fictitious person.

I have come to the conclusion that, however expressed, the real meaning of the sub-section is to imply the unreality of any person who is named upon the face of the instrument as the payee of the bill. The statute itself uses the phrase "payee." That cannot mean in truth the payee, because by the hypothesis there is no payee, and, dealing as the statute was, with the form of the instrument, and enacting that if a name which appeared as that of the payee on the face of the instrument was the name of a fictitious person the bill might be treated as payable to bearer, it expressed in popular words, though perhaps not very felicitously chosen, its meaning accordingly.

For these reasons I am of opinion that on this ground also, the judgment of the court below was wrong and ought to be reversed, and I so move your lordships.

Lord SELBORNE.—If the bills in question in this case had been genuine, really signed by Vucina in favour of C. Petridi & Co., and if the indorsements only had been forged, the case would have been governed by *Robarts* v. *Tucker*. But the signatures of Vucina were forged; the use of the name of C. Petridi & Co. as payees was part of the fiction: they were not in any true sense payees, and the bills were, nevertheless, accredited by the plaintiffs to the bank as genuine, and as coming forward, like other genuine bills of Vucina, for payment in due course, on days specified in the plaintiffs' letters of advice; and their payment as such was expressly directed by the plaintiffs. When I speak of the plaintiffs' letters of advice, I do not forget that the effect of acceptances payable upon the face of the bills at the Bank of England might, perhaps, have been the same, but in this case there were both, and I think it unnecessary to consider whether the addition of the one form of direction to the other made any difference. If it did not, the effect of the letters of advice cannot on that account be less. This state of things appears to me to raise a question which was not decided in *Robarts* v. *Tucker*, or in any other case cited at the bar. It is (as *Robarts* v. *Tucker* was) a question between the plaintiffs as principals and the bank as their agent, and not between any parties to the bills.

If the plaintiffs misled the bank upon a material point, however innocently, and although they were themselves deceived by the fraud which had been committed, I think that they, and not the bank, ought to bear the loss which has been the consequence. Here there was never any real holder of these bills, by whom they could have been indorsed, or any outstanding liability from which a discharge was necessary. Your lordships have to deal with the case of an agent, not claiming any title to or interest in the bills, but instructed by his principal to pay them. It is convenient to speak of them as bills, but, properly speaking, they had not (though they seemed to have, and were represented by the plaintiffs as having) that character; they were accepted as such; but there was no real drawer, and no real payee, and they were never negotiated. It is not (as I understand) disputed that there might, as between banker and customer, be circumstances which would be an answer to the *primâ facie* case that the authority was only to pay to the order of the person named as payee upon the bill, and that the banker can only charge the customer with payments made pursuant to that authority. Negligence on the customer's part might be one of those circumstances: the fact that there was no real payee might be another; and I think that a representation made directly to the banker by the customer

upon a material point, untrue in fact (though believed by the person who made it to be true), and on which the banker acted by paying money which he would not otherwise have paid, ought also to be an answer to that *primâ facie* case. If the bank acted upon such a representation in good faith, and according to the ordinary course of business, and a loss has, in consequence, occurred which would not have happened if the representation had been true, I think that is a loss which the customer, and not the bank, ought to bear.

I should be of that opinion on general principles; and the application of those principles is fortified, to my mind, in this particular case by the circumstances under which the forgeries were committed, and the facts that the plaintiffs had large dealings with Vucina going on at the same time with the forgeries, in the course of which they accepted many of his genuine bills, all which were in like manner accredited to and made payable at the bank, and that there were documents in the plaintiffs' possession (the true and forged letters of advice from Vucina, and the forged bills themselves, when returned by the bank) from which, if attention had been paid to them, the fraud might have been discovered in an early stage.

I do not see how it can be open to dispute that it was material to the bank to know whether these were genuine or forged bills; or (subject to the consideration of some matters which I postpone) that, in paying the bills, as they did, without inquiry into the genuineness of the indorsements (which for the present I assume to have been regular upon the face of them), the bank acted in good faith, and according to the usual, and practically necessary, course of business; or that, if the bills had really been Vucina's, and if C. Petridi & Co. had been real payees, no loss would have been incurred. If it were the duty or the practice of bankers, without special reasons for suspicion, to refuse or delay payment of foreign bills appearing on their face to be regular, and regularly advised for payment by their customers, until they could ascertain by inquiry the genuineness of every foreign indorsement, it must continually happen that the bills would not be paid at the proper time and place, and *bonâ fide* holders might treat them as dishonoured. It was admitted that it is not in the ordinary course of business to make such inquiries, and I should say that business could not go on if it were so. No doubt there is, in the ordinary course of business, the possible risk which occurred in *Robarts* v. *Tucker*, of a genuine bill being stolen and presented for payment with a forged indorsement. Between that case and one like the present there is this very substantial difference, that the acceptor in that case has not in any way contributed to mislead the bankers, and when there is a real *bonâ fide* payee, the acceptor remains liable to him; but if, when there is no such payee, the person who signs as drawer indorses the bill with the name of a pretended payee, there is no outstanding liability from which a discharge is needed for the acceptor's protection. The risk of a genuine bill being stolen and presented with a forged indorsement is one which, being of rare occurrence, and distributed over a large amount of business, bankers may be willing to run. But they are entitled to judge for themselves what risks they will run, and the customer is not, in my opinion, entitled to tell the banker (in effect) that the risk is an ordinary one, and when it turns out to be otherwise to put upon him another risk, which, if the truth had been known, the banker with his eyes open would not have undertaken. When, as in this case, the customer accredits the bills as genuine and as coming forward in due course against him for payment on certain days, the banker must, I think, be considered to undertake the risk incident to bills of that description, and no more. If this would be true of a single bill, much more of a series of bills of large amount, all successively authenticated to the banker in like manner by the customer who orders them to be paid. The judgment under appeal puts upon the bank a risk which it never was called upon, and never agreed, to undertake.

It seems to me also clear (as a matter of fact, and without reference to the question under the Bills of Exchange Act) that the Constantinople firm of C. Petridi & Co. were never in any true sense payees of these bills, and their genuine indorsements would never have appeared upon them without an additional fraud. The suggestions at the bar, as to conceivable ways in which such indorsements might have been obtained, were, in my judgment, irrelevant to the real facts, with reference to which, and not to merely imaginable possibilities, this case ought to be determined. In *Stone* v. *Freeland* and *Cooper* v. *Meyer* a real firm, Butler & Co., and real person, Woodman, were named as payees, but the courts did not hold that enough to make the firm or the person so named a real payee.

If the question were merely one of legal estoppel against the acceptor, it may be true that the estoppel would be only against denying the genuineness of the drawer's signature; or, if the acceptor knew that there was no real payee, against insisting that the bill must receive an indorsement, which he knew to be impossible. But there are authorities, relevant as far as general principles are concerned, which, even as between parties to a negotiable instrument, seem to me to go beyond legal estoppel. I cannot but think it an extension of that doctrine to hold (as was done in *Cooper* v. *Meyer*) that when the bill is payable to the drawer's order, the acceptor (because he is supposed to know the drawer's signature) is bound by the subseqent indorsement of the person who forged the signature as well as by that original signature. And I am not convinced that estoppel is a sufficient explanation of the cases in which the drawer of a cheque has been held bound by fraudulent alterations, for which the state of the paper afforded space. The drawer was ignorant of and could hardly be held bound to anticipate the subsequent fraud. But, if it were universally true that the liability of an acceptor, to a *bonâ fide* holder of a bill, in all such cases depends upon legal estoppel, I do not think it would follow that the discharge of a banker, or other agent employed by the acceptor to pay the bill, must depend, under similar circumstances, upon that principle only.

If in the present case the plaintiffs, instead of making their acceptances payable at the Bank of England, had directed (in the same terms) a managing clerk in their own office, ignorant of the fraud, to pay those acceptances, and to take, for that purpose, the necessary money from their cash box, and if the clerk so authorized had paid the bills, exactly as the Bank of England did (not, indeed, to Glyka himself, but to someone acting for him, and presenting them in any manner not irregular), I cannot doubt that the clerk, so acting in good faith, would have been exonerated. A banker undertakes to do what is in the proper course of a banker's business, and so far differs from an agent who is not a banker; but beyond this I see no principle for putting him in a worse position than any other agent.

In *Bennett* v. *Farnell* Lord Ellenborough held that when the payee was fictitious, and the acceptor did not know it, the bill was neither to order nor to bearer, but was completely void. If, in such a case, the acceptor had directed his bankers to pay the bill, and the bankers had paid it in good faith upon an indorsement regular upon its face, though fictitious in

fact, the bankers would have been, in my judgment, entitled to credit in account for what they had so paid. Whatever might have been, before the Bills of Exchange Act of 1882, the materiality of the acceptor's knowledge or ignorance on such a point as between himself and a *bonâ fide* holder of the bill, I should not have thought it material as between him and his bankers paying the bill under such circumstances. I have come to this conclusion without resting my opinion upon the statute of 1882. Assuming the present case not to be expressly ruled by that statute, it is also (in my judgment) not ruled by any former authority. And I cannot but think that the statute, so far as it does rule certain other cases *in pari materiâ* and not well distinguished from this in principle, is as proper to be taken into account as any of the authorities which preceded it, as to the acceptor's knowledge or ignorance where there is not a real payee.

But it was insisted that in paying these bills as they did the bank deviated from the proper course of business, and ought to be held affected with notice that the indorsements were fraudulent. The first point relied upon for that purpose was that the bills, drawn as they were for large sums, were all presented and paid across the counter, and not through any bankers. This was admitted to be "unusual" in the evidence for the bank; but it was not, as I read the evidence, either admitted or otherwise proved that it was irregular or sufficient in itself to excite a suspicion that there was something wrong, although it was unusual in the sense of not often happening. No authority was produced to show that it was irregular according to the law merchant; and if not, and if the payments were *bonâ fide* made, without any actual suspicion on the part of the officers of the bank, I cannot think it enough to defeat their right to charge the plaintiffs with those payments, that they did not take a precaution not required by the law merchant, and on which they could not have insisted without the risk of the bills being treated by *bonâ fide* holders as dishonoured. In *Robarts* v. *Tucker* payment through a banker was no protection to the defendant.

Some of these bills were in fact referred by the counter-clerks of the bank, before payment, to Mr. Disney, the principal in the private drawing office of the bank; not (as I understand the evidence) because of any suspicion, but because they had received general instructions that any cheques or bills of large amount should be so referred. Mr. Disney (the truth of whose evidence I see no reason to doubt) thought that if the bill was advised (as it was) the counter-clerk must pay it; and Mr. Ziffo, the plaintiffs' outdoor manager, to whom (on his coming to the bank on other business in June, 1887) Mr. Disney mentioned the fact that such bills had been presented across the counter and paid in bank notes, expressed the same opinion. This happened when not more than four of the bills, amounting altogether to £3,000, had been presented and paid. When from time to time the plaintiffs' pass-book was sent to them, the bills then paid and debited in it against the plaintiffs were returned with it; and they remained from thenceforth in the plaintiffs' possession. It was apparent upon the face of them that all those bills had been paid across the counter; but no objection was taken by the plaintiffs on that or any other ground; and similar bills to a continually increasing, and ultimately very large amount, were afterwards from time to time advised and came forward and were paid in like manner. I cannot hold that these circumstances are sufficient to deprive the bank of any right which they would otherwise have a right to charge to payments to the plaintiffs' account.

The other point urged at your lordships' bar (but not apparently before either of the courts below) was that according to the statement of Mr. Kurz, the plaintiffs' deputy-manager, in cross-examination, the course of post between London and Constantinople was four days; and 19 out of the 43 forged bills paid by the bank purported to be indorsed in Constantinople on the third day before the date of acceptance in London. No question was put on that subject to any other witness; and of the dates appearing on the bills the plaintiffs also had notice when they were returned. One of these, of which the indorsement was on the third day before acceptance, was the fifth in the whole series. I think it would not be right in this state of the evidence, and upon a point which, though open upon the plaintiffs' pleading (in their reply), was for some reason not pressed on the courts below, to treat the bank as having had notice that the indorsements were not regular.

The judgments in the courts below, of the weight of which (as well as of the opinions agreeing with them, which I know some of your lordships to entertain) I am fully sensible, seem to have been addressed to two questions only—that of the proper construction and effect of section 7, sub-section 3, of the Bills of Exchange Act, 1882, and that of negligence on the plaintiffs' part. As to the Bills of Exchange Act, I am not myself satisfied that Charles, J., and the majority of the judges in the Court of Appeal were wrong in holding that the words of the statute, "where the payee is a fictitious or non-existing person," do not extend to the case of a real person falsely represented as payee upon a forged bill, though in principle the cases seem to me much the same. The difficulty to my mind arises out of the fact that the Legislature has here described "a person" as "fictitious or non-existing" instead of saying "where the payee is fictitious or non-existing," and it has been increased, rather than removed, by reference to other parts of the statute, particularly sections 5 (sub-section 2), 24, 41 (sub-section 1) 46 (sub-section 2), 50 (sub-section 2), and 54 (sub-section 2).

I cannot, however, agree with the opinion that, in the cases which do fall within sub-section 3 of section 7, knowledge on the part of the acceptor that the payee is a fictitious or non-existing person is still necessary. Such a qualification of the express words of the statute cannot properly, in my judgment, be implied from the earlier authorities, which treated knowledge as necessary. Those authorities were, no doubt, within the view of the Legislature; and all reference to the necessity of knowledge being here omitted, I think the omission must be taken to have been deliberate and intentional, and that there is no sound principle on which what is so omitted can be supplied by construction. I think it right to add that, in point of principle, it seems to me neither unjust nor unreasonable that the rights and liabilities of third parties should, in such a case, depend upon the facts, rather than upon an inquiry into the acceptor's state of mind. I am glad that the majority of your lordships have seen your way, with the Master of the Rolls, to put a construction upon section 7, sub-section 3, of the Act of 1882 which makes its operation co-extensive with its principle.

As to the other point, my opinion does not rest upon mere negligence, but on what seems to me higher ground. Upon that ground I find myself compelled, notwithstanding my sincere respect for the opinions from which I differ, to give my voice in the appellants' favour. The amount in controversy is large; the question is one of much importance both to the parties and to bankers and their customers generally; and it is not, in my judgment, covered by

any previous authority. The case of *Robarts* v. *Tucker* is, no doubt, law; but I am not for extending it, as it seems to me to be extended by the order under appeal.

Lord WATSON.—The bank and Vagliano Brothers appear to me to have been equally innocent in this sense, that they entertained no suspicion that the forged documents which have given rise to this action were other than genuine bills of exchange; and also that nothing wittingly done, or omitted to be done, by them, in the conduct of their respective businesses as bankers and financiers, can reasonably be regarded as the proximate occasion of Glyka's forgeries, or of the success which attended them. Which of these innocent parties must bear the loss resulting from Glyka's frauds is the only question to be determined in this appeal.

It seems to have been assumed by all the learned judges in the courts below that, in making payment of the bills in question on behalf of the acceptors, the bank was under the same legal obligation to ascertain the identity of the payee which was held to attach to the defendants in the case of *Robarts* v. *Tucker*. That assumption, which is really the basis of the judgments appealed from, does not appear to me to be well founded.

The decision of the Queen's Bench in *Robarts* v. *Tucker* has, ever since its date, been accepted in mercantile practice as determining the obligations incumbent upon bankers who agree to retire acceptances on account of their customers. It casts upon them the whole duty of ascertaining the identity of the person to whom they make payment with the payee whose name is upon the bill. They may pay in good faith to the wrong person, in circumstances by which the acceptor himself, or men of ordinary prudence, might have been misled; but they cannot take credit for such a payment in any question with the acceptor. It has been said by one of the learned judges that the rule is a harsh one, and it is possible that in some instances it may operate harshly; but it appears to me to be settled beyond dispute, and I see no reason for suggesting any doubt, that it puts a reasonable construction upon the contract constituted by the agreement of the banker to pay his customers' acceptances when they fall due. In the absence of any special stipulations it construes the arrangement so constituted as importing that, on the one hand, the customer is to furnish or repay to the banker the funds necessary to meet his obligations as acceptor, and that, on the other hand, the banker undertakes to apply the money provided by the customer, or advanced on his account, so as to extinguish the liability created by his acceptance. Accordingly, no payment made by the banker which leaves the liability of the acceptor undischarged can be debited to the latter.

The ratio of the judgment in *Robarts* v. *Tucker* does not carry the liability of the banker beyond this point, that his undertaking to retire bills, genuine in their inception, on behalf of acceptors who, by signing in that character, became immediately indebted to the payees, implies an obligation on his part to discharge their debt, which he can only do by making payment to the proper creditor. It would obviously require a considerable extension of the principle in order to make it apply to documents purporting to be bills of exchange, in which the drawer's signature is a forgery, the payee a person who is not intended to be a holder, and the genuine signature of the acceptor has been procured by fraud. His signing such a document creates no legal obligation against the acceptor; although it is possible that he may be estopped from pleading his non-liability if, and when, the document has come into the hands of a *bonâ fide* holder for value. I venture to doubt whether the payee, whose name was fraudulently inserted, could ever occupy that position, because the occurrence of his own name in the original tenour of the bill would be sufficient notice to him that something was wrong, and called for inquiry. At the time when Glyka's bills were presented for payment they did not raise, and never had raised, any liability against Vagliano Brothers, although the latter informed the bank that they were liable and willing to pay; and, when the bills had been paid by the bank and returned to them, there remained no debt due by Vagliano Brothers which would have been the consequence of the bank's making an erroneous payment of a genuine bill.

The risk of error attending the payment of bills supposed to be genuine, but which are wholly counterfeit with the exception of the drawee's signature, is materially greater than the risk attending the payment of honest bills. In the latter case the danger of imposition can only arise from the document of debt having been stolen, or fraudulently obtained from the true owner; whereas, in the former, the document, never having been in the possession of a real owner, will almost, as a matter of certainty, be used for the purpose of deceiving the acceptor, or the bank acting as his agent. In the ordinary course of business it is very difficult for a banker, who has no reason for suspecting fraud, to make an exhaustive inquiry, in the case of each bill, as to the identity of the person by whom it is presented, without exposing himself to claims of damage. But experience has shown that the number of genuine bills which get into dishonest hands, and are erroneously paid, is comparatively insignificant, and does not materially affect profits derived from the business of retiring bills on account of the acceptor.

Again, it is well nigh impossible that a regular system of appropriating genuine bills, in all of which the drawee, payee, and acceptor are the same, and of obtaining payment by means of forged indorsations, could be carried on for any length of time without discovery. If the series of documents forged by Glyka had been genuine drafts by Vucina in favour of Petridi & Co., it is hardly conceivable that even the ingenuity of Glyka would have enabled him to get possession of no less than forty-three of these bills, and to obtain payment of their contents at intervals extending over a period of eight months. In that case it is probable, if not certain, that detection would have followed at an early stage of his frauds; because the real payee would have discovered the loss of each bill as it fell due, and would have taken measures to stop payment.

It appears to me to be beyond dispute that the bank paid Glyka's spurious bills under the belief that they were genuine commercial drafts, and that their payment was attended with no greater risk of error than is incidental to the cashing of genuine bills. It would be ridiculous to suggest that the bank would have dealt as they did with these bills had it not been for the existence of that erroneous belief. The very fact that no payee complained of having lost a bill payable at their office, or of their having made payment to the wrong person, was well calculated to assure the bank that they had made, and were making, payment of all Vagliano Brothers' acceptances to the proper creditors.

It is, in my opinion, unnecessary to consider what would have been the precise extent of the implied obligation of the bank to Vagliano Brothers, with reference to these forged bills, if the latter had been unconnected with the belief upon which the bank acted; because that belief was induced and warranted by their representations. Their acceptances, if genuine, were in themselves distinct assurances, upon which

the bank was entitled to rely, that each bill bearing their signature was a real draft upon them by their correspondent Vucina, and the notes sent by them to the bank from time to time directing payment of the bills were so many renewals of the same representation, strengthened by the further assurance that their acceptances were genuine.

Throughout these transactions the bank acted in good faith as the agents of Vagliano Brothers; and the errors into which they were betrayed were mainly, if not wholly, attributable to their having treated the bills as genuine, in reliance upon the representations of their principals, which were untrue. I think that, in these circumstances, Vagliano Brothers cannot be permitted to cast upon the bank liability for errors arising from their own representations. These representations were, no doubt, made in the honest belief that they were true; but that circumstance cannot, in my opinion, avail Vagliano Brothers in the present question with their agents.

These considerations are sufficient for the disposal of this appeal; but on considering the opinions which have already been expressed, and are yet to be delivered by your lordships, I think it right to state my own opinion with regard to the construction of section 7 (3) of the Bills of Exchange Act 1882. Upon that point I concur in the reasoning of my noble and learned friend Lord Herschell. I think that the language of the sub-section, taken in its ordinary significance, imports that a bill may be treated as payable to bearer in all cases where the person designated as payee on the face of it is either non-existing, or, being in existence, has not, and never was intended to have, any right to its contents. The enactment has reference to real bills only, and has no direct application to these documents of Glyka's manufacture, which were not bills in their inception and never acquired the force of bills by virtue of estoppel. But the fact that the payees were fictitious within the meaning of the statute affords a good answer to Vagliano Brothers' contention, that the bank was bound to deal with these documents on the same footing as if they had been real bills, and ought not to have paid except upon genuine indorsations by Petridi & Co.

For these reasons I concur in the judgment which has been moved by the Lord Chancellor.

Lord BRAMWELL.—The plaintiffs are merchants and agents, or bankers, for foreign traders. They kept a banking account with the defendants. That is to say, they, the plaintiffs, paid to their credit with the defendants' money—technically lent it, and doubtless delivered to them other assets, drew cheques on them, and addressed accepted bills to them for payment. The plaintiffs claim of the defendants a large balance. The defendants admit the credit side of the account, but say they have paid bills accepted by the plaintiffs addressed to them, the defendants. It is immaterial, but this is not technically a set off, for the defendants never could have maintained an action against the plaintiffs in respect of these payments. The plaintiffs never owed the bank anything. I say this is immaterial, but it is as well to be technical. Set off or not, there can be no doubt but that the defendants have, as they allege, paid bills accepted by the plaintiffs, and addressed payable at the defendants, equal to the amount claimed; but they have paid them to persons who could not have enforced payment of them from the plaintiffs. They were bills on which the plaintiffs were not liable to any holder unless he claimed under Petridi's indorsement, and which, if presented to them, they need not, and possibly would not, have paid. The drawing and indorsements on them were forgeries, or fictitious. It is for the defendants to establish that they have a right to charge the plaintiffs with the amount of these bills.

The first ground on which they claim this right is that the plaintiffs by their conduct, wilful, careless, or unskilful, or all, enabled the fraud to be committed as to the whole or part (the part after the first one or two)—in effect, that the plaintiffs caused the defendants to pay these bills. I think it is necessary for the defendants to show that the plaintiffs *caused* them to pay these bills as they did. It is not enough to show that they gave occasion to their doing so—that different conduct would have prevented the fraud and the payment by the defendants.

I think the result of the authorities, *Robarts* v. *Tucker*, *Young* v. *Grote*, *Bank of Ireland* v. *Trustees of Evans' Charities*, *Merchants of the Staple of England* v. *Bank of England*, is, that the conduct of the bank's customer, to enable the bank to charge the customer, must be conduct directly causing the payment.

Now there is no doubt that there were many ways in which the plaintiffs might have detected the forgeries. The forged letters which advised the forged bills omitted to advise some which were genuine; yet the latter were accepted by the plaintiffs. The letters of the plaintiffs to Vucina did not mention the forged bills. The plaintiffs signed a letter to Vucina, in which the balance against him was in blank; that balance seems to have appeared in different amounts in the plaintiffs' books at different times. Then the forged bills were all indorsed on the part accepted, unlike the genuine bills. The bills after payment, had they been examined by the plaintiffs, would have shown that they had not been paid through a banker. The indorsements would have been known to the plaintiffs' clerks and to the plaintiffs to bear impossible dates. It would have been seen that Pasqua appeared to leave the bills for acceptance, and yet not to be the holder for payment. Maratis was a fictitious name, and would not be known to the plaintiffs. Vucina's account became very large, the balance against him unusually large, but no notice was taken; and what was much pressed was that Glyka was enabled to steal, and did steal, the forged bills after their acceptance. It was not the duty of anyone exclusively, apparently, to give out bills accepted to those who called for them. I suppose, as that call might be made at any time in the day, any clerk might go to the leather case, take out the bill, and give it out. It was kept in the room where Glyka sat. Whether this was negligence I cannot say. I really do not know. No witness said it was; it may be unusual. I say sincerely I do not know. I cannot of my own knowledge or reasoning say it was, and there is no evidence. All these things, put together, make it wonderful that the fraud could be practised—most wonderful that it could be practised to the extent it was without earlier discovery; but do not, in my opinion, give the defendants a right to charge the plaintiffs with the amounts paid for these bills as payment caused by them.

A great deal has been made of the advice notes the plaintiffs sent to the defendants of bills becoming due, with a request to the defendants to pay them. In my judgment these advice notes in no way help the defendants. They mean nothing more than the very acceptances themselves meant. The bills were accepted, payable at the defendants'; but to whom? To those who could give a discharge for them, and were entitled to enforce payment. That is all the advice notes mean. Suppose a genuine bill really drawn by Vucina, and really payable to Petridi, and suppose a forgery of Petridi's name, can it be suggested that the advice note would enable the defendants to charge the plaintiffs with that bill if they paid it? Certainly not. With all respect, it is a

mistake to suppose that by that, or by the very acceptance itself, any more or other representation is made by the plaintiffs to the defendants than that they, the plaintiffs, are estopped to anyone interested to deny that Vucina drew the bill. The plaintiffs are not estopped from saying that they are not liable to pay the bill unless it is indorsed by Petridi. I am afraid, though, that that memorandum operates strongly on some opinions.

The other ground on which the defendants claim to charge the plaintiffs with the amount of these bills is that Petridi & Co., the payees, were fictitious persons within the meaning of the Bills of Exchange Act, s. 7, sub-section 3, and that the defendants therefore might pay them to a *de facto* bearer. I differ on both points. It must be borne in mind that the Bills of Exchange Act is "an Act to *codify* the law relating to bills of exchange," not to alter or amend it, and by section 97 the rules of common law, including the law merchant, "save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange."

Then, were Petridi & Co. fictitious or non-existing persons? There was a firm of that name, a firm as identifiable as N. M. Rothschild & Co., Glyn, Mills, Currie, & Co., as the Bank of England itself would be identifiable if their names appeared as payees of a bill of exchange; and to my mind that shows they were not fictitious or non-existing persons. It is asked, What if the payee were John Smith? Well, if there were nothing to identify a particular John Smith as payee when all "the surrounding circumstances" were looked at, it may be that he might be treated as a non-existent person. But what if it was shown that the bill was delivered to a particular John Smith, in payment of a debt due to him from the drawer, could any holder of it treat it as payable to bearer, Smith's name being forged as indorser? Certainly not; but then it is said that that is not the case here, that the bill was not delivered to Petridi & Co., nor intended to be so; that, in the intention of the makers of the bill, Petridi was a sham, and so fictitious or non-existent; that Petridi & Co. are not fictitious nor non-existent, that they exist in the flesh, yet they are fictitious *quâ* payees, constructively fictitious; that if Vucina had drawn the bill, Petridi was real and existent; but inasmuch as Glyka did not mean Petridi to have the bill, he was non-existent. This beats me. They are at the same time real and unreal, they are that which is said to be an impossibility, being and not being at the same time. The bill means one thing or another, according to the intent of the drawer, that the drawee has, or has not, a right to Petridi's indorsement, according as that intent is one thing or another. Because the argument would be the same if Vucina had really drawn the bills, but not intended Petridi to have them; a possibility, if Vucina will forgive me, that if Glyka had intended to commit his fraud through the innocent agency of Petridi, Petridi would be real and not fictitious If the argument is good it would show that a *bonâ fide* holder of these bills not claiming through Petridi might have enforced payment from the plaintiffs. It is said that such a payment, *i.e.*, to himself, is according to the intention of the drawer. So it is of the drawer *de facto*, but not of him who, by the bill itself, the drawee has a right to suppose is the drawer. The plaintiffs are estopped from denying that Vucina is the drawer, but they are not estopped from denying that Vucina meant that Petridi and his assigns should receive the amount of the bill, and that it should not be paid unless indorsed by Petridi.

This argument, as I have said, makes the effect of a bill depend, not on the meaning of the writing, but on the intent of the maker. A bill payable to the Bank of England is payable to a fictitious person if the drawer intends to forge their name and give it to another person. A payee is real or fictitious, at the option of the holder, within the Act. But it was shown that a bill drawn like these might get into the hands of Petridi & Co., though not so intended, who might take it for value and be entitled to maintain an action against the plaintiffs. Would Petridi be fictitious then? It may be asked, What difference does it make to the plaintiffs that there is a C. Petridi & Co., when, if the payee had been actually fictitious or unreal, and the name was put on the back of the bill, it might be treated as payable to bearer? The answer is obvious. If the payee is a known person the drawee can well believe that the drawing is genuine; he knows he cannot be made to pay without that person's indorsement. He knows that before presentment for acceptance the bill has been in ordinary course, or at all events will be, in the hands of a responsible person, if a good name is used. His holding and indorsement are a guarantee that the bill is in right hands. Take this very case. Glyka could not have got Petridi's indorsement. I do not mean could not in point of law, but could not practically. Without that the plaintiffs were not bound to pay the bill. I have no doubt that Glyka chose Petridi's name to avoid suspicion. If it had been a strange name it might have attracted attention and caused some inquiry.

An argument is used, which, with all submission, I think very feeble. It is said that the statute says "fictitious or non-existing," and that fictitious is needless on the plaintiffs' construction; I do not agree. But what is the value of such an argument? Nothing; unless there is no other. A prudent draftsman does not accurately examine whether a word will be superfluous, he makes sure by using it.

A word on the case of *Cooper* v. *Meyer*. It is somewhat remarkable. The question was important; the judgment is singularly short, and nothing is said by Parke, J. I think the decision right. Lord Tenterden says, when the drawer is a real person his indorsement may be disputed; but if there is no such person, and (Bayley, J., also says) if the acceptor accepts without knowing there is such a person as the supposed drawer the acceptor undertakes to pay to the signature of the person who actually drew the bills. Further, I should say that, as the bills were accepted for the accommodation of Darby, with no knowledge of any such person as the drawer, the acceptor authorized the indorsement as he authorized the drawing by Darby. The court did not say that no indorsement was necessary, or that anyone but Darby could have indorsed. This case does not help the defendants.

I say, then, that Petridi & Co. were not fictitious or non-existent, and that the bill could not be treated as payable to bearer. But, supposing it could, by whom could it be so treated? By the holder in due course; by the person who could maintain an action; not by a man who stole it; not by a man who could maintain no action on it. The enactment is for the benefit of the holder—the honest holder who is embarrassed by the difficulties of there being no actual existing payee. Section 5, sub-section 2, says, that when drawer and drawee are the same person, or the drawee fictitious, or a person not having capacity to contract, the holder may treat the instrument as a bill or a promissory note; surely that means a holder for value. Suppose A. draws on a fictitious person, indorses it to B. for his (B.'s) accommodation, who negotiates it, and has to take it up. B. could not say, "the statute says, I may treat this as a promissory note." The answer would be, "you are not a holder for value." Now in this case the money

was always paid by the defendants to Glyka or Glyka's agents. Glyka had no right to "treat" the bill in any way. It was in his possession by a theft. He clearly stole it after it was accepted.

The enactment, I say, is for the benefit of the holder, not of the acceptor; it gives rights against him. The plaintiffs could not, even if Petridi is considered as fictitious, treat these bills as payable to bearer. How could they? How can an acceptor treat a bill as payable to bearer? But if he cannot, if the section does not apply to him, neither does it apply to his agent for payment, his banker at whose house it is made payable. How can it be said that the plaintiffs have given a mandate to the defendants to pay these bills without Petridi's indorsement, to pay them to a person who had no right to receive the money, who could not have compelled the plaintiffs to pay them? These bills, as the acceptances were not "payable at the bank, and not elsewhere," might have been presented to the plaintiffs. Had they been, the plaintiffs could have refused payment, perhaps would. No one could have maintained an action against the plaintiffs on these bills. How can it be right that the defendants should have paid them? If a clerk of the plaintiffs had paid this bill I agree he would not be liable to his employers, unless his suspicions had been excited. But the duty of a clerk is different from that of a banker. The defendants have deprived the plaintiffs of this right to refuse payment by electing to pay. Let it not be supposed I find any fault with them; I do not in the least; but so it is.

I am of opinion that this case is governed by *Robarts* v. *Tucker*. I own to a prejudice in favour of that case. I do not agree with the notion that a banker is entitled to make inquiries as to whether he should pay as there suggested. He must honour or dishonour the bill on presentment. The case was decided on no such ground, but on this, that the customer's mandate is to pay only to such person or persons as can give a discharge of the instrument. I am afraid, however, that a dislike of that case has a good deal to do with the opinions unfavourable to the plaintiffs. Lord Esher says that is a harsh case. I have heard able arguments on both sides. On the one side, that the banker sees the person who presents the instrument. On the other, that the banker's customer knows the parties to whom he gives his acceptance or cheque. There are two remarks to be made. One is that the banker can bargain with his customer, if he likes (I do not mean by Act of Parliament, but he can make his stipulation with his customer), that he will not be liable in such cases as the present. The other is that bankers do not make such a bargain, yet they and banking, I am glad to say, flourish. I have said nothing of the defendants paying this enormous amount over the counter to strangers. I have no doubt, as a matter of knowledge and of reasoning, that this was most unusual. There is, besides, cogent evidence that it was. The paying cashier inquired of his principal if the bill should be paid when first presented. The principal, according to his own account, thought it a thing to mention to the plaintiffs' clerk when the instances had been few. I have no doubt (especially when the cases multiplied) instead of a gossiping intimation, not enough to reach Ziffo's mind (as Charles, J., finds), that for the protection of themselves there ought to have been a formal communication to the plaintiffs. If Mr. Disney was satisfied with what he said Ziffo said to him, he is a very strange person. The thing is absurd. "I suppose you must pay if they have been advised." How could the advice that the bills would be presented for payment remove the suspiciousness of the presentment when it took place? True, the plaintiffs might have seen that the bills had been paid over the counter, but they trust to the defendants having paid properly. But I have not referred to this as a ground on which the defendants should fail. I have no doubt there was gross carelessness, but a carelessness to the bank's own hurt, a carelessness of precautions for their own good.

If, however, on some ground which I cannot see, the whole conduct of the parties is to be looked at, if it is to be said that the bank may charge Vagliano with payments they need not have made, then I think that must, at least, be limited to those payments which were reasonably, rightfully, and carefully made, and not to such as those in question.

I rely, also, on and agree with the judgments of the judges who have decided in favour of the plaintiffs; also on that of the Master of the Rolls, except that part which holds that C. Petridi & Co. were fictitious. This is my opinion, and I am glad to think it is also that of my noble and learned friend, Lord Field. I am sorry that it is not shared in by any other noble and learned lord who heard the case. We are probably wrong, but—and I say it, I am sure I need not protest, with the most sincere respect for those who do not agree with me, for I know of no others more deserving of respect—it is some comfort to me to think that the head-note of our opinion may be expressed very shortly, and in the most abstract form, namely, "a banker cannot charge his customer with the amount of a bill paid to a person who had no right of action against the customer, the acceptor." But I think the head-note which will represent the decision of your lordships must be in the most concrete form possible, and should limit itself to stating the facts and saying that on them it was held that the judgment should be for the appellants. I think the judgment of the Court of Appeal should be affirmed.

Lord HERSCHELL.—I propose to deal, at the outset, with the question of the construction of the Bills of Exchange Act, which gave rise to a difference of opinion in the court below.

The facts material to this part of the case I take to be these. The bills in question purported to be drawn by Vucina, but were, in fact, entirely the production of Glyka, a clerk in the service of Vagliano Brothers, the respondents. He fraudulently procured the necessary forms to be printed, and filled them up, inserting the name of Vucina as drawer, and of C. Petridi & Co. as payees. A firm of C. Petridi & Co. carries on business at Constantinople, and had been the payee of some genuine bills previously drawn by Vucina upon Vagliano Brothers. I think there can be no doubt that this fact suggested to Glyka the insertion of the name of C. Petridi & Co., but I do not believe that he made the choice with the idea that it would assist his fraud. I entertain no doubt, under the circumstances disclosed by the evidence, that Vagliano Brothers would equally have accepted the bills if any other name had been inserted, and that Glyka knew this. It was, of course, never intended by Glyka that Petridi & Co. should be the persons to whom the bill should be paid. The name was inserted merely to make the bills complete in form. The bills were accepted by Vagliano Brothers, payable at the Bank of England, who were requested by Vagliano Brothers to pay them at maturity. They were presented for payment with indorsements to all appearance regular, these having been written by Glyka, and were paid to the persons presenting them at maturity.

The conclusion at which the majority of the Court of Appeal arrived with reference to the construction of the sub-section of the Bills of Exchange Act with which your lordships have to deal is thus stated:—"The word 'fictitious' must in each case be interpreted with due regard to the person against whom

the bill is sought to be enforced. If the drawer is the person against whom the bill is to be treated as a bill payable to bearer, the term 'fictitious' may be satisfied if it is fictitious as regards himself, or in other words, fictitious to his knowledge. If the obligations of the acceptor are in question, and the acceptor is the person against whom the bill is to be so treated, 'fictitious' must mean fictitious as regards the acceptor and to his knowledge. Such an interpretation is based on good sense and sound commercial principle."

The conclusion thus expressed was founded upon an examination of the state of the law at the time the Bills of Exchange Act was passed. The prior authorities were subjected by the learned judges who concurred in this conclusion to an elaborate review, with the result that it was established to their satisfaction that a bill made payable to a fictitious person, or his order, was, as against the acceptor, in effect, a bill payable to bearer only when the acceptor was aware of the circumstance that the payee was a fictitious person; and, further, that his liability in that case depended upon an application of the law of estoppel. It appeared to those learned judges that, if the exception was to be further extended it would rest upon no principle, and that they might well pause before holding that section 7, sub-section 3, of the statute was "intended, not merely to codify the existing law, but to alter it, and to introduce so remarkable and unintelligible a change."

With sincere respect for the learned judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is, in the first instance, to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived by the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

If a statute intended to embody in a code a particular branch of the law is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that, on any point specifically dealt with by it, the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was—extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding, such as a demurrer to evidence. I am, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.

One further remark I have to make before I proceed to consider the language of the statute. The Bills of Exchange Act was certainly not intended to be merely a code of the existing law. It is not open to question that it was intended to alter, and did alter, it in certain respects. And I do not think that it is to be presumed that any particular provision was intended to be a statement of the existing law rather than a substituted enactment.

Turning now to the words of the sub-section, I confess they appear to me to be free from ambiguity. "Where the payee is a fictitious or non-existent person" means, surely, according to ordinary canons of construction, in every case where this can, as a matter of fact, be predicated of the payee.

I can find no warrant in the statute itself for inserting any limitation or condition. I am putting aside for the present the question by whom a bill answering the description of the sub-section may be treated as payable to bearer; and I am accepting, too, for the moment, the meaning attributed by the majority of the Court of Appeal to the word "fictitious"—viz., a creation of the imagination, confining myself to the question in what cases a bill, purporting on the face of it to be payable to order, may be treated as payable to bearer. I find it impossible, without doing violence to the language of the statute, to give any other answer than this: In all cases in which the payee is a fictitious or non-existent person. The majority of the Court of Appeal read the section thus: Where the payee is a fictitious or non-existent person, the bill may, as against any party who had knowledge of the fact, be treated as a bill payable to bearer. It seems to me that this is to add to the words of the statute, and to insert a limitation which is not to be found in it or indicated by it. It is said that when the acceptor is the person against whom the bill is to be treated as payable to bearer, "'fictitious' must mean fictitious as regards the acceptor, and to his knowledge." With all respect, I am unable to see why it must mean this. I confess I cannot altogether follow the meaning of the words fictitious "as regards" the acceptor. I have a difficulty in seeing how a payee, who is, in fact, a "fictitious" person in the sense in which that word is being used, can be otherwise than fictitious as regards all the world — how such a payee can be "fictitious" as regards one person and not another. The truth is, the words, "as regards" the acceptor, are treated as equivalent to the words "to the knowledge of" the acceptor. But I do not think these expressions are synonymous. It seems to me that to import into the statute after the words "fictitious person" the words "as regards" the acceptor or drawer, as the case may be, and then to interpret those words as meaning "to the knowledge of," only tends to obscure the fact that the condition that the payee must be fictitious to the knowledge of the person sought to be charged as upon a bill payable to bearer is being introduced into the enactment.

For the reasons I have given I find myself compelled to the conclusion, notwithstanding my respect for those who have expressed a contrary view, that, in order to establish the right to treat a bill as payable to bearer, it is enough to prove that the payee is in fact a fictitious person, and that it is not necessary, if it be sought to charge the acceptor, to prove in addition that he was cognisant of the fictitious character of the payee.

If the conclusion which I have indicated as being, in my opinion, the sound one involved some absurdity or led to some manifestly unjust result, I might, perhaps, even at the risk of straining the language used, strive to put some other interpretation upon it. But I cannot see that this is so, or that the interpretation I have adopted does any violence to good sense,

or is otherwise than in accordance with sound commercial principle. I will assume that as the law stood at the time the Bills of Exchange Act was passed, a bill drawn to the order of a fictitious payee could have been treated as a bill payable to bearer only as against a party who knew that the payee was fictitious. This decision even was arrived at little more than a century ago, and was dissented from by distinguished judges, and it is obvious, from the observations of Lord Ellenborough, in *Bennett* v. *Farnell*, that, by some eminent lawyers, at least, it was regarded rather as a departure from strict principle, which ought not to be further extended, than as an embodiment of sound commercial principle.

But is it impossible to take any step beyond this without violating sound principle and working injustice? Let me draw attention, for a moment, to the relative position and rights of the drawer and acceptor of a bill of exchange. A drawee who accepts a bill does so either because he has in his hands moneys of the drawer, or expects to have them before the bill falls due, or because he is willing to give the credit of his name to the drawer, and to make him an advance by payment of his draft. It is immaterial to whom the drawer directs him to make payment; that is a matter for the choice of the drawer alone. The acceptor is only concerned to see that he makes the payment as directed, so as to be able to charge the drawer. It is, in truth, only with the drawer that the acceptor deals; it is at his instance that he accepts; it is on his behalf that he pays; and it is to him that he looks either for the funds to pay with, or for reimbursement if he holds no funds of the drawer at the time of payment.

In the ordinary case, where the payee designated in the bill is a real person intended by the drawer to receive payment, either by himself or by some transferee, the acceptor can only charge the drawer if he pays the person so designated or someone deriving title through him. If payment be made to any other person, the drawer's liability on the bill is not discharged by payment; he will or may remain liable to the real payee, or those claiming under him, and the acceptor, having paid otherwise than according to the directions of the drawer, cannot justify the use of his funds in making the payment, or claim to be reimbursed by him. But now, suppose the drawer inserts as payee the name of a fictitious person, requests the drawee to accept a bill so drawn, indorses the payee's name, and puts the bill into circulation. He certainly intended it to obtain currency and to be paid at maturity, and he as certainly did not intend it to be paid only to the payee named, or someone deriving title through him. Nor, as it seems to me, can it reasonably be said that he intended to direct the drawee to pay such person and such person only.

What, then, is the position of a lawful holder of a bill so drawn? I do not understand it to be doubted that even before the Bills of Exchange Act such a holder could enforce payment of the bill against the drawer, for he not merely knew that the payee designated was a fictitious person, but was himself the author of the fiction. As against the drawer, then, such a bill could be treated as payable to bearer. But, if it cannot be so treated as against the acceptor, the holder, who, it may be, bought or discounted it on the faith of the acceptance, relying on the credit of the acceptor, and unwilling to trust to that of the drawer alone, is deprived of that upon which he relied, of the liability which he regarded as his security for payment. The holder in such a case suffers wrong. Would any injustice result if the bill could, as against the acceptor also, be treated as payable to bearer? The drawer must be taken to have intended the bill to be paid by the acceptor at maturity, but to whom? Not to the fictitious payee, or someone claiming through him. Why not, then, to the bearer, who can hold the drawer liable upon the bill, and treat it as payable to him? And, if it were the law that the acceptor was bound, in such a case, to pay the bearer, who would suffer? Not the drawer, for payment would have been made to a person who could compel him to make payment, and he could have no ground for complaint if the acceptor used his funds in thus discharging his liability on the bill, or, in case he had not provided such funds, if he were held liable, to re-imburse the acceptor. And how would the acceptor suffer in such a case? It was his object in accepting the bill to render himself liable to make payment to the person intended by the drawer to receive it, either out of moneys provided by him, or looking to him for re-imbursement. His position under such circumstances would be precisely what it would have been if he had made payment to a real person designated as payee, or to those claiming under him. And it might, I think, fairly be said that he was making the payment in accordance with the intention of the drawer.

It may be that the right of the holder to treat such a bill, as against an acceptor ignorant of the fictitious character of the payee, as a bill payable to bearer, could not be established merely by an appeal to the law of estoppel, and that such estoppel would exist only against the drawer who knew that the payee was a fictitious person. I will assume that this was the law prior to the recent statute. But why should not the Legislature have intervened with a positive enactment imposing this liability upon the acceptor, an enactment which, it seems to me, would wrong no one, and would prevent a holder for value from suffering wrong? Estoppel is not the only sound principle upon which a law can be based. The law of estoppel was not thought to afford sufficient protection to those dealing with the apparent owner of goods. The Legislature deemed it necessary to intervene, and the Factors Acts were passed, each of which added something to the protection of persons so dealing. Why, then, should it be thought improbable that the Legislature should have created in the holder of a bill, drawn payable to a fictitious person, a new right against the acceptor? If I am correct in thinking that this added right would obviate and not entail injustice, that it would make the law more reasonable, and bring it more into conformity with the course of commercial transactions, I can see no reason for doubting that the Legislature so intended, if this be the plain, natural meaning of the words they have used, or for endeavouring so to construe the language as to find in it no more than a statement of the previous law.

I have dwelt at some length upon this point because it appeared to me important to show that the words of the enactment might have their natural effect given to them without leading to results either unjust or commercially inconvenient. But I desired also to elucidate the principle upon which the enactment was, in my opinion, based; because this is not without its bearing upon the next question to be considered, and to which I will now pass. It is, to my mind, one of greater difficulty.

Even assuming, it is said, that where the payee is a "fictitious" person the bill may be treated as against the acceptor as a bill payable to bearer, the word "fictitious" is only applicable to a creature of the imagination, having no real existence, whilst in the present case "C. Petridi & Co." was the name of a firm having a real existence, so that the payee here cannot be termed a fictitious person. But are the words "where the payee is a fictitious person" incapable of legitimate application in any other case

than that suggested? The first observation I have to make is, that, if so, there was no necessity for the introduction of the word "fictitious" in the enactment; the word "non-existent" would have sufficed. It was argued that whilst a fictitious person is one who has never existed, a non-existent person is one who has existed but whose existence has ceased. But even if this be admitted, the word "non-existent" would have sufficed, for it can hardly be doubted that it is employed as suitably in reference to that which has never existed, as to that which, having existed, exists no longer.

Without, however, dwelling too much on this point, which may perhaps have a historical explanation, let me call attention to the inconvenient complexity and strange and unmeaning distinctions to which, as it seems to me, the construction adopted by the Court of Appeal would give rise. If, for example, a drawer inserts after the words, "Pay to the order of," a name which he invents, himself indorses that name, and puts the bill into circulation, it is within the terms of the statute, and may be treated as a bill payable to bearer. But if he inserts the first name that occurs to him, though he never intends a bearer of that name to be the payee, or that title shall only be made through him, but himself indorses this bill and puts it into circulation just as he did the other, this bill, as I understand the court below, stands in a different position. The case is not within the statute, and if the bill can be treated, even as against the drawer, as a bill payable to bearer, this does not depend upon the words of the enactment, but must result from the rules of the common law, which, in so far as they are not inconsistent with the express provisions of the Act, are by section 97 (2) still to apply to bills of exchange.

It follows that, according to the view of the majority of the Court of Appeal, the Legislature has dealt by express enactment with one case of estoppel, that is to say, where the payee is a "fictitious person" in the sense which they attribute to those words, but has left the analogous case, where, though the payee was not fictitious in that sense the name was inserted as a mere pretence, and without any intention that payment should be made to the person designated, undealt with, and the rights and liabilities upon the bill to be ascertained by an appeal to the rules of the common law; certainly a strange proceeding in a code of this description, and one for which it would be difficult to find a satisfactory explanation.

But this is not all. If I am right in thinking that in the case of a payee who is a fictitious person (whatever be the meaning of that expression) a bill may, as against the acceptor, be treated by a lawful holder as payable to bearer, whether the acceptor knew of the fiction or not, why should this right and liability differ according as the name inserted as payee be a creature of the imagination or correspond to that of a real person, the drawer in neither case intending a person so designated to receive payment, and in each case himself indorsing the bill in the name of the nominal payee before putting it into circulation? I am at a loss for any reason why this distinction should exist. It is true that there is this difference between the two cases, that in the one an indorsement by the named payee is physically impossible, whilst in the other it is not. But I do not think this difference affords a sound basis for a distinction between the respective rights and liabilities of the drawer, acceptor, and holder. It seems to me that it would in each case be reasonable, and on the same grounds, that the acceptor should be liable to the holder of the bill, indemnifying himself out of the funds of the drawer, or obtaining reimbursement from him.

It must be admitted, of course, that if the language of the statute is not reasonably capable of any other intrepretation than that adopted by the majority of the Court of Appeal, if it will not allow of a construction which would cover the case we have been considering, then one must submit to the conclusion that the Legislature has left the law in this respect in an unsatisfactory position, and full of distinctions devoid of any sound principle. But are we compelled to this conclusion? Do the words "where the payee is a fictitious person," apply only where the payee named never had a real existence? I take it to be clear that by the word "payee" must be understood the payee named on the face of the bill; for of course by the hypothesis there is no intention that payment should be made to any such person. Where, then, the payee named is so named by way of pretence only, without the intention that he shall be the person to receive payment, is it doing violence to language to say that the payee is a fictitious person? I think not. I do not think that the word "fictitious" is exclusively used to qualify that which has no real existence. When we speak of a fictitious entry in a book of accounts we do not mean that the entry has no real existence, but only that it purports to be that which it is not, that it is an entry made for the purpose of pretending that the transaction took place which is represented by it.

In his report of the case of *Stone* v. *Freeland* the learned reporter speaks of their having been in that case "a fictitious indorsement." The facts were that a bill had been drawn payable to Butler & Co., and indorsed in that name. There was a house, Butler & Co., with whom Cox, the drawer, had dealings; but the bill had never been in their hands, and appeared to have been indorsed by Cox. Now, in what sense was the word "fictitious" here used? Not surely to convey the idea that the indorsement had no real existence, and was a mere creature of the imagination, but that it was put forward as being that which it was not.

These seem to me to be instances (and other illustrations might be given) of an analogous use of the word "fictitious" to that which, I think, may be attributed to it in the statute. Turning to the interpretation of the word "fictitious" in Dr. Johnson's Dictionary, I find amongst the meanings given are "counterfeit," "feigned." It seems to me, then, that where the name inserted as that of the payee is so inserted by way of pretence only, it may, without impropriety, be said that the payee is a feigned or pretended, or, in other words, a fictitious person. Stress was laid upon the fact that the words of the statute are, "where the payee is a fictitious person," and not "where the payee is fictitious." There is not, to my mind, any substantial difference in the meaning of the two phrases. And I cannot think that the Legislature intended the rights and liabilities arising upon mercantile instruments to depend upon nice distinctions such as this.

For the reasons with which I have troubled your lordships at some length, I have arrived at the conclusion that whenever the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person, or of one who has no existence, and that the bill may, in each case, be treated by a lawful holder as payable to bearer.

I have hitherto been considering the case of a bill drawn by the person whose name is attached to it as drawer, whilst the bills which have given rise to this

these contentions on behalf of the respondents can be maintained.

Before the Act of 1882, the law seems to have been, as laid down by Lord Ellenborough in *Bennett* v. *Farnell*, that "a bill of exchange made payable to a fictitious person or his order is neither in effect payable to the order of the drawer nor to bearer unless it can be shown that the circumstance of the payee being a fictitious person was known to the acceptor." The Act of 1882, s. 7 (3), enacts that "where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer." As a statement of law before the Act that would have been incomplete and inaccurate. The omission of the qualification required to make it complete and accurate as the law then stood seems to show that the object of the enactment was to do away with that qualification altogether. The section appears to me to have effected a change in the law in the direction of the more complete negotiability of bills of exchange—a change in accordance, I think, with the tendency of modern views and one in favour of holders in due course, and not, so far as I can see, likely to lead to any hardship or injustice.

Then it was said that the proper meaning of "fictitious" is "imaginary." I do not think so. I think the proper meaning of the word is "feigned" or "counterfeit." It seems to me that the "C. Petridi & Co." named as payees on these pretended bills were, strictly speaking, fictitious persons. When the bills came before Vagliano for acceptance they were fictitious from beginning to end. The drawer was fictitious, the payee was fictitious, the person indicated as agent for presentation was fictitious. One and all they were feigned or counterfeit persons, put forward as real persons, each in a several and distinct capacity, whereas in truth they were mere make-believes for the persons whose names appeared on the instrument. They were not, I think, the less fictitious because there were in existence real persons for whom these names were intended to pass muster.

In the result, therefore, I think that on both grounds the bank is entitled to succeed. Nor is that conclusion altogether to be regretted. An opposite conclusion would, I think, go a long way to encourage mischievous negligence on the part of persons called upon to accept bills of exchange. To an acceptor it would be a matter of indifference whether the drawer's signature were genuine or not. If it were genuine the transaction would be completed in regular course. If it were not genuine the loss would fall, not on the acceptor whose negligence had led to it, but on the banker, who could have no means of detecting the forgery, and must have been thrown off his guard by the carelessness of his employer.

Lord MORRIS.—I entirely agree in the conclusion arrived at by my noble and learned friend (Lord Herschell), viz., that whenever the name inserted as that of the payee is inserted without any intention that payment shall only be made in conformity therewith, the payee becomes a fictitious person within the meaning of the Bills of Exchange Act, 1882, s. 7, sub-section 3, and that the bill may be treated by a legal holder as payable to bearer; and having had the advantage of reading the noble and learned lord's judgment in print, I concur in the reasoning by which that conclusion is arrived at.

That conclusion appears to me not only to embrace the bills which are the subject of this litigation, but I am of opinion they are *à fortiori*, and necessarily, within the statute as bills payable to bearer. The bills were regular in form, with Vucina, of Odessa, as drawer, Petridi, of Constantinople, named as payee, and Vagliano as drawee. Vagliano accepts the bills; that acceptance is the only real action of the three parties named in the bills. Vucina drew none of the bills, and knew nothing whatever about them; Petridi had no knowledge of, or any connection of any kind with them; Vucina, though a known existing person, had no reality in regard to them; the paper writings only became bills as against Vagliano, who, by his acceptance, is estopped—in the language used in the statute, is precluded—from denying they were bills as against the bank, who paid them on the faith of his acceptance, and also upon his express requisition to do so. If Vucina was an unreal person Petridi must be also an unreal person, and therefore a fictitious person in regard to the bills. The drawer can alone designate the payee; but there was, in fact, no drawer; Vucina, the alleged drawer, could not and did not name any payee; Glyka, the forger, who wrote the documents in the form of bills of exchange, was not a drawer; he forges the name of Vucina as drawer; that cannot constitute Glyka himself a drawer. Vucina cannot become the *alter ego* of Glyka because Glyka forged his name, nor can Glyka be the *alter ego* of Vucina, who never knew of or heard of Glyka's existence; the only person who could call into existence a payee had no legal existence. There never was, in fact, a real bill of exchange. Though the acceptor, Vagliano, is bound to know the drawer and guarantee his existence and handwriting, and is precluded from denying against the holder that it is a bill of exchange, only to the extent of the estoppel is the document a bill of exchange. In the case of a real drawer that the payee is a fictitious person (unless it is obvious on the face of the bill) must be proved by the holder; but in the case of an unreal drawer, as a fact, the unreality, and therefore fictitiousness, of the person named as payee follows necessarily.

I am of opinion that the judgment of the Court of Appeal should be reversed.

Lord FIELD.—The question in the case between the appellants, the Bank of England, and their customer, a foreign banker and merchant, shortly stated, is whether the appellants are justified in debiting the respondent's account with various payments made by them, amounting in the whole to the sum of £71,500. The sums so paid were the amounts of a series of documents purporting to be bills of exchange, and to have been drawn upon the respondent by one of his correspondents at Odessa, named Vucina, and to be payable to the order of "C. Petridi & Co."

The acceptances by the respondent of these supposed drafts were genuine, although obtained from him by a fraud, to which he was no party; but the drawings purporting to be by Vucina were forgeries by one of the respondent's clerks, named Glyka, who having, after acceptance, also forged indorsements of the name of the firm of the alleged payees, obtained payment of the amounts from the appellants, at whose bank the respondent had made the acceptances payable.

Besides making the acceptances so payable, the respondent had, previous to their falling due, advised the appellants of his having so accepted by letters, in the following terms:—

"From Vagliano Brothers to the Cashiers of the Bank of England.

"19, Old Broad-street, London, E.C.,
"17th February, 1887.

"The undernoted bills have been accepted by us and made payable with you, which please pay at maturity and debit our account.

"Yours truly,
"VAGLIANO BROTHERS.

"No. 97,326, drawn by G. Vucina, Odessa, 4th February, due 18th instant, £600.

"No. 332, drawn by D. P. Pulaco, Piraius, 29th January, due 18th instant, £200."

The second of these two bills was an ordinary genuine bill, in no way connected with the present question. The first was also the first forgery by Glyka; and, as it fell due in the course of the then current month, and had been accepted subsequent to the general monthly advice, it was the subject of a special advice.

The second forged draft (for £700) fell due on the 7th of March, and was included in the usual monthly advice, which was in the following form:—

"Vagliano Brothers.

"List for March enclosed.

"19, Old Broad-street, London, E.C.

"28th February, 1887.

"The Cashiers of the Bank of England.

"Gentlemen,

"Herewith we beg to hand you our list of acceptances falling due next month and made payable with you, which be good enough to pay at maturity and debit our account.

"Yours truly,

"VAGLIANO BROTHERS."

Enclosed with the letter was a list of bills, describing them by the date when drawn, the number, the drawer's name and residence, the date when due, and the amount. Similar letters were subsequently regularly sent by the respondents to the appellants, in which the acceptances making up the residue of the £71,500 were advised.

The transactions between Vucina and the respondent are very large, representing at times over a million sterling in the course of a year; and, amongst other drafts by Vucina, the respondent had, in the years 1886 and 1887, before the commencement of, and in one instance contemporaneously with, the transactions now in question, accepted genuine drafts of Vucina, sixteen or seventeen in number, payable to the order of a firm of C. Petridi & Co., carrying on business in Constantinople, and with whom Vucina had numerous transactions. Indeed, if Glyka is to be believed, there had been a direct communication between the respondent and C. Petridi & Co. in reference probably to some of these genuine drafts, all of which represented genuine transactions between Vucina and C. Petridi & Co., and the indorsements upon which the appellants had paid them were all genuine and in order. There cannot, I think, indeed be much doubt but that Glyka, having obtained possession of some of the genuine business letters of Vucina, and of genuine acceptances and indorsements, made use of them to fabricate his forgeries, probably also thinking that, the names being familiar to the respondent's clerks, no inquiry would be made.

There were, of course, no transactions of any kind in reference to which those bills could be supposed by anybody to have come into existence or be used; but that Glyka intended to make use of the actual names of existing persons, and existing to the knowledge of the respondent or his clerks, to facilitate his fraud, I entertain no doubt. It is equally clear that Glyka had no intention whatever that the acceptances should ever come to the knowledge either of the alleged drawers or payees. He doubtlessly expected to be able, as the result of his Stock Exchange speculations, to retire them before maturity, and conceal their existence from the respondent.

Under these circumstances the appellants, firstly, contended that the payees named in the draft were "fictitious persons" within the meaning of section 7, sub-section 3, of the Bills of Exchange Act, 1882, and that the bills were, therefore, according to their tenour and effect in law, bills payable to bearer, so that, whatever might have been the original limits of the authority under which the appellants had acted in undertaking the making of the payments complained of, it was competent to them, now that the actual facts had been discovered, to show and rely upon them as justifying their right to debit the respondent with the amount.

I will deal with that contention first. That the terms of the original mandate as between the appellants and respondent were limited to payment to the actual indorsees of the payees named in the instruments is, I think, clear, and was not, if I followed the argument of the appellants correctly, seriously disputed. At the times of acceptance and payment neither party entertained any suspicion that C. Petridi & Co. were other than what they appeared to be—genuine payees, and Vucina a genuine drawer. The respondent, therefore, had the right to assume that, by making the payment to the order of the payees, he would acquire a discharge to that amount in his accounts with the assumed drawer, Vucina.

On the other hand, it appears from the evidence that the bank on presentation of the acceptances did no more than refer to the advices and indorsements in order to satisfy themselves that the bills were in order. In other words, by accepting the duty of paying the acceptances at maturity they intentionally undertook the risk which the law merchant has been held, under those circumstances, to impose upon bankers in the case of a genuine acceptance (*Robarts* v. *Tucker*), a liability the existence of which I understood the appellants did not deny, but they endeavoured to distinguish that case from the present by a circumstance which did not exist in that case, viz., that the respondent in this case had by the letters of advice untruly, although innocently, represented the drawing as genuine, whereas, it being a forgery, the respondents in paying the amount would acquire no valid discharge against any valid drawer.

Assuming, however, that the letters of advice amount to such a representation, it does not appear to me that the appellants in making the payments complained of relied in any way upon it, nor that the representation goes any further than the acceptance itself, which in the case of *Robarts* v. *Tucker* was held insufficient to vary the duty of the banker.

The sole question in this case appears to me to be whether in making the payments to Glyka the bankers have complied with the direction of their customer. That direction is found in the letters of advice and the acceptances, and I do not see that the terms of the latter differ from the former. The question, therefore, upon the first point seems to me to be reduced to this:—Whether, as alleged by the appellants, the payees were "non-existing or fictitious persons" within the 3rd sub-section, and, if so, whether, as against an acceptor, no party to, and ignorant of, the fiction, the bills might be treated as payable to bearer so as to justify the payments to Glyka.

Upon this point the appellants argued that, as in fact there was no person in existence capable of giving the discharge contemplated by the acceptor, or of making a valid title by indorsement, they were under no obligation to make any inquiries as to the named payee's indorsement or require it, but were justified, as against the respondent, in payment to bearer, that being in law the tenour and effect of the bill.

In support of this proposition they cited various cases decided in the courts of common law for the purpose of showing that where the names in one case even of known and existing persons had been inserted as payees fictitiously, and without any intent that they should be actual payees, the courts had treated the bills as payable to bearer. Those cases have been fully discussed and dealt with in the courts below,

and it will, I think, appear that in all of them the persons against whom the bills were so treated had been parties to the putting forth of the bills, either with knowledge of the fictitious insertion, or with authority to make the instrument (as when accepted in blank) a negotiable instrument for the payment of money to somebody, which a holder in due course must of necessity have the right to enforce against somebody, so that the parties to their emission could not be heard to say that the bills were not payable at all for want of an indorsement by a payee who was never intended to have the power to, and could not make any valid indorsement.

The case nearest to the present in its facts is that of *Cooper* v. *Meyer*. There the persons named as payees were known and existing persons, although their names were fictitiously inserted by the drawer as payees without any intention that they should have anything to do with the bills. But the point decided in that case simply was that the acceptor, for whom the holder had discounted the bill, having accepted, for the accommodation of the drawer who had been guilty of this fiction, evidence that the handwriting of the indorsement was the same as that of the drawing was sufficient as against the acceptor, who was precluded from denying the drawing, and who, it was said, had given credit to the drawer's handwriting.

Upon the authority of these cases, and what was said to be the true construction of the statute, it was contended that the fraudulent intention of Glyka in inserting C. Petridi & Co. as payees, although unknown to the acceptor, had, as against him, converted an acceptance which was in terms payable to a named payee, "or order," into a liability to pay any bearer. But I fail to see how, upon principle, the intention of a drawer can alter the terms of a bill in which there is a named and ascertainable payee. All it can do is, where more than one person fulfils the description of the payee in the bill, to say which was the person intended (*Mead* v. *Young*), and I, therefore, have come to the conclusion, which has been arrived at by the noble and learned lord (Lord Bramwell), that the payees in the present case were not "fictitious or non-existent persons," within the meaning of the statute, so as to entitle the appellants to treat the respondents' acceptances as payable to Glyka, or any other bearer.

It was not denied that the firm of C. Petridi & Co., who were so named as payees, were existing persons carrying on business at Constantinople; that they were known to be such to Vucina and others; and that the respondent had been in commercial relations with them by paying bills to their genuine indorsements. They are, however, said to be "fictitious" persons because Glyka intended so to deal with the bills that the fact that their names appeared upon them should remain concealed. Now, what he intended was to obtain the amount of the bills by fraudulently inserting a genuine name as the payee, relying upon his being able, in his position in the respondents' counting-house, to prevent the discovery of the forgery. But I cannot see how that can render actual existing persons fictitious within the meaning of the statute. If he had made Rothschild, of Vienna, or Hirsch, of Constantinople, payees, that would have been as fraudulent, but would not have made them fictitious persons.

In this view it is unnecessary to consider whether, if the payees had been fictitious persons, within the meaning of the statute, the bills might be treated, as against the respondent, who was ignorant of the fiction, as payable to bearer.

But the appellants argued, secondly, that, even if the payments in question could not be justified in themselves, the conduct of the respondent precluded him from complaining of them. They urged that his representation in the letter of advice that the bills were genuine commercial instruments, his instructions to honour them at maturity, coupled with such a lax system of business as enabled a man in the position of Glyka to concoct and carry into effect his extensive frauds, the omission to examine the forged indorsements on the bills when periodically returned by the appellants, the non-observance of the omissions in the forged letters, which ought to have been noticed and so excited inquiry, and the amount of the forged acceptances, £6,000 in June, £19,000 in July, and over £15,000 and £16,000 in August and September, which ought also to have excited attention, amounted to conduct without which the loss would not have happened, and which so far conduced to the loss as to render the alleged rule applicable that where a loss has to fall upon one of two innocent parties, it ought to be held to fall upon the party conducing to it.

The appellants' case in this respect is, I think, a strong one, and deserving of great consideration, and, as I look upon their position as one of considerable hardship (for in any view of the case the forgeries by which they were deceived had been concocted and carried out by the respondents' servant, and, as I think, without such care and supervision on the respondents' part as I should like to have seen), I should have been well satisfied if, consistently with what I conceive to be the law, I could have held in their favour.

No doubt in one case, *Lickbarrow* v. *Mason*, 2 T.R. 70, Ashhurst, J., stated, as a broad general principle that whenever one of two innocent parties must suffer by the act of a third person, "he who has enabled such person to occasion the loss must sustain it."

But more recent decisions, and one of this House, of great importance, have either shown that this proposition is not to be understood in all its generality or cannot be supported; and this was very clearly pointed out in two cases which were not, I think, cited in argument (*Arnold* v. *The Cheque Bank* and *Arnold* v. *The City Bank*, 1 C. P. D. 568) by the judges constituting the Common Pleas Division, who, in a very careful judgment, reviewed all the authorities. It was an action by the drawer to recover the proceeds of a bill which had been received by the defendants upon a forged indorsement, and negligence affording facilities for the fraud was set up, and evidence in support of it tendered at the trial, but rejected by the Lord Chief Justice. There were several acts of alleged negligence relied upon, some of them of a similar character to some of those relied upon in the present case. In delivering the considered judgment of the court, consisting of the Lord Chief Justice and the now Lord Justice Lindley, and Archibald, J., the Lord Chief Justice said on the second and third points, "It was contended by the defendant that there was evidence of negligence in the custody and transmission of the draft by the plaintiffs, which afforded facilities for the forgery and fraud by which the defendants were induced to receive it, and that the evidence which was rejected would have shown an almost invariable custom for merchants in America remitting bills to correspondents in England to send another independent letter of advice either by the same or a subsequent mail, and that there were opportunities of sending such a letter by other vessels leaving on the same day as *The Celtic*, or on subsequent days which would have arrived in time to have enabled Messrs. Williams & Co., the indorsees, whose indorsement had been forged, in the event of their not having received the draft in due course, to have communicated with Smith, Payne, & Smith, either by letter or telegram, to have stopped payment. We are of opinion, however, that there was no evidence of

negligence which could operate by way of estoppel to the plaintiffs. Reliance was placed by the defendants on the case of *Young* v. *Grote*. That case, no doubt, must be considered as well decided, but various opinions have been expressed as to the real ground of the decision. But we have only to look at the case itself to see that it really proceeded on the authority of the extract from Pothier cited in the judgment of Best, L.C.J., which makes the inability to recover depend upon the fault of the drawer of the cheque in the mode of drawing it, and is entirely consistent with the rule laid down and explained on fuller consideration in subsequent cases—viz., negligence, in order to estop, must be negligence in the transaction itself: see *per* Blackburn, J., in *Swan* v. *North British Australasian Co.*; indeed, in a later case, *Bank of Ireland* v. *Evans' Charities*, this is stated by Parke, B., himself to be the true ground of decision. The rule, which is expressed by Ashurst, J., in *Lickbarrow* v. *Mason*: 'We may lay it down as a broad, general principle that, whenever one of two innocent parties suffers by the act of a third person, he who has enabled one person to occasion the loss must sustain it,' was, though not expressly referred to, observed and acted on in *Young* v. *Grote*, and it has received illustration and explanation in subsequent cases on the subject, which show that the words enabling a person to occasion the loss' must be understood to mean by some act, conduct, or default in the very transaction in question: see *Freeman* v. *Cooke*, 2 Ex. 654. The correct rule seems to us to be that which is thus stated by Blackburn, J., in his judgment in *Swan* v. *North British Australasian Co.*, where, referring to the judgment of Wilde, B., below, he says 'that he omits to qualify the rule (he had stated) by saying that the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake; and also must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom that person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy.' In the case of the *Bank of Ireland* v. *Evans' Charities* it was expressly held both that the negligence, in order to operate as an estoppel, must be negligence 'in or immediately connected with the transfer itself,' and, further, that it must also be 'the proximate cause of the loss.'"

The principle thus enunciated seems to me to be sound, and, applying it to the present case, I am unable to say that the conclusions arrived at by the learned judge who tried the cause and all the judges of the Court of Appeal are wrong, and I am of opinion, therefore, that both grounds urged by the appellants fail, and that the judgment of the Court of Appeal should be affirmed.

Indeed, as has been observed by Lord Bramwell, in any view of this part of the case I cannot see how this objection can avail in respect of the earlier bills, which, up to the 14th of May, amounted to £3,000, and up to the 27th of June £6,000 more. Nothing is alleged to have been done or omitted, at all events at the first date, which could preclude the respondent from complaining of the prior payments.

Taking the view which I do of this case, it is unnecessary for me to advert to the alleged negligence of the bank in continuing to pay such large sums in cash over the counter, and not through a bank, further than to say that there is nothing in the evidence relating to the matter (which is very much in conflict), which, in my judgment, relieved the bank from their responsibility in respect of the payments complained of.

Judgment appealed from reversed, with costs here and below.

Solicitor for the appellants, *Freshfield.*

Solicitors for the respondents, *Hollams, Son, & Coward.*

Court of Appeal

From Q. B. Div. July 6.

TAWES *v.* KNOWLES. (*a.*)

Easement—Grant of adjoining tenements—Right of way—Unity of possession—Mortgage of servient tenement without reservation of right of way—Implied reservation—Reconveyance—Determination of right of way.

The owner of two adjoining tenements possessed a right of way from one tenement through the other. The right of way was not a way of necessity. Previous to the grant of these tenements to two respective grantees, the grantor had conveyed the servient tenement by way of mortgage without any reservation of the right of way. Subsequently, by will, the grantor devised the two tenements to the predecessors in title of the respective plaintiff and defendant. The defendant's predecessor paid off the mortgage, and took a reconveyance of all the interest of the mortgagee, and blocked up the passage creating the right of way.

Held, in an action to secure the original right of way, that, the plaintiff and defendant being both volunteers under the will, the plaintiff had no equity to deprive the defendant of what the defendant's predecessor had obtained by the reconveyance, which was not a mere release of a charge, but an estate larger than what the defendant's predecessor had acquired under the will of the testatrix.

Decision of the Queen's Bench Division (ante, *p.* 512) *affirmed.*

Appeal from the judgment of a divisional court (A. L. Smith and Grantham, JJ.).

The facts sufficiently appear from the judgment of the court below (*ante*, p. 512).

Warrington, for the appellant, the plaintiff, contended that he was entitled to the right of way under the devise to him of 49, Churchway, as a continuous and apparent easement: *Pyer* v. *Carter*, 5 W. R. 371, 1 H. & N. 916; *Brown* v. *Alabaster*, 36 W. R. 155, 37 Ch. D. 490; *Thomas* v. *Owen*, 36 W. R. 440, 20 Q. B. D. 225. He could not claim the right of way as against the mortgagee, but he could as against everybody else, unless the mortgagee had foreclosed or sold the property: *Wheeldon* v. *Burrows*, 27 W. R. 165, 28 *ibid.* 196, 12 Ch. D. 31. The defendant did not derive her title through the mortgagee; she was the devisee of the mortgagor. In equity the mortgagor had an estate in the mortgaged property, not merely a right to redeem, and the testatrix by her will gave the plaintiff all she had power to give, including the right of way. The reconveyance did not put the defendant in the position of a purchaser for value of the legal estate; it was merely a release of the security, placing the parties in the same position as if the mortgage had never existed.

Baker, for the defendant, was not called upon.

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

plied—the reasonable price—you cannot sue him upon the bond as bond, and Coke says if you sue him upon the bond as bond and try to bind him by the seal and nothing else, you cannot do it. But, he says, If the bond is a single bond—*i.e.*, with nothing extra but the reasonable price for the things which have been supplied, and those things are necessaries, then you can sue him, and you can sue him on the bond.

Well, how sensible that is! If there was no bond you certainly could sue him for the price. Why should the law say, because it is a bond (which you are to consider in precisely the same way as you would if there were no bond) you cannot sue him. That would be the very height and essence of foolish technicality, and even in Coke's technical days it was disregarded at once, and there is his authority for saying so. Now what is the next case? You have what we all know to be a most valuable criticism and explanation of Coke next to his own—Hargrave's Notes—always considered by lawyers as of the utmost value, and he explains exactly, and in more modern language, what the distinction is. He is a great authority.

Now has this principle been acted upon? There is the case of *Ayliffe* v. *Archdale*, Cro. Eliz. 920, which is distinctly to the point. We find the case of *Russel* v. *Lee*, 1 Levinz's Rep. 86, relying upon this passage of Coke's. In these we have a strong judicial declaration of what the law was. Then we have, in *Keane* v. *Boycott*, 2 Hy. Bl. 512, the same passage cited with approval—a judicial declaration, therefore, that it is the law. Later on Bayley, J., in *Baylis* v. *Dineley*, 3 M. & S. 477, recognizes the law distinctly as laid down by Coke and gives it his approval; perhaps the decision on the point was not necessary, but it is a *dictum* of approval from Bayley, J., who is of the highest authority. Again, we find an elaborate exposition of the law by Martin, B., in *Cooper* v. *Simmons*, 10 W. R. 271, 7 H. & N. 719, giving there the authorities, relying upon Coke upon Littleton, 172a, and laying down the law positively, that the fact that an infant is sued upon a bond does not prevent you from recovering if the bond is a single bond, and you do not intend to rely upon it as a bond to the extent that you cannot inquire into the consideration or into the reasonableness of it.

Therefore, to my mind, it comes to this: that you can sue an infant upon a deed for necessaries; but when you do so you must treat the case as against an infant really as if there was no deed. That is how it seems to me to work out. You must treat it as if there were no deed. Therefore, you must see whether the things were supplied, in respect of which the money is sued for. You must consider what they were. You must consider whether they were necessaries subject to the ordinary definition of necessaries, and you must consider whether the price which is claimed in respect of them is reasonable. You must do everything which you would have to do if there were no deed, and which you must do although there is a deed, and although in all other cases of deed you would not have to do it.

Now, that being so, the next thing to consider is, what are necessaries? Food and clothing are always spoken of as necessaries under given circumstances—that is, if the infant cannot get them in any other way. Is education to be considered a necessary? Take it without authority, and say to oneself, Is education in trade, the education to a business in this commercial country of England, this working country of England, a necessary? Before, what I should call, literary education was thought as much of by citizens, education to a trade, to the means of earning a boy's own livelihood when he came to man's estate, and for the purpose of making him a useful citizen to his country by carrying on trade, must have been always thought of the greatest importance; and one would have expected to hear that to teach a boy a trade or a profession was always considered within the class of necessaries in England. Here, again, we have the authority of Coke in the very passage upon which he relied for the other point. He states there that education in trade—mind not education in classics, or education in poetry, or even a literary education—he does not speak of that education, he is talking as a lawyer and a man of business, and what he says is that to educate a young man in England to a trade by which he can earn his livelihood and do good to his country is a class of thing which may be a necessary. Therefore, here you come to it. That it is "a class of thing which may be a necessary." What would make it a necessary? If the boy could get, I suppose, the education which is wanted without going to the plaintiff for the sort of thing that is wanted, it may not be a necessary. Then you must look at the boy's condition in life. If we were to propose to put a young duke or marquis, or this or that person of leisure, to learn the trade of a shoemaker, we should say that must be a fancy and a luxury; he could not want it for a livelihood. But if you took a lad in a lower class of life, you would say that such an education was very good and very necessary. You would have to consider the boy's position in life in each case. Then if you come to something more than shoemaking, to what may be considered a higher trade, such as that of an auctioneer, valuer, and farmer, which this young man was apprenticed to learn, he is in a class of life which makes it reasonable that he should earn his livelihood by those three trades, or one of them; and, therefore, so far, it is reasonably necessary for him.

But that is not enough. The person who sues him has got to show that he supplied him with necessaries. Therefore, he has not only to show that he agreed to supply him with an education which may be a necessary if a jury think so; he must show that he did so supply him. Then he must go on to show that the price which he desires to charge is reasonable, and if it were not reasonable he could not recover it. But if he makes out all this, then he has brought himself within all the conditions which would entitle him to recover if there were no deed; and, according to the authorities I have cited, he is not prevented from suing, and suing upon the bond, if it is a single bond, and if it complies with these conditions. That is what the plaintiff has done here.

Well, those questions which go to show whether what he has supplied and what he professed to supply were necessary for the young man; whether he in fact supplied them; and whether the price which he charged in the bond, and which he proposes to charge now, were reasonable, are all questions of fact to be left to the jury. If they were properly left to the jury, and it cannot be said that the jury have answered them wrongly, then the plaintiff has made out his case.

It is said that the judge misdirected the jury here. In what did the misdirection consist? Mr. Gould complains that there was not a sufficient direction. That is a most difficult point to make out when you ask for a new trial. On that ground it has been often said, and particularly by Martin, B., that non-direction is not misdirection, unless it goes to the length of making what the judge has directed a misdirection. How can that be said in this case? We have read the questions which the judge left here. They seem to be questions which develop every point of the case, and, therefore, the only objection can be that the summing up was too short. I do not think

that is a fault in a summing up. It is clear it deals with every point and deals with them clearly, but it has not, Mr. Gould says, sufficiently developed them. Well, a development which is a development by length very often mystifies people instead of keeping their minds clear. I can see no fault with the direction in this case.

Upon the facts as found, therefore, this verdict is a right verdict, properly procured by a right summing up; the verdict is for the plaintiff, and this appeal must be dismissed.

FRY, L.J.—This is an action upon an indenture of apprenticeship by which the defendant, an infant, contracted to serve his master for four years, and further, on attaining majority, to pay the sum of £300 as well as the sum of £200 which should be paid to the master for teaching the infant the trade of a farmer, valuer, and auctioneer.

Now one point raised upon this is the question whether or not this indenture was a reasonable and proper one, and the jury found that the arrangement was a necessary one for the defendant if he wished to learn the trades of auctioneer, valuer, and farmer, which apparently he did; and they found, further, that the deed of apprenticeship was a proper arrangement for the defendant to have entered into.

Now is there anything in the case which ought to lead us to say that the verdict was arrived at without evidence or against the weight of evidence? On the contrary, it seems to me to be a most reasonable and proper finding. The deed of apprenticeship has nothing remarkable about it, with one exception—*i.e.*, the contract of the infant to pay part of the money, which is certainly an unusual circumstance. One usually finds that the father and friends of the infant pay it at once. But the circumstances of the present case are rather peculiar. There is an infant who is in expectation of receiving some £4,000 on attaining his majority—a small sum of money which I am afraid has led to his being idle during his apprenticeship—and his mother was not in a condition in which to find the whole of his premium. Nevertheless she was extremely desirous that he should be apprenticed to the plaintiff, who appears to have been a person who would advance his interests in life. I can find nothing in the apprenticeship deed which is objectionable. It is quite true it is unusual for a master to sue an infant upon a contract to pay any portion of the premium. That is because, as I have already observed, it is unusual for such a contract to be entered into.

Now the next question is this: Assume the deed to be a reasonable and proper one, can an action be maintained on a covenant to pay for it by the person who has done the service against the infant? The point seems to me really to turn entirely upon the passage in Coke upon Littleton which the Master of the Rolls has read. Coke having laid down the general proposition of the inability of an infant to bind himself, says there are some exceptions. "As an infant may bind himself to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards; but if he binde himself in an obligation or other writing with a penalty for the payment of any of these, that obligation shall not bind him."

Now, in the first place, I desire to express my opinion that, with regard to teaching and instructions, although it includes the teaching and instruction of a trade or business, it is not necessarily confined to instruction in trade. I should be sorry for it to be supposed that a literary or scientific education, which might lead him to occupy a position of great respectability or emolument in any of the learned professions, may not come within the language of Coke. It would be a case then of "teaching or instruction whereby he might profit afterwards." The interests of the State as well as those of the individual require him to receive an education of a kind whereby he may profit.

I would next observe that the very language of Coke implies that it is upon a single covenant that an infant might be made responsible. It is quite true he does not say so in express words. Now that it was true that an infant might be sued upon a bond without a penalty is maintained by Hargrave's comment which has been alluded to. That comment is based upon distinct authorities, one in the reign of Charles I., and the other in the reign of Charles II. The first is *Pickering* v. *Gunning*, Palmer, 528, in which, referring to an earlier case in the reign of James I., *Whittingham* v. *Hill*, Cro. 16 Jac. I. 494, it was determined that a bond taken for necessaries of an infant was good. In Charles II.'s reign the same proposition was the basis of a judgment of the court in the case of *Russell* v. *Lee*, which was a case of a single bill, that is to say, upon an obligation without a penalty, and there it was held to be good. It is quite true that that was an action for necessaries and not for education, but it was already clear that education, whether it be or be not strictly a necessary, as likely to lead to the future profit of an infant, comes within the same rule of law. In fact, I think it must be admitted to be a necessary now after *Pickering* v. *Gunning*. That action was one against an infant for diet, lodging, washing, clothing, and schooling, and one of the judges declined to find with regard to schooling "*quâ* a necessary," to which another of the judges, Doddridge, J., replied in a somewhat quaint mixture of Norman French and Latin:—"Et coment schooling n'est necessary en primier degree al son esse, est en second al son bene esse, car est pur son profit. Car omne quod est utile est aliquande necessarium." Therefore there is no doubt at all that education is a necessary.

Those are the older authorities. As the Master of the Rolls has pointed out, there are also other cases, all of which insist upon the old law as being the present law. Therefore there seems to me to be no doubt whatever that upon a single bond or covenant an infant might bind himself to pay for his schooling and education, provided that the transaction is a reasonable one.

Now the only authority which can be presented in any way as creating any doubt with regard to this conclusion is the case of *Gylbert* v. *Fletcher*. That case is one which shows that, under an indenture of apprenticeship by which the apprentice covenanted to serve his master, on the covenant to serve, the master cannot sue. I ought to add that there is a subsequent decision in equity which shows that the same rule applies, and that no relief can be obtained in equity. Now the reason for this decision is not to be found in the decision itself. I have a strong suspicion that the case rests upon two facts, the one that by common law the master has got considerable powers of correction, and in a certain sense the custody of his apprentice, and therefore it is thought the enforcing of the obligation to serve might prejudice his right with regard to a negligent apprentice, and, secondly, that, by very early statutes power was given to justices of the peace to deal with recalcitrant apprentices, and it seems to me that it was thought to be better to leave to the master this power either of domestic correction or of haling the offender before the justices, rather than of suing upon his covenant. That case is, however, an exception to the general rule that an infant may be sued for a covenant to teach or instruct an apprentice when it is for his

benefit, and does not affect the law as to the liability of an infant on a covenant to pay for his education.

It is said that the master did not do his duty in transferring the latter portion of the infant's time or services from the businesses of valuing and auctioneering to that of farming. I can see nothing whatever in the observation. It seems to me that this was a wise and reasonable thing when he found that the apprentice disliked auctioneering and valuing, and I think that the defendant is the only person who could blame himself in not having derived more benefit from these indentures than he did. On the other points I entirely agree with the Master of the Rolls.

LOPES, L.J.—I do not propose to cite the different authorities which have been mentioned. I shall be content with saying that a careful investigation of those authorities appears to me to establish this—namely, that an infant can be sued on his single bond—by which I mean a bond without a penalty—for necessaries, provided it is shown that what is sued for is a necessary, and the charge made for it is a reasonable charge. I believe that to be the result of the authorities, and I am satisfied with stating the law in that form.

The authorities also establish this: that education may in certain circumstances be a necessary. Whether it is a necessary will always be a question for a jury; and whether the particular kind of education is a necessary will also be a question for a jury. In determining whether it is a necessary, and in determining whether the particular kind of education is a necessary, the station of life, the means of the person in question, and all the circumstances of the case will have to be considered.

Now, that being so, I will apply the law as I understand it to the present case. It being clear that the infant can be sued upon his covenant in this case, the first question that had to be considered was this: whether the particular education which was provided for by this deed was a necessary? The jury had evidence before them with regard to the means of the young man, his position in life, and what was desired for him, and what it would be reasonable for him to do; and having that evidence before them (there is evidence both ways) they came to the conclusion, as I think they were fully justified in doing, that this particular education—viz., the education which would enable him to be a valuer, auctioneer, and farmer—was necessary for him. A great deal was said by Mr. Gould in regard to this triple kind of education, these three kinds of lines which he was to follow—auctioneering, valuing, and farming. I can see nothing unreasonable in that he would learn all those different things, and it would be for him in after life to determine which of them it would be most advantageous for him to follow. It was said by Mr. Gould that the auctioneering and valuing were relinquished and the farming was taken to, and that was a breach of the agreement by the master. I cannot agree with him at all in that. It seems to me a most reasonable thing. If this young man thought he had learned enough of the auctioneering and valuing, or did not care to follow those particular pursuits and preferred farming, it seemed to me to be a most reasonable thing on the part of the master to transfer the youth to the farming branch.

Another question that the jury had to consider—where again there was evidence both ways—was whether the amount of the premium that was to be paid was a reasonable one, and they came to the conclusion that it was. I think they were fully justified in that conclusion. There was evidence upon which they might so find. So far from thinking any conclusion they arrived at on this matter, or with regard to the necessity of the particular education in question, unreasonable, I do not hesitate to say that if I had been on the jury I should have formed the same opinion that they did.

The only one other observation which I desire to make is that the decision in this case does not in any way militate with the decisions which have been brought to our notice with respect to a breach of contract on the part of the apprentice to serve, such as *Gylbert* v. *Fletcher* and other cases. In my opinion there was no fault to be found with the direction of the judge, and there was evidence upon which the jury were justified in finding as they did. I think, therefore, this motion should be dismissed.

Lord ESHER, M.R.—I do not mean at all to differ from what Fry, L.J., has said about the education. It is not merely education for a trade. I did not mean to exclude all other education.

Appeal dismissed.

Solicitors for the appellants, *Torr & Co.*, for *Andrew & Trotter*, Lincoln.

Solicitors for the respondent, *Page & Scorer*, Lincoln.

From Prob. Div. & Adm. Div. March 24.

MICHELL v. MICHELL. (a.)

Married woman—Restraint on anticipation—Restitution of conjugal rights—Settlement of wife's property for husband's benefit—Jurisdiction—Matrimonial Causes Act, 1884 (47 & 48 *Vict. c.* 68), *s.* 3.

The court has no jurisdiction under section 3 *of the Matrimonial Causes Act*, 1884, *to order a settlement to be made on the husband of property of the wife which is subject to a restraint against anticipation.*

Swift *v.* Swift, 15 *P. D.* 118, [1891] *P.* 129, 38 *W. R. Dig.* 86, *explained.*

Norris *v.* Norris, 6 *W. R.* 640, 27 *L. J. P. & M.* 72, *approved.*

Appeal from Jeune, J.

The husband, the present respondent, had obtained a decree against his wife, the present appellant, for a restitution of conjugal rights, and the wife had refused to obey this decree.

The husband then applied, under section 3 of 47 & 48 Vict. c. 68, for a settlement of the wife's separate property for the benefit of himself.

Prior to her marriage with the present respondent, the whole of the wife's property was settled on trust to pay the income to the wife for her separate use without power of anticipation, and after her death on trust, as to part of the capital, for the children of the wife by a former husband, and as to the rest of the capital on trust for the children of the second marriage, and, in default of such children, on trust for the children of the first marriage.

Jeune, J., overruled an objection taken on behalf of the wife that the court had no jurisdiction to deal with the wife's property which was subject to a restraint against anticipation, and he directed a settlement to be made under which a portion of the wife's income was to be paid to the husband.

The wife appealed.

Inderwick, Q.C., Bankes, and *Lewis Thomas*, for the appellant.—There is no power to interfere with existing marriage settlements except in cases where the

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

marriage is put an end to: *Norris* v. *Norris*, 6 W. R. 640, 27 L. J. P. & M. 72; 20 & 21 Vict. c. 85, s. 45; 22 & 23 Vict. c. 61, s. 5; 47 & 48 Vict. c. 68, s. 3. A married woman cannot by any conduct on her part put an end to the fetter against anticipation: *Hyde* v. *Hyde*, 36 W. R. 708, 13 P. D. 166; *In re Glanvill*, 34 W. R. 309, 31 Ch. D. 532; *In re Andrews*, 34 W. R. 62, 30 Ch. D. 159; *In re Keane*, 19 W. R. 1025, L. R. 12 Eq. 115. In *Swift* v. *Swift*, 15 P. D. 118, [1891] P. 129, 38 W. R. Dig. 86, the final order did not necessarily interfere with property subject to a restraint on anticipation.

Bayford, Q.C., and *Vesey Fitzgerald*, for the respondent.—There is nothing in *Swift* v. *Swift* to show that the order was confined to property not subject to a restraint against anticipation.

They also cited *Seatle* v. *Seatle*, 30 L. J. P. & M. 216, 9 W. R. Div. Dig. 18.

LINDLEY, L.J.—The appeal must be allowed. The question is an important one in consequence of the frequency of clauses against anticipation inserted in marriage settlements. The history of the legislation on the subject makes it, to my mind, impossible to uphold the decision of Jeune, J.

There are three Acts of Parliament which we have to consider. The first is the Act of 1857 (20 & 21 Vict. c. 85), which applies, not only to divorces, but to judicial separations in which the wife continues to be a wife; and section 45 enacts: [The Lord Justice read the section, and continued:—] That section was judicially considered in *Norris* v. *Norris*, and, as I understand that decision, it was this, that the court could not, under that section, alter an existing marriage settlement, and could not deprive a wife of the protection enjoyed by her under a clause restraining her from anticipation. It is quite obvious that you do alter the settlement if you strike out that clause, or if you override it, or do anything whatever which frees the married woman from the fetter which is imposed by that clause. This being the interpretation put on the language of the section, and the power of the court being fettered, and, as the Legislature thought, unduly fettered, the power of the court was enlarged, in 1859, by 22 & 23 Vict. c. 61, and enlarged by terms which, it is agreed on all hands, enables the court, in cases falling within section 5 of that Act, to override clauses against anticipation. But observe that that enlarged power is only given where a wife ceases to be a wife—viz., after a final decree of nullity of marriage or dissolution of marriage; and when, therefore, according to the ordinary doctrines of the Court of Chancery, she would be free from the restraint against anticipating her income.

Now we come to the third Act, the 47 & 48 Vict. c. 68, which is the Act we have to deal with here. This Act applies where there has been an order for restitution of conjugal rights—*i.e.*, where the wife does not cease to be a wife, but, on the contrary, remains as much a wife as ever; and in that case it is very curious to observe that the Legislature has adopted, not the wider language of the Act of 1859, but the narrow language of the Act of 1857.

We cannot, consistently with the ordinary principles which guide us in interpreting Acts of Parliament, hold that this Act does more than was done under the first Act. We cannot say that, having regard to the history of this legislation, the court has power to vary the settlement in this sense—namely, to strike out of it that clause which restrains the wife from anticipation, or to make her make a settlement which is inconsistent with the continued existence of that clause.

When we come to the authorities they will be found, subject to what I shall say as to *Swift* v. *Swift*, to be perfectly consistent with that view. *Seatle* v. *Seatle* is certainly not inconsistent with it, because in that case I cannot find that there was any clause restraining anticipation; and it is quite obvious, to my mind, that when a married woman has a life income which she can do what she likes with, and can assign and incumber, the court has power to make her resettle that, and make her do what it wishes. *Seatle* v. *Seatle*, therefore, does not throw any light on the question. *Swift* v. *Swift* does, and I cannot understand *Swift* v. *Swift* except in one way. I think that when Butt, J., made the first order in that case he was under the impression, as his language shows, that if the wife had the income, it did not much matter whether it was under a fetter or not; but when we pursue that case to see what was done, we find that finally nothing was done inconsistent with the view which I now take, because in *Swift* v. *Swift* the wife had two incomes: she had an income of £300 a year, which she was free to do what she liked with during her life; she had also an income of £500 a year, as to which she was restrained from anticipation. The final order was that she should make a settlement of something under £300 a year—an order which could be complied with consistently with the existence of the clause restraining her from anticipation. So that when we come to look at *Swift* v. *Swift* from first to last we do not find that any order was there made which was inconsistent with the view which I have been compelled to take of this Act of Parliament. It does not appear that Jeune, J., was acquainted with the final order in *Swift* v. *Swift*. His observations are based on the judgment of Butt, J., in the early part of that litigation—the subsequent order throws a great deal of light upon it.

I can, therefore, find no case which is really inconsistent with the view I am expressing; but, on the other hand, there are cases which are consistent with that view, and which I do not think are consistent with any other view. I mean the decisions in the sequestration case of *Hyde* v. *Hyde* and *In re Glanvill*, which go the whole length of saying that the court had no power, except, indeed, under the Conveyancing Act, which does not apply here, to do anything to deprive the wife of the protection which is thrown around her by clauses of this description. The appeal must be allowed.

BOWEN, L.J.—I am of the same opinion. We must recollect that after the 20 & 21 Vict. c. 85 had been passed, which contained a section *in pari materia*, and in very similar language to this, the case of *Norris* v. *Norris* was decided, by which the court refused to alter the marriage settlement, and said that language like that gave the court no power to alter it; and, further, that by 22 & 23 Vict. c. 61 power was given to the court expressly to do that, in a limited class of cases only, where nullity or dissolution of marriage had been decreed. When, therefore, we find the third Act of Parliament, 47 & 48 Vict. c. 68, going back to the language of the first Act, when dealing with a class of cases which are not cases of nullity or dissolution of marriage, but where the marital tie still exists, it would be doing violence to all the rules of construction to suppose that we ought to place upon the language of the last Act any other construction than that which was placed upon the same language by the court in *Norris* v. *Norris*.

That such was, in fact, the construction placed by *Norris* v. *Norris* upon the first Act seems plain when we refer to the case, and especially by the light which was shed upon it by the note in the report (27 L. J. P. & M., at p. 73), which cites *Tourle* v. *Tourle*, a case

decided before Lord Campbell in the Appeal Court on the 13th of May, 1858, in which Lord Campbell again says: "The point has been considered, and the court are of opinion they have no power to alter marriage settlements." That is, therefore, the way in which the law stands upon the Act of Parliament alone. But I think, besides that, there is every reason for supposing that the Act of Parliament may have been designedly intended to do something short of enabling the separate property of a married woman, where there was a fetter upon anticipation, being brought within the purview of that section. It is contrary to the principles of this court, and of any court in this kingdom which deals with a woman's property (unless the statute has expressly given them power), that a woman should be enabled by her own conduct to discharge herself from the fetter imposed by the restraint upon anticipation of her income. That has been pointed out in case after case—as, for example, in *In re Glanvill*, and in the Court of Appeal in *Hyde* v. *Hyde*, where the court refused to allow a sequestration to issue although a married woman was in contempt.

As to the other authorities cited—viz., *Seatle* v. *Seatle* and *Swift* v. *Swift*—very clear observations have been made upon them by my learned brother, and I say nothing more.

KAY, L.J.—It seems to me that the legislation in matrimonial cases is not only perfectly consistent in all the three Acts which have been cited, but that it is very reasonable, and evidently very carefully and cautiously worded.

The first Act applies either to a case of dissolution of marriage or to a case of judicial separation, and in either case it gave power to the court to make a settlement for the benefit of the husband and children, where the wife was in fault, of property of the wife. But it did not refer in any way to marriage settlements or to altering marriage settlements.

Then came the case of *Norris* v. *Norris*, where the language of the judges is very shortly reported, but which was a case in which, having decreed dissolution of marriage, Lord Campbell, then presiding in the Matrimonial Court, after consideration, declared that "as regards marriage settlements we think we have no power to deal with them in any way." We have not got the facts of that case before us very completely, but it is obvious from the language, that what the court was asked to do was in some way to interfere with the marriage settlement. Therefore, I have come to the conclusion that it was a case in which the wife was under the marriage settlement restrained from anticipation, and the court was asked, notwithstanding that restraint, to deal with the interest which she had under the marriage settlement. That very probably is so. But whether that was so or not, then came the second Act, the Act of 1859, which did not apply to a case where the *vinculum* of matrimony remained, but where it was broken; and it provided that where there was an absolute dissolution of marriage, the court in that case, and in that case only, might deal with the marriage settlement and alter it for the benefit of the former husband and children.

Then came the third Act, which does not deal at all with the case of dissolution of marriage, but deals with a case in which there has been an order for restitution of conjugal rights, or where there is an application for restitution of conjugal rights by the husband, and there the court is empowered, not to interfere with the marriage settlement, but, adopting the language of the first Act, it is empowered to make a settlement out of the property of the wife.

Therefore, it seems to me, as I have said, that the Legislature has very carefully limited the power of interfering with marriage settlements to the sole case where a dissolution of marriage has been decreed. Accordingly, in this present case, there having been no dissolution of marriage, but it being a case of decree for restitution of conjugal rights, the court has no power whatever to interfere with the marriage settlement.

I have no doubt, from the language of Jeune, J., that he felt the difficulty, and only thought that he was bound by the decision of *Swift* v. *Swift*; but whether the original language of Butt, J., meant that he had power to interfere with the marriage settlement or not, it is clear that the final order made in that case by Hannen, P., was one which did not, or need not, interfere in any way with the marriage settlement, because the only amount directed to be settled might have been supplied out of funds to which the wife was entitled, and in respect of which there was no restraint upon anticipation at all. Hannen, P., determined that all the court would do under the Act of 1884 was to direct a settlement to be made, and he directed a settlement to be made of so much of the wife's income. Now that settlement could perfectly have been made without in the least degree interfering with the income as to which the married woman was restrained from anticipation. It is impossible, therefore, to treat *Swift* v. *Swift* as being a decision that the court had, under the Act of 1884, any power to alter a marriage settlement by settling that part of the wife's property as to which she is restrained from anticipation. If it did so decide, I confess, from my view of this Act, I should be entirely unable to agree with it.

Appeal allowed.

Solicitors for the appellant, *Ingram, Harrison, & Ingram.*

Solicitors for the respondent, *Day & Cather.*

High Court of Justice.

Chan. Div. North, J. — June 25.

In re CRAWSHAY.
WALKER *v.* CRAWSHAY. (a.)

Settlement—Forfeiture—Life interest—Proviso for cesser on alienation—Agreement to settle—Settlement pursuant thereto.

By an agreement for a settlement made in contemplation of marriage, C. agreed that, after the marriage should have been solemnized, a settlement should be executed, whereby any moneys and property which he should receive and be entitled to under the will of his mother, should be settled in trust for his wife for life, then for himself for life, then for the children of the marriage. The marriage took place, and a settlement was subsequently executed pursuant to the agreement. The mother, having under her father's will a power to appoint a sum of money among her children, appointed by will a part thereof, to be held upon trust for C. for his life, subject to a proviso for the cesser of his life interest if he should at any time assign, charge, or otherwise dispose of it, or attempt so to do.

Held, that the agreement and settlement did not apply

(a.) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

to the life interest of C., which he was incapable of assigning, and that the forfeiture intended to be avoided had not taken place.

Originating summons.

The question to be determined was whether the defendant Codrington Fraser Crawshay had, by virtue of an agreement made in contemplation of his marriage, or the settlement made in pursuance of it, so assigned or otherwise dealt with his interest in a sum of £15,000 New Consols as to cause a forfeiture of all interest therein, under a proviso in his mother's will.

By his will, dated the 21st of October, 1865, William Crawshay bequeathed the sum of £150,000 £3 per Cent. Consolidated Annuities to trustees upon trust to pay the dividends to his daughter, Jessy Crawshay, during her life for her sole and separate use, and after her decease upon trust, as to the capital, for such child or children of his said daughter Jesse as she should by deed or will appoint, and in default of such appointment, upon trust for all and every the children of his said daughter, in equal shares.

The testator also bequeathed a further sum of £10,000 to his said daughter Jesse, to be paid to the trustees of the above-mentioned legacy, upon the same trusts as the above-mentioned legacy.

William Crawshay died on the 4th of August, 1867.

By an agreement for a settlement dated the 28th of September, 1881, and made between Codrington Fraser Crawshay of the first part, Emily Howard Cartland of the second part, and George Howard Cartland and John Howard Cartland of the third part, after reciting that a marriage was intended shortly to be solemnized between Codrington Fraser Crawshay and Emily Howard Cartland, and that C. F. Crawshay was entitled on the death of his mother, Jessee (*sic*) Crawshay, under a settlement made upon her marriage, to a sum of £5,000 or thereabouts, and might also become possessed of or entitled to other property and moneys under her will, it was witnessed that it was mutually declared and agreed between the parties thereto that when conveniently might be after the solemnization of the intended marriage, or immediately upon a request in writing being made after the solemnization of the intended marriage, an indenture of settlement should be made and executed whereby the said sum of £5,000, "and any further moneys and property which the said Codrington Fraser Crawshay should receive and be entitled to under the will of his said mother Jessee Crawshay as aforesaid," should be conveyed, surrendered, settled, assigned, and assured upon trust for Emily Howard Cartland for her life for her separate use, and after her decease for Codrington Fraser Crawshay for his life, and after his decease for the children of the intended marriage

The marriage between Codrington Fraser Crawshay and Emily Howard Cartland took place on the 29th of September, 1881.

By her will, dated the 29th of January, 1885, Jessy Crawshay appointed that "the principal sum of £15,000 Consolidated Annuities, part of the said trust fund"—which represented the said sums of £150,000 £3 per Cent. Consolidated Annuities and £10,000 over which she had the power of appointment under her father's will as set forth above, should be held upon trust that the trustees or trustee thereof should, subject to a proviso thereinafter contained, pay the dividends and annual income thereof to her son Codrington Fraser Crawshay during his life, and after his death upon trust for his children, as he should by deed or will or codicil appoint, and in default of appointment, upon trust for all or any of his children who, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry, such children, if more than one, to take in equal shares as tenant in common. Then there followed a proviso to this effect: "Provided and I appoint and declare that if my said son Codrington Fraser Crawshay shall at any time or times assign, charge, or otherwise dispose of in the way of anticipation the annual income hereinbefore directed to be paid to him during his life, or any part thereof, or by any deed or writing attempt so to do, or shall become bankrupt, or shall have done or committed, or shall hereafter do or commit, any act or thing, or suffer or become subject to any process or circumstances, whether voluntary or involuntary on his part, by reason or in consequence of which the said annual income, if belonging to him absolutely, or any part thereof, would become legally payable to any other person or persons, then and in either of the said cases his life interest shall cease as if he were dead, the subsequent trusts herein declared of the said principal sum of £15,000 being accelerated, and the said annual income during the remainder of his life, if there shall be no one absolutely entitled to the principal from which the same shall be derived, being paid to or applied for the benefit of the person or persons for the time being presumptively entitled to such principal, according to their respective interests therein."

On the 9th of October, 1885, a settlement was executed in pursuance of the agreement of the 28th of September, 1881.

Jessy Crawshay died on the 17th of July, 1889, and her will was proved in the principal registry on the 7th of August following.

The plaintiffs were the present trustees of a sum of £15,000 New Consols (representing the sum of £15,000 £3 per Cent. Consolidated Annuities).

The defendants were the said Codrington Fraser Crawshay and the two (infant) children of the marriage.

G. Murray, for the plaintiffs.

Bramwell Davis, for Codrington Fraser Crawshay.—(1) The money in question does not come to Mr. Crawshay under his mother's will at all, but under his grandfather's, and so it is not caught by the agreement or settlement. (2) Assuming it does come to him under his mother's will, the agreement does not include life interests. (3) Even if it would include life interests, at any rate it does not include one which was to cease on any attempt to assign it.

He cited *Brooks* v. *Keith*, 9 W. R. 565, 1 Dr. & Sm. 462 (see p. 466); *In re Allnutt, Pott* v. *Brassey*, 31 W. R. 469, 22 Ch. D. 275; Davidson's Prec. Conv., 3rd. ed., vol. 3, pt. 1, p. 200 n.; *Coventry* v. *Coventry*, 11 W. R. 868, 32 Beav. 612; *Ewart* v. *Ewart*, 1 W. R. 466, 11 Hare, 276; *White* v. *Briggs*, 22 Beav. 176; *Scholfield* v. *Spooner*, 32 W. R. 910, 26 Ch. D. 94.

Reginald Winslow, for the infant defendants.—The property is not within the covenant. (See judgment of Cotton, L.J., in *Scholfield* v. *Spooner; Hurst* v. *Hurst*, 21 Ch. D., *per* Fry, J., at p. 286; Vaizey on Settlements, I., 254.)

NORTH, J.—The first point taken in this case was that the covenant in the agreement for a settlement does not include the £15,000 in question, or the life interest in it, on the ground that it was not money received to which the husband was entitled under his mother's will; it being said it was only in exercise of a power contained in her will, the power being to say how the money coming under another will (that of the grandfather) was to go. But it was an exercise by her of a special power, and if she had not exercised

that special power by her will this £15,000 would not have gone this way at all; it would have passed in default of appointment and been outside the case. It is not the case of the mother exercising a general power, but it is a special power; and in my opinion it is clear it came under her will, because, if she had not made such a will, the £15,000 would never have come in this channel at all.

Then two other points are taken. It is said that the terms of the agreement for settlement are not such as to include life interests; and, secondly, that, even if they would, at any rate they do not include a life interest which can only continue till the covenant comes into play and then cease to exist, and therefore nothing can pass under it. I do not think it necessary to deal with the first of those two questions, because, assuming that a life interest would pass under such an agreement, I do not think that a life interest that is killed by the agreement at its birth does pass at all. The proper thing to do is, I think, first of all, to look at the agreement for a settlement and see what that says. It is an agreement for a settlement made upon a marriage. It recites the marriage is intended, and then it recites that the husband is entitled to certain property, and may become possessed of other property and money under the will of his mother. Then the agreement is that he will, upon a certain request, execute a settlement. "In consideration of the intended marriage and for making some provision for his intended wife and the issue of the marriage, it is agreed that he will upon request execute a settlement whereby any moneys and property which he shall receive and be entitled to under the will of his mother shall be settled upon certain trusts, being for his wife for life, first remainder to him for life, afterwards to the children of the marriage, with remainders over."

In my opinion, that is intended to secure for the persons to be benefited under the settlement some things that they would not have but for the existence of it; in other words, it is intended to make a settlement upon them, and I do not think that its intention, or that its scope, is to do anything more than secure for them anything that came under it—anything that legitimately comes within its terms. But the contention is, that the effect of executing it is, not only not to give the wife and children anything under the agreement, but actually to destroy the interests of the husband in another fund, which the wife and other persons interested under the agreement for a settlement cannot get in any way by virtue of that agreement. I do not think that is the scope and object of the agreement at all. The agreement is to secure what can be secured for the parties interested, but not to affect interests outside the agreement, or prejudice them when the so prejudicing them will do no good whatever to the persons interested under the agreement in question. In my opinion, therefore, it is intended to give and secure to the beneficiaries under the settlement whatever they can get, but when it has done that its object is at an end, and it is not intended to destroy or divert an interest which cannot be diverted of the beneficiaries under the intended settlement. In my opinion, therefore, the settlement does not apply to the interest of the husband which he is incapable of assigning, and I think it would be clear in principle, though I am glad to find two of the cases cited in my opinion point to the same direction, and particularly that Chitty, J., took the same view in *In re Allnutt, Holt* v. *Brassey*, and I am glad to have his concurrence expressed there in the view that I take.

Then we come to the will itself, and it is said we must look at the will and see if the interest has come to an end. The will provides that Mr. Crawshay is to have the interest of the £15,000 for his life, subject to these words at the end:—"If my son shall at any time or times assign, charge, or otherwise dispose of." Perhaps it is wrong to say it was given to him for life, because the direction is to pay the dividends and annual income to my son during his life, and after his death upon trust for the children, subject to this proviso which follows, which is:—"That if my son shall at any time assign, charge, or otherwise dispose of in the way of anticipation the annual income hereinbefore directed to be paid to him during his life, or any part thereof, or by any deed or writing attempt so to do, or become bankrupt, or commit anything whereby by reason or in consequence of which the annual income, if belonging to him absolutely, or any part thereof, would become legally payable to any other person or persons, then and in either of the said cases his life interest shall cease as if he was dead, the subsequent trusts being accelerated."

What is the meaning of that? It is this. She intends he shall take the interest of the fund in question in such a way that it shall not be capable of alienation at all. It is not her desire that it shall be forfeited in a particular event; it is that it shall be secured to him in a particular event, and, in order to secure it to him, the object is that he is to be incapacitated from doing anything by which, if he takes an absolute interest during his life, there will be any portion of his life in which some person who is not an object of the trust created by her will will be receiving the income. That really is the object to which this clause of forfeiture, as it is called, is addressed. It is to confine the fund to the persons whom the testatrix intends to be the recipients of it, and to prevent any outsider ever becoming entitled in any way to the fund. Well, that will be accomplished if it is so construed as to prevent the agreement to do what he could not do being fatal to the gift, and, in my opinion, the true construction is that, inasmuch as nothing has been done by which the right to receive the income of this fund can be forfeited, the forfeiture which she intends to avoid has not taken place.

Under the circumstances I am of opinion that the interest the son takes in the income of £15,000 is not divested or put an end to by the execution of this.

Solicitors, *A. R. & H. Steele.*

Chan. Div.
Kekewich, J. } June 5, 6, 8.

GRIGG *v.* NATIONAL GUARDIAN ASSURANCE CO. (LIMITED). (*a.*)

Bill of sale—Registration—Pledge—Delivery order—Parol contract—Document essential to the transaction—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 3, 4—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 8, 9.

The plaintiff, as owner of goods in a warehouse, subject to a charge of £100, *agreed verbally with the defendants for a loan of* £250 *on the security of the goods. He also gave them a promissory note for* £255 *and a written agreement for payment of further interest. The* £100 *was paid off and the inventory of the goods handed to the defendants, the balance being paid to the plaintiff. The warehousemen refusing to transfer the goods till their charges were paid, the plaintiff gave the defendants an*

(*a.*) Reported by H. C. ROPER, Esq., Barrister-at-Law.

order on the warehousemen for the delivery of the goods on payment of their charges. The defendants paid the charges, and the goods were transferred into their names in the warehouse books, the plaintiff giving them a promissory note for the amount of the charges and a written agreement for further interest.

Held, that the transaction was one of pledge, and was not affected by the Bills of Sale Acts.

Motion.

This was a motion to restrain the defendants from selling certain furniture and effects, the property of the plaintiff, and for an account. The question was whether the transaction amounted to the giving by the plaintiff of a bill of sale which ought to have been in statutory form and registered.

In May, 1890, the plaintiff was the owner of these goods, which were warehoused at Messrs. Taylor & Sons' Repository, subject to a charge of £100 and interest in favour of Messrs. Attenborough. On the 11th or 12th of that month he applied to the defendant company for a loan of £250 for fourteen days on the security of the goods, and this was agreed to on condition that the goods were transferred into the name of the secretary of the company, Mr. T. J. Bourne. The plaintiff also gave the defendants a promissory note for £255 payable fourteen days after date, and an agreement for payment of interest in case of default. Part of the £250 was paid to Messrs. Attenborough, who thereupon gave the inventory of the goods to the defendants.

Messrs. Taylor & Sons refused to transfer the goods until their charges were paid, and the plaintiff gave the defendants an order addressed to Messrs. Taylor & Sons as follows: "Deliver to Mr. Thomas James Bourne or his order all property warehoused with you in my name on payment of your charges."

The defendants paid these charges and the goods were transferred in the warehouse books into the name of their secretary. The plaintiff then gave the defendants a promissory note for £30 15s., payable fourteen days after date, for the warehousing charges, and an agreement for payment of further interest in case of default. Both promissory notes, both agreements, and the delivery order were dated, and the £250 lent on, the 12th of May, 1890.

The plaintiff did not make the necessary payments, and after some correspondence the goods were in the beginning of May, 1891, removed by the defendants' orders from Taylor & Sons' warehouse to an auctioneer's premises for immediate sale.

Minton Senhouse, for the motion.—The agreement was, in fact, for a bill of sale, and ought to have been in writing in the statutory form and registered. The only document here is the delivery order, which is not in proper form and cannot be registered. The bill of sale is therefore void. The transaction was not one of pledge. Possession of the goods was not at once transferred by the delivery order, it was only to be transferred on the occurrence of a future event. The delivery order is essential to their title, and the contract was not complete without it: Bills of Sale Act, 1878, ss. 3, 4; Bills of Sale Act, 1882, ss. 3, 8, 9; *Ex parte Close*, 33 W. R. 228, 14 Q. B. D. 386; *Ex parte Parsons*, 34 W. R. 329, 16 Q. B. D. 532; *Ex parte Hubbard*, 35 W. R. 2, 17 Q. B. D. 690; *In re Cunningham & Co.*, 33 W. R. 387, 28 Ch. D. 682; *Mills* v. *Charlesworth*, 39 W. R. 1, 25 Q. B. D. 421.

Warmington, Q.C., and *Dundas Gardiner*, for the defendants.—The transaction was a parol agreement for a pledge, and the Bills of Sale Acts do not apply. The delivery order was not an assurance, and was not a necessary part of our title. Possession passed to us at the first, subject to the charges of Attenborough and Taylor & Sons, although the custody of the goods remained the same. We obtained the delivery order to satisfy Taylor & Sons, but our title was complete without it. The transaction was a "transfer of goods in the ordinary course of business" within section 4 of the Act of 1878. That section also excepts "orders for the delivery of goods": Reed on the Bills of Sale Acts, 8th ed., p. 41; *Hilton* v. *Tucker*, 36 W. R. 762, 39 Ch. D. 669; *Newlove* v. *Shrewsbury*, 36 W. R. 835, 21 Q. B. D. 41; *North Central Wagon Co.* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 35 W. R. 443, 35 Ch. D. 191.

Minton Senhouse replied.

KEKEWICH, J.—The question for decision in this case is whether a charge in favour of the defendants on the plaintiff's goods is avoided by the Bills of Sale Acts. That is not the question apparently raised by the notice of motion, and no one reading the affidavit in support of the motion would suppose that it was the question intended to be raised on the motion. Mr. Senhouse, however, who has argued the case with tact and ability, has seen that this is the point which calls for decision. The circumstances are peculiar in this sense, that they are more or less distinguishable from every reported case, but yet they are such as must often have occurred and are likely to occur again. There is no necessity to recapitulate them, and I will therefore at once endeavour to apply to the facts the settled law. The following propositions I take to be established by the cases cited, but I must not be taken to consider that any one case establishes these propositions, nor, if I mention one case as an authority for a proposition, must it be taken that that is the only authority, as the cases overlap one another. First, the Bills of Sale Acts strike not at transactions, but at documents: *North Central Wagon Co.* v. *Manchester, Sheffield, and Lincolnshire Railway Co.* Secondly, if there be a document, it must be expressed in statutory form unless it fall within the statutory exceptions; it is no answer to say that it cannot be so expressed: *Ex parte Parsons, In re Townsend.* Thirdly, the Acts have no application to a pledge as distinguished from an assurance: *Ex parte Hubbard, In re Hardwick*, in which case *Ex parte Close* is quoted with approval. Fourthly, delivery, which is essential to a pledge, may be effected without a physical change of possession: *Mills* v. *Charlesworth.* Fifthly, the Acts have no application where the right to possession can be proved by parol evidence without reference to documents: *Newlove* v. *Shrewsbury.* Sixthly, if the right can be so proved, the co-existence of a document recording the transaction but not expressed in statutory form does not vitiate the transaction: *Mills* v. *Charlesworth.* It follows, to my mind, from these propositions that there is no document here which comes within the mischief of the Bills of Sale Acts. The delivery order is the only document, and it does not purport to contain the contract between the parties. So far as the goods were concerned the contract is by parol only. The agreements for payment of interest refer to payment of money, not to the security of the goods. The delivery order was the means of changing possession.

The owner had not personal possession of the goods, so he signed the delivery order as an authority to hand over possession to the pledgee. Handing over to the pledgee and holding on behalf of the pledgee are equivalent. When the delivery order had effected that, it had done all that was necessary. It is merely a record of the transaction completed and is therefore, not within the Bills of Sale Acts. It is said that unless that order had been signed the transaction would not have been completed, and being therefore an

professional man. He was justified in doing, but what [illegible] was not to do. Under these circumstances, in a matter of professional life and death, this case is tried, and it is tried until nine o'clock at night, in the absence of witnesses, in the absence of counsel, in the absence of prosecuting counsel, and the only reason given was that that was the mode to preserve order in the court. All I can say is, that it placed the applicant in an immense disadvantage. Convictions followed, then the sentence is gone through, and as a matter of course, there is an application by the law officers, and without opposition the name of the applicant was removed from the roll. Twelve years have passed since then, and twice has application been made to replace this gentleman on the roll, on which applications the circumstances under which the conviction took place were not brought pointedly before the court. There is also a body of testimony which is most striking and is most favourable to the applicant, and no doubt is cast upon his present character as vouched to by his townsmen. We have, therefore, a man who has been for twelve years of his life, no doubt, before us, a body of evidence very strongly marked, that during the whole of that time he has conducted himself perfectly irreproachably. We have the fact that one important circumstance was never presented to the judge and jury, was never presented to the court, either in 1883 or in 1886 [illegible], and we have, further, that all the circumstances of the case are brought to our notice for the first time. Under all these circumstances, it is not conceivable that this court should allow this gentleman to be once replaced upon the rolls. I quite agree that this court ought not to be hastily asked, and that the court ought to be careful to guard the character of those who clothes with exceptional powers and responsibilities. If I thought there was not a strong case here for the reversal of this sentence, I would [illegible] it. I do not see that the applicant [illegible] blame, but, taking all these things together, I think his application should be granted, but on [illegible] by the applicant of all the costs of the application, as under two reasons, the Law Society [illegible] in bringing the matter before the court.

I [illegible] am of the same opinion. The [illegible] to [illegible] that the applicant was guilty of gross [illegible], and I think he maintains that was not [illegible] was the attempt to administer, not only that there was no criminality, but that the applicant was entirely innocent of anything wrong. Certainly, [illegible] with impaired confidence upon the [illegible] and I do not think that the [illegible] in 1883 that the accusation had [illegible] opportunity of being tested. He had [illegible] to [illegible], and, up to 1883, had not [illegible] to attempt to interfere with the verdict of the jury. The [illegible] to my reasons, in my mind, a very serious misgiving as to whether the accusation had [illegible], and we ought to give effect to that misgiving. I have not the slightest doubt that if our procedure permitted an application for a new trial in a criminal case, there would have been ample ground for the interference of the court in this case, thinking that a new trial should be had. I venture to repeat what I said in 1886, that the court has the power, even where it is proved, clearly that there has been a miscarriage against the accused, and, where the statement of a jury, based on good evidence has been offered, to restore a person to the position of confidence which he had previously in the community. A period of twelve years has gone since then, during which time the applicant has been able to satisfy us that he has been a good citizen, and I agree that

e ought to be restored to the rolls on the terms of aying the costs of this application.

Application to restore to the rolls granted, on payment f the costs of the application.

Solicitor for the applicant, *W. C. Clennell.*

Solicitor for the Incorporated Law Society, *E. W. Villiamson.*

Court of Appeal

From Q. B. Div. June 16; July 21.

PELTON BROTHERS *v.* HARRISON. (*a.*)

Married woman—Separate estate—Restraint on alienation—Death of husband—Liability of widow for debts incurred during coverture—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-sections* 2, 4.

A woman possessed of separate estate subject to a restraint on anticipation incurred a debt while under coverture. After the death of her husband judgment was recovered against her, and was limited to such of her separate property as was not subject to the restraint on anticipation. There being insufficient property to satisfy this judgment, application was made to appoint a receiver of the property which had been subject to the restraint.

Held, that the removal of the restraint by the death of the husband did not make such property liable.

Beckett *v.* Tasker, 19 *Q. B. D.* 7, 35 *W. R. Dig.* 96, *affirmed.*

Appeal from a judgment of the Queen's Bench Division (Denman and Wright, JJ.).

The following statement of facts is taken from the written judgment of the court:—

"A married woman incurred a pecuniary liability. At the time of incurring it she had separate property, as to some of which she was restrained from anticipation, but as to the rest, which was of substantial value, she was not. Her husband died in June, 1890. After his death she was sued upon the obligation contracted during the coverture, and judgment was obtained against her, which was drawn up in the form settled in *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120, at p. 132:—"It is adjudged that the plaintiff do recover £ and costs (to be taxed) against the defendant, such sum and costs to be paid out of her separate property as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant not subject to any restraint on anticipation, unless, by reason of section 19 of the Married Women's Property Act, 1882, the property shall be liable to execution notwithstanding such restriction."

Execution was issued against her property, which had been separate during the coverture, and as to which she was not restrained from anticipation, but she had incumbered it so that only about £16 was recovered. The execution creditor then obtained *ex parte* an order for a receiver of the property of the married woman as to which, during the coverture, she had been restrained from anticipation.

This order was discharged by Lawrance, J., and an application to a divisional court to reverse his decision was dismissed, with costs.

The execution creditor appealed.

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

June 16.—*Horne Payne, Q.C.*, and *Gregson*, in support of the appeal.

Butcher, contrà.

Cur. adv. vult.

July 20.—KAY, L.J. [after stating the facts, as above set out, continued:—] The question is whether under this judgment the property which the married woman was restrained from anticipating can be affected. The shortest answer is that the judgment expressly directs that there shall be no execution against such property, and, in my opinion, it is as completely excepted from the consequences of the judgment as if it had been specifically mentioned in it and stated to be excepted, because the married woman was restrained from anticipating it.

But we are invited to hold that this is not the meaning of that form of judgment, and that by the Married Women's Property Act, 1882, it was intended to make liable property which could not be affected during the coverture by reason of the restraint on anticipation, if by her surviving her husband it becomes freed from that restraint.

In order to construe an Act of Parliament it was laid down long ago in *Heydon's case*, 3 Rep. 7b, that one of the most material things to consider is the state of the law before the Act, and the defect in that law which the Act was intended to remedy.

In 1880 the attention of the profession and the public had been called to the law with relation to the pecuniary obligations of married women by a decision of the Court of Appeal in *Pike* v. *Fitzgibbon*, 29 W. R. 551, 17 Ch. D. 454. It was there held, reversing the judgment of Malins, V.C., that the engagements of a married woman could only be enforced against so much of the separate estate to which she was entitled, free from any restraint on anticipation, at the time when the engagements were entered into, as might remain at the time when judgment was given against her; and that they could not be enforced against free separate estate to which she became entitled after the time of the engagements, nor against separate estate to which she was entitled at the time of the engagements, but which she was restrained from anticipating. In short, it was held in that case that only the property which at the time of the engagements sued on she could have assigned or charged by writing under her hand could be made liable under a judgment against her.

In that state of the law the Married Women's Property Act, 1882, was passed. It relates to married women, and to married women only. It does not relate to a woman who is not actually under coverture. It provides (section 1, sub-section 2) that a married woman shall be capable of entering into and rendering herself liable in respect of her separate property, and of suing and being sued either in contract or in tort, or otherwise in all respects as if she were a *feme sole*, and her husband need not be joined, and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise. By sub-section 4, "Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may hereafter acquire."

The property sought to be affected in this case was not acquired after the date of the engagement sued on, it was hers at that time, and it could not have been made liable during the coverture by reason of the restraint on anticipation.

The form of the judgment in *Scott* v. *Morley* recog-

nizes what has never been disputed, that the statute makes no difference in this respect, but that property as to which she is restrained from anticipation, whether possessed by her at the time of the engagement or acquired afterwards, could not be made liable by any process: *Harrison* v. *Harrison*, 36 W. R. 748, 13 P. D. 180.

But it is argued that when the husband died this property was still separate property, and that by the death of the husband the restraint on anticipation was gone, and it may therefore be treated as separate property acquired upon the death of the husband.

The answer to this argument is, that there is no such thing as separate property of an unmarried woman. Separate property means property held separately from the husband. The ordinary words of settlement are in trust for the wife "for her sole and separate use, independently of her husband and of his debts, control, and engagements," and the words "separate use" or "separate property" are merely a short mode of expressing the effect of that provision.

By section 2 of the Act all property of a woman who marries after the date of it becomes upon her marriage her separate property. Therefore, if this argument were to prevail, it would follow that any property whatever acquired by a woman after the death of her husband since this Act would be her separate property, because it would become so if she should marry again; and, indeed, that the property of every unmarried woman is separate property because it will become so on her marriage. That is precisely the effect in equity of a trust for the separate use of a woman. Such a trust is completely inoperative while she is discovert, but it becomes effective the moment she marries, and continues so during any coverture or any number of successive covertures.

It may be argued that if this is so, it follows that the separate property of a married woman which might, during the coverture, be made liable for her engagements, as it ceases to be separate property upon her husband's death, could not be made liable after that event. In my opinion that does not follow. Such property, if according to the language of the Act the contract of the married woman did "bind" it during the coverture, could not become free from the possible obligation by its ceasing to be separate property on the death of her husband. It was property which the creditor could have attached during the coverture. His right or power of attaching it did not cease because it was no longer separate property.

This was so held when the wife died before the husband and her free separate property devolved upon him. Judgment was given against him as her representative in the form settled in *Scott* v. *Morley*, partly because of the language of the Act that her contract bound that property, but also by reason of section 23, which imposed upon her representative in respect of her separate estate the same liabilities as she would have had if living: *Surman* v. *Wharton*, *ante*, p. 416, [1891] 1 Q. B. 491. The argument, however, was mainly founded on the judgment of the Court of Appeal in *Jay* v. *Robinson*, 38 W. R. 550, 25 Q. B. D. 467. A woman was divorced. After the divorce she became entitled to a *chose in action*. She married again in 1889. Without any settlement under section 2 of the Act that *chose in action* would have become her separate property upon her second marriage. But by a deed of settlement in contemplation of that second marriage that *chose in action* was settled in trust to pay the income thereof during the joint lives of the husband and wife to the wife for her separate use without power of anticipation. Subsequently the *chose in action* was reduced into possession by the payment of £5,000 to the trustees of the new settlement. A judgment had been recovered against her during her former coverture substantially in the form in *Scott* v. *Morley*, and the Court of Appeal, giving a liberal construction to section 1, sub-section 4, of the Act of 1882, held that "separate property which she may thereafter acquire," included separate property acquired upon a subsequent coverture, and a receiver was therefore appointed in respect of this £5,000.

There were two questions of difficulty in that case—(1) Whether the obligation of the married woman contracted during the former coverture is a debt contracted before marriage within the meaning of sections 13 and 19, or whether those words refer only to debts properly so called—that is, debts contracted by an unmarried woman; and (2) whether "separate property which she may thereafter acquire" includes separate property acquired during a second or other subsequent coverture. The Court of Appeal decided both these questions in favour of the creditor.

But that case did not decide that the £5,000 dealt with in it could have been attached under the judgment if she had not married again.

It is argued that unless it could, the law on this subject is in a very anomalous condition. But if it be so, that is a matter rather for the consideration of the Legislature than of this court.

If the argument in this case were to prevail, I do not see how to avoid the conclusion that all property acquired by a woman after the death of her husband, whether settled to her separate use or not, could be made liable under a judgment obtained against her before the death of her husband under this section 1, sub-section 4, of the statute, which does not profess to make liable anything except the "separate property" which a married woman may thereafter acquire. In my opinion the mischief which this section of the Act was intended to remedy was that pointed out by the decision in *Pike* v. *Fitzgibbon*, where it was held that separate property acquired during coverture after the date of the engagement sued on could not be reached under a judgment against the married woman. It was intended to make such after-acquired separate property liable to execution, but not any property acquired by her when not under coverture, nor any property, though separate property, as to which during coverture she was restrained from anticipation. It does not enable a married woman who has no separate property at the time to bind herself by a contract or engagement: *Palliser* v. *Gurney*, 35 W. R. 760, 19 Q. B. D. 519, approved in *Stogdon* v. *Lee*, *ante*, p. 467, [1891] 1 Q. B. 661. Nor does it enable her if she has separate property to bind herself except in respect of that separate property and any other which she may thereafter acquire. The point was decided in the same way in *Beckett* v. *Tasker*, 19 Q. B. D. 7.

The appeal must be dismissed, with costs.

LOPES, L.J., concurred in this judgment.

Appeal dismissed.

Solicitors for the plaintiffs, *Child*, for *Streeter*, Croydon.

Solicitors for the defendant, *Mear & Fowler*.

From Q. B. Div. July 3.

MOUL AND ANOTHER v. GROENINGS. (a.)

Copyright—Musical composition—Foreign copyright—Protection in United Kingdom—"Subsisting and valuable rights or interests arising from or in connection with" the prior "lawful production" of foreign compositions in the United Kingdom—International Copyright Act, 1886 (49 & 50 *Vict.* c. 33), *ss.* 6, 11—*Order in Council of the 6th of December*, 1887.

A bandmaster who has purchased and lawfully produced in England, by means of his band, a piece of music by a foreign composer, before the date of the Order in Council making the International Copyright Act, 1886, *applicable to England, has acquired a subsisting and valuable right or interest in the production within the meaning of the proviso in section 6 of that Act, and cannot be restrained by the proprietors of the foreign composition from the further production of it.*

Appeal from the decision of the Queen's Bench Division, affirming the judgment of the Brighton County Court.

The plaintiff, Mayeur, for whom the plaintiff Moul was the English representative and agent, was a French subject, and in the year 1877 composed and first produced in Paris a piece of music called "The Caprice Polka," which was duly registered in France and obtained the protection of the Copyright Acts in that country. He did not protect it in this country.

In March, 1887, an English publisher named Lafleur printed and published this polka in England.

The defendant, a bandmaster at Brighton, purchased a copy of this polka from Lafleur for five shillings, in order that it might be performed by his band, and thereupon instructed his band to play it, before the 2nd of December, 1887; and it was subsequently played by his band on the pier at Brighton both before and after that date.

On the 2nd of December, 1887, the Order in Council by which the International Copyright Act, 1886 (49 & 50 Vict. c. 33), became applied, amongst others, to French subjects came into force.

The 6th section of the International Copyright Act, 1886, provides as follows:

"Where an Order in Council is made under the International Copyright Acts with respect to any foreign country, the author and publisher of any literary or artistic work first produced before the date at which such order comes into operation shall be entitled to the same rights and remedies as if the said Acts and this Act and the said order had applied to the said foreign country at the date of the said production. Provided that, where any person has, before the date of the publication of an Order in Council produced any work in the United Kingdom, nothing in this section shall diminish or prejudice any rights or interests arising from or in connection with such production which are subsisting and valuable at the said date."

By the 11th section of the same Act it is provided that "the expression 'produced' means, as the case requires, published or made, or performed or represented, and the expression 'production' is to be construed accordingly."

The plaintiffs brought an action in the Brighton County Court claiming damages for the infringement of Mayeur's sole right of performance, and for an injunction.

The county court judge found for the defendant.

The plaintiffs appealed to the Divisional Court (A. L. Smith and Grantham, JJ.), who affirmed the decision of the county court judge.

The plaintiffs appealed.

Asquith, Q.C., Rose Innes, and *Roskill*, for the plaintiffs.—The object of this Act being to assist foreign composers, the construction most favourable to them should be put upon this proviso to section 6. There was no evidence of value in their right or interest to support the finding of the county court judge.

Cutler, Q.C., and *Megone*, for the defendant, were not called upon.

LINDLEY, L.J., after stating the facts and reading section 6 of the Act, said: We have to construe this section and see what protection, if any, is afforded to the defendant in this case. The meaning of the word "produced" in section 6 is explained in section 11, where it is defined to mean "published or made, or performed or represented, as the case requires." The defendant's case is that on the 2nd of December, 1887, the date when this statute came into force, this piece of music had been lawfully produced in England, and that he had a right or interest in this production which was subsisting and valuable. On this question the county court judge has found, although not without great doubt, that this right or interest was a valuable right or interest within the meaning of section 6 of the Act; and unless it can be said there is no evidence to support that finding, this court is bound by it. The Divisional Court have not thought that finding wrong; but we are now asked to go further than this and say that, upon the evidence, this finding was wrong, and that this is not a valuable right or interest. I put, in the argument, the case of the bandmaster's selling the goodwill of his business, including the right to perform this particular piece of music. Can I say that there is no value attached to this right?

Then it is to be noticed that the proviso in this section 6 is peculiarly worded. The expression used is "any person," and again, "any rights or interests," so that it does not say that the right or interest must belong to the person producing the piece in England. As to this I agree with the observations of Smith, J., who says: "If all the bandsmen in the kingdom and all others are to be prevented from playing this polka, it might well be that Lafleur's 'interest' in his unsold copies, if such there be, would be seriously affected, and it seems to me that this would also prevent this action from succeeding, if it were proved that Lafleur was in such a position on the 2nd of December, 1887." I am by no means certain that in construing this section Lafleur's position can be left out of account. This appeal fails.

FRY and LOPES, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellants, *Mann & Taylor.*

Solicitors for the respondent, *Thomas & Hick.*

(a.) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

From Q. B. Div. June 25.

THOMAS v. SEARLES. (a.)

Bill of sale—Validity—"True owner" of chattels—Successive assignments of same chattels—Consideration not truly stated—Undisclosed trust or condition—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10, sub-section 3—Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), ss. 3, 5.

H., being already indebted to T. on earlier securities, including a bill of sale over certain goods, and desiring to obtain a further advance, executed a bill of sale to T. upon the same goods, on the understanding that he should afterwards pay T. the amount due to him on the then subsisting securities, and this amount was paid.

An execution creditor of H. contended that the bill of sale was invalid.

Held, that the bill of sale was good.

Appeal from the judgment of A. L. Smith, J., in favour of the plaintiff upon an interpleader issue.

On the 26th of January, 1889, the plaintiff, who had for several years had money transactions with one Captain Hampden, advanced him the sum of £290 upon a bill of sale of his furniture and effects under the following circumstances.

At the date of the advance, Captain Hampden was indebted to the plaintiff upon a bill of sale given in March, 1888, upon the same goods, in a sum of more than £150; he was also indebted to the plaintiff in other sums on certain promissory notes, and he desired a further advance of £50. Accordingly, it was arranged that a bill of sale should be given upon the goods for £290, and that this sum should be advanced to Captain Hampden upon the understanding that he should afterwards pay to the plaintiff the amount due to him on the then subsisting securities, which was fixed at £235.

Accordingly after the execution of the bill, the amount of £290 was paid to Captain Hampden by two cheques for £240 and £50, which were duly honoured, and two or three days later the sum of £235 was paid to the plaintiff by Captain Hampden.

In June, 1889, an execution was levied at the suit of the defendants upon the same goods. An interpleader summons was taken out by the sheriff, and an issue directed to be tried between the claimant and the execution creditors.

The defendants contended that the bill of sale was a sham and a fraud upon the creditors of Captain Hampden, and that the consideration was, under these circumstances, not truly stated.

A. L. Smith, J., held that the plaintiff was entitled to succeed upon the issue.

The defendants appealed.

Horace Kent, for the appellants.—This bill of sale is void as against the creditors upon three grounds. First, Captain Hampden was not the true owner within section 5 of the Bills of Sale Act, 1882, when he executed the bill of sale on the 26th of January, 1889. The previous bill of March, 1888, over the same goods was still subsisting, and there cannot be two true owners of the same goods at once. The effect of the billl of sale is at once to pass the whole property in the goods to the grantee: see *Ex parte Stanford*, 34 W. R. 507, 17 Q. B. D. 259. Secondly, the consideration is not truly stated, for the true bargain between the parties has not been set out as is required by the Act. Thirdly, this money was subject to a trust or condition as to the repayment of £235, and by sub-section 3 of section 10 of the Act of 1878, this trust not being disclosed in the bill of sale, it is void.

H. Reed (*Jelf, Q.C.*, with him) was not called upon.

LINDLEY, L.J., after stating the facts, said:—Three points have been raised by this appeal. I will deal first with the two last, as they are the more easily disposed of.

It has been argued that the consideration for the bill of sale is not truly stated. The bill is expressed to be in consideration of the sum of £290 "now paid." The question the court has to consider is whether this sum was in fact and truth and substance, and not merely in form, paid or not. Two cheques were unquestionably paid to Captain Hampden for that amount; but it is said that, because there was some agreement as to the subsequent application of the money, that sum was not the true consideration for the bill. In my opinion that agreement has nothing to do with this matter, and this point fails.

The next point is, that this bill was subject to some undisclosed trust, which brings it within the prohibition in sub-section 3 of section 10 of the Bills of Sale Act, 1878. That sub-section provides as follows:—"If the bill of sale is made or given subject to any defeasance, or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith, and as part thereof, otherwise the registration shall be void." It was said that there was here an agreement at the time the £290 was paid that a sum of £235 should be repaid by the borrower to the lender, that being the amount agreed to be due on certain previous securities by the borrower to the lender. The first question which arises on that argument is, Is there a trust? The promise of repayment creates no trust whatever; it simply creates a debt, and if Captain Hampden had become a bankrupt after the bill had been given and before the repayment, the lender's only remedy would have been to prove as a creditor in the bankruptcy. That being so, the question as to whether a trust attaching to the money was a trust attaching to the bill of sale, within the meaning of that section of the Act, does not arise; though I think, as far as I can see, that it is not within it, and that the section means that the bill of sale must be subject to some trust—that the holder must be subject to some trust in order to come within the prohibition. That point, therefore, also fails.

The first point raised on behalf of the appellants is of some importance. It has been contended that it is impossible to have two valid bills of sale, except as against the grantor, in respect of the same chattels. That is a startling proposition, because, if that were so, the facilities for raising money by bills of sale would be enormously curtailed. But there is no principle or authority for such a proposition. By section 3 of the Act of 1882, so far as the two Acts are consistent, they are to be read together, and it is quite obvious that the Act of 1878 contemplates successive bills of sale on the same goods, because in section 10 of that Act there is a provision as to their priority. That section, therefore, remains in force unless there is something in the later Act inconsistent with it. Is this the case? For this, section 5 is relied on. That section avoids a bill of sale, except as against the grantor, "in respect of any personal chattels specifically described in the schedule thereto, of which the grantor was not the true owner at

(a.) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

ie time of the execution of the bill of sale." ; has been contended for the appellants that ie moment a man has given a bill of sale over his oods he ceases to be the "true owner" of them, nd cannot give a second in respect of them. But is nat so? When a man gives a bill of sale over his oods by way of security only, he still has the equity f redemption in them. Why should he not avail imself of that equitable interest for the purpose of iving security for further advances? It would be oing a great deal too far to stretch the language of ection 5 of the Act of 1882 so as to repeal the Act of 878, and make that impossible. I am not prepared o hold now for the first time that this section has the ffect which has been contended for. This point also ails, and the appeal must be dismissed.

FRY and LOPES, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellants, *S. S. Seal.*

Solicitors for the respondent, *Cooper & Sons.*

From Q. B. Div. June 5.

TOMKINSON v. BALKIS CONSOLIDATED CO. (*a*.)

Company—Transfer of shares by person having no title —Certificate issued to transferee—Sale of shares by transferee—Denial by company of transferee's title—Estoppel—Representation contained in certificate—Measure of damages.

P., being the owner of certain shares in the defendant company, executed a blank transfer thereof, and, having procured a certification from the secretary of the company, deposited the transfer so certified with the plaintiffs as security for an advance of £250. P. then sold the same shares to M. and B., and they were registered as owners. Subsequently the plaintiffs, having executed their transfer, sent it to the company for registration, and received a certificate in the usual form. They then contracted to sell the shares on the Stock Exchange, the market price being £426, and, having repaid themselves the sum owing to them from P., handed over to him the balance of the purchase-money. The company refused to recognize the plaintiffs' purchasers, on the ground that the plaintiffs never had a good title to the shares. The plaintiffs, being bound to carry out their contract with their purchasers, bought other shares, the market price then being £717.

Held, that the company, having given the plaintiffs a certificate, were estopped from denying the plaintiffs' title; and that the plaintiffs were entitled to recover from the company the sum of £717.

Appeal by the defendants from a judgment of Pollock, B., at the trial of an action without a jury.

The action was brought by a firm of stockbrokers against the Balkis Consolidated Co. under the following circumstances.

In December, 1888, the defendant company had issued the whole of their authorized share capital, and one Powter was the registered owner of 1,000 shares. Powter was indebted to the plaintiffs on a running account, and being desirous of obtaining from them a further advance, which would make his debt amount to £250, he proposed to secure the repayment of that sum by an assignment of his shares. He accordingly executed a blank transfer thereof, specifying the numbers, and at his request the secretary of the company certified the transfer—that is, he wrote and signed a certification on the face of it, stating that the original certificate in respect of the shares had been lodged with the company. The transfer, so certified, was handed by Powter to the plaintiffs, who thereupon advanced him the agreed sum.

In January, 1889, Powter sold the same shares to Maitland and Balfour, and their names were entered on the register of the company, and a certificate in respect of the said shares was given to them.

In May, 1889, the plaintiffs inserted their own names on the blank transfer deed given to them as transferees, executed it, and sent it to the company's office to be registered. On the 1st of July the company issued and sent to the plaintiffs a certificate, signed by two of the directors, countersigned by the secretary, and sealed with the company's seal, stating that the plaintiffs were the registered proprietors of the said 1,000 shares.

In August, the sum of £193 14s. 6d. being still due to the plaintiffs, they, having obtained the permission of Powter, proceeded to sell the shares in the usual manner on the Stock Exchange. In due course they executed deeds of transfer in favour of various purchasers, and forwarded the same, together with their certificate, to the company's office. The secretary, having certified the transfers, returned them to the plaintiffs, who then handed them to the purchasers, and received from them in exchange the contract price—viz., £426 17s. 6d. This sum the plaintiffs dealt with as follows:—They repaid themselves the £193 14s. 6d. still due as above mentioned, and further applied £123 3s. in payment of other debts due to them from Powter, and paid over to him the balance of £110.

In October the plaintiffs heard that the company refused to recognize their purchasers, on the ground that the plaintiffs themselves never had any title to the shares.

The plaintiffs, being bound to supply their purchasers with shares, went into the market and bought another thousand shares, for which they had to pay £717 10s.

The plaintiffs sought to recover this sum, or, in the alternative, damages.

Pollock, B., was of opinion that, on the authority of *In re Bahia and San Francisco Railway Co.*, 16 W. R. 862, L. R. 3 Q. B. 584, the defendants were estopped from denying the plaintiffs' title by reason of their having given them a certificate, and ordered judgment to be entered for the plaintiffs for the full amount claimed.

The company appealed.

Finlay, Q.C., and *Buckley, Q.C.* (*Sutton* with them), for the appellants.—The giving of the certificate to the plaintiffs does not estop the company from denying the plaintiffs' title. In the *Bahia case* the claim was by the transferee of the persons who had held the certificate, which was treated as creating an estoppel. The present case is more analogous to *Simm* v. *Anglo-American Telegraph Co.*, 28 W. R. 290, 5 Q. B. D. 188. The judgment of Bramwell, L.J., in that case is strongly in favour of the company; it shows that they are not, by the mere giving of the certificate to the plaintiffs, estopped from saying that the supposed transfer to the plaintiffs was a sham transfer. The plaintiffs did not enter into the contract to sell the shares on the strength of any representation contained in the certificate. They acted on the faith of a worthless transfer, which they themselves sent to the company to be registered. If the plaintiffs say they were induced to part with their money to Powter by the certification, it has been held in *Bishop* v. *Balkis Consolidated Co.*, *ante*, p. 99, 25 Q. B. D. 512, that such certification does not operate

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

as an estoppel on the company. If there is any estoppel at all, it can only be to the extent of the plaintiffs' interest in the shares, which was £193 14s. 6d. The plaintiffs are really seeking to obtain, and have obtained, damages for misrepresentation, but *Derry* v. *Peek*, 38 W. R. 33, 14 App. Cas. 337, shows that liability to such damages must be confined to cases where there is fraud. See also *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.*, 35 W. R. 590, 18 Q. B. D. 714. If the court should hold that damages proper are recoverable, the measure of them should be the amount by which the plaintiffs are out of pocket—*i.e.*, the difference between £717 10s. and £426 17s. 6d.

Reid, Q.C. (*Hollams* with him), for the respondents.

Lord ESHER, M.R.—This is an action against a company for refusing to register the transferees of certain shares which the plaintiffs bought and afterwards contracted to sell, the consequence of such refusal being that the plaintiffs were obliged, in order to carry out their contract with their transferees, to go into the market and procure other shares. The company say that the shares which the plaintiffs purported to transfer were not their shares, that they never had a good title to them, because their supposed transferor had previously sold them to some one else. The plaintiffs reply to this: You are estopped from denying that the shares were ours, for you gave us a document of title; you gave us the certificate in order to enable us to sell. Now what is the representation which such a document must always be taken to carry with it? I think that the purchaser of shares who has obtained a certificate is in this position, he can say to the company: I could not tell whether I had a right to be registered without reference to you; I sent you certain documents given to me by my transferor, and asked you to look at them and at the register, and then to say whether I was entitled to be registered; and by giving me a certificate you represented that I was so entitled, and was in a position to sell.

This is in accordance with what was said by Cockburn, C.J., in the case of *In re Bahia and San Francisco Railway Co.*—viz., that a certificate is "a declaration by the company to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the company, and it is given by the company with the intention that it shall be so used by the person to whom it is given, and acted upon in the sale and transfer of shares." The meaning of that is that the object of a certificate is to enable a man to sell, and with that I entirely agree.

I am of opinion that the company by giving this certificate made a representation that the plaintiffs were entitled to these shares, which representation was intended to be acted upon in a certain way, and that the plaintiffs acted in the way intended when they proceeded to sell the shares. They are entitled to say to the company, "We sold these shares because you gave us this certificate." The company, therefore, are estopped from denying that the plaintiffs were entitled to these shares.

We were referred to the case of *Bishop* v. *Balkis Consolidated Co.*, in which it was held that a company is not estopped by a certification; but a certificate is an entirely different thing from a certification; and in considering what the effect of a certificate is, the *Bahia case* is very material. We were also referred to the case of *Derry* v. *Peek*, which is always cited now whenever a case of misrepresentation arises. But I am of opinion that that case has nothing to do with the doctrine of estoppel, and does not in any way touch the present case.

Then there is the question as to the proper amount of damages. I think that the plaintiffs applied the £426 17s. 6d. as they were lawfully entitled to do, and that the whole sum which they paid for the purchase of the other shares is the true measure of damages.

LOPES and KAY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellants, *Stretton, Hilliard, & Co.*

Solicitors for the respondents, *Hollams, Son, & Co.*

From Q. B. Div. May 12.

BURCHARD v. MACFARLANE. (a.)

Practice—Discovery—Commission issued in Scotland—Production of documents by third parties—6 & 7 Vict. c. 82, s. 5.

Section 5 of 6 & 7 Vict. c. 82 only permits the court to order the production of documents before a commissioner as ancillary to the examination of a witness, and does not give power to the court to enforce discovery against persons who are not parties to the action.

Appeal from an order of the Queen's Bench Division (Lord Coleridge, C.J., and Mathew, J.).

The action, which was pending in the Court of Session in Scotland, arose out of a contract by the pursuers to purchase from the defenders a vessel named *The Lady Octavia.*

The Lord Ordinary had granted a commission to examine certain witnesses, and granted "diligence against havers at the instance of both parties for recovery of the documents specified in their respective specifications Nos. 22 and 23 of process, and commission to certain commissioners to take the oaths and examinations of the havers," resident in Germany, London, Glasgow, and Edinburgh respectively and receive their exhibits and productions, and ordained "Mr. A. H. Tindall, chairman, and Mr. A. G. Dyhurst, secretary of Lloyd's Register of British and Foreign Shipping to appear before the commissioner in London and produce any of the documents called for so far as under their control." The specification No. 22 of documents called for by the pursuers was "(1) All correspondence passing between the defenders or Barr, their surveyor, or any person on their behalf on the one hand, and Emil Padderatz, surveyor at Hamburg to Lloyd's Register of British and Foreign Shipping, or any one on his behalf on the other, relating to the condition of the vessel known as *The Lady Octavia* or the surveys of said vessel in 1889 and in July and October, 1890, between the 1st of January, 1889, and the date of raising this action; (2) All correspondence between the said Emil Padderatz on the one hand, and the London office of said Lloyd's Register of British and Foreign Shipping, or any of the officials of said register relating to said matters prior to said date; (3) All reports obtained by, and all communications addressed to, said Lloyd's Register of British and Foreign Shipping, or any of the officials of said register in reference to said vessel during the years 1889 and 1890; (4) Failing principals, copies, drafts, scrolls, or jottings of any of the above documents are called for." The specification No. 23 of documents called for by the defenders was "all correspondence passing between the pursuers or any one on their behalf on the one hand, and Lloyds, or Lloyd's Register of British and

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

Foreign Shipping, or W. H. Tindall, the chairman, and A. G. Dryhurst, the secretary, or anyone on behalf of or as representing Lloyds or Lloyd's Register of British and Foreign Shipping on the other hand, relating to the vessel referred to on record as *The Lady Octavia* between the 1st of May, 1890, and the date of raising the present action." A copy of the interlocutor was duly served, and the commissioner called upon Messrs. Dryhurst and Tindall respectively "to attend to produce the documents mentioned in the specifications served upon you, and give your oath and examination respecting the same on behalf of the pursuers." On their failure to appear a summons was taken out before Wright, J., at chambers, who ordered them to attend before the commissioner at such time and place as he might appoint "for examination as to the documents which Lloyd's Register of British and Foreign Shipping have in their possession answering the description mentioned in the specifications Nos. 22 and 23 of process in the said action, and also that they do respectively produce to the said commissioner the documents mentioned in the said specifications (without prejudice to the said W. H. Tindall and A. G. Dryhurst's objections before the commissioner as to all or any class of documents or document or to further application by pursuers to a judge in any such case)."

On appeal the Divisional Court affirmed this order. Messrs. Tindall and Dryhurst appealed.

Sir R. E. Webster, A.G., Cohen, Q.C., and *James Fox*, in support of the appeal.—This order purports to be made under 6 & 7 Vict. c. 82, s. 5, which enacts that "if any person, after being served with a written notice to attend any commissioner or commissioners appointed to execute any such commission for the examination of witnesses as aforesaid (such notice being signed by the commissioner or commissioners, and specifying the time and place of attendance), shall refuse or fail to appear and be examined under such commission, such refusal or failure to appear shall be certified by such commissioner or commissioners, and it shall thereupon be competent, to or on behalf of any party suing out such commission, to apply to any of the superior courts of law in that part of the kingdom within which such commission is to be executed, or any one of the judges of such courts, for a rule or order to compel the person or persons so failing as aforesaid to appear before such commissioner or commissioners, and to be examined under such commission, and it shall be lawful for the court or a judge to whom such application shall be made by rule or order to command the attendance and examination of any person to be named or the production of any writings or documents to be mentioned in such rule or order." The clause in that section as to documents only means that on the examination of a witness he may be ordered to produce documents as ancillary to his examination, and does not give rights over third parties other than witnesses. This order, however, does not treat either of the applicants as witnesses, but calls on them to ascertain and disclose the documents in their possession.

They cited *Elder* v. *Carter*, 38 W. R. 612, 25 Q. B. D. 194.

J. G. Barnes, Q.C., and *Hon. A. Lyttleton, contrà.*—It is intended to call the applicants as witnesses, and when they are in the box they will be asked to produce the letters and report. The surveys are required in order to prove or disprove the breach of warranty on which the action proceeds. The order itself shows that a Scotch court would call for the production of these documents by a witness, and the effect of the statute is to enable the court to enforce here whatever the Scotch court might enforce within its own jurisdiction.

Lord HALSBURY, L.C.—In this case I do not find any evidence that there are in fact documents in existence such as might be conjectured from the form of this order. The documents, if they do exist, relate to the business of third parties, and not to any right existing between the pursuers and the defenders. They are a correspondence and a report between Lloyds and Lloyd's agent. It is true that they have relation to the particular vessel which is the subject of sale, but that only happens by reason of the peculiar form of incorporation which Lloyds possess, and which enables them to class vessels.

Sitting in this court, and treating the dispute as if it had happened in England, I am bound by the decision of the Court of Appeal in *Elder* v. *Carter*, and I am consequently driven to the inquiry whether or not this is in substance an order for inspection and discovery, or whether it is part of a procedure to examine witnesses. I do not know what facts are to be established. I do not know what documents are asked for. I do not know that the parties have ever condescended upon any particular document, or intimated that they have any knowledge of any document existing at all, and I am led to the conclusion that it is inspection and discovery that is sought, and not the examination of witnesses on commission.

The meaning of the order is, as I construe the meaning of this instrument, that the witness is to be examined if he has got in his possession documents which may become part of the necessary evidence in the cause. If that is the meaning of it, it is quite clear that such an order is not rendered valid because it is limited to a particular ship and to the particular years over which these transactions are spread. This order has been obtained, not by one of the parties against the other, but by both of them against third persons who have no interest in the question and have not been heard. To enforce such an order would be a serious invasion of private rights.

I have hitherto spoken as if this was a matter which occurred in England. On looking at the Act of Parliament it appears to me that the only process intended to be enforced was for the production of documents as ancillary to the examination of witnesses. If there be any difference between the rights of discovery which exist in Scotland and the rights of discovery existing here, I can only say that, sitting in this court, I can only know of such distinction so far as it is brought before me by evidence, and no such evidence has been produced.

The result is that, looking at the order of the Scotch court, and the order that has been made in furtherance of it, we must come to the conclusion that the latter is not an order which is justified by the 5th section of 6 & 7 Vict. c. 82, but that it is an order for discovery under circumstances under which no such order could be made in this country, and I think, therefore, that this appeal ought to be allowed.

Lord ESHER, M.R.—In this case the question turns on the true interpretation of the statute, and we have not to consider the law of Scotland, whatever it may be. The order on the face of it assumes to be made against Tindall and Dryhurst in an action with which they have no relation whatever, and to which they are absolute strangers. It is objected, therefore, on their behalf, that the order cannot be made, both for this reason and because it requires them, not only to state whether there are such documents, but to produce them and allow them to be read before it is determined whether they are evidence either for plaintiff or defendant. What the meaning of this order is I

confess I have myself no doubt. The real meaning of it is that the documents should be produced in order that the persons applying for them may read them and know their contents. In my opinion such an order is beyond the jurisdiction of the judge.

In the Courts of Chancery before the Judicature Acts there was no such thing as a bill of discovery against a third person to discover matters in an action between other parties in which he had no interest. If there were a *subpœna duces tecum* issued in this form it would have been bad, because it is putting upon a witness who had no interest in the question a burthen that there was no right to put upon him, that is, that he should look through his documents or books, and come to the conclusion as to what was relevant to the inquiry. A *subpœna duces tecum* is an order from the court to a person to produce a document which was alleged to be in his possession, and to produce it to the court at the trial, and not to produce it to either party. Under such a *subpœna* when a witness brought the document into court the parties could not ask him for it. All that could be done was that the witness produced the document to the court, and might insist that his document should not be handed to the parties even at the trial. When the judge was satisfied that it was evidence in the case for either party he might order it to be read. Therefore the suggestion is that the Act of Parliament gives, as against third parties, a power which did not exist in any court as against them before the Act.

Now the words relied upon in this Act of Parliament are:—"An order for the production of any writings or documents to be mentioned in such rule or order." That is very like the words in ord. 37, r. 7, "The court or a judge may in any cause or matter, at any stage of the proceedings, order the attendance of any person for the purpose of producing any writings or other documents named in the order." It was held by the Court of Appeal in *Elder* v. *Carter* that notwithstanding the largeness of those words, when the purpose of the rule came to be considered, such an order could not be made against a third person who was not a party to the cause.

That is a judgment which is binding upon this court, and, in my opinion, is clearly right. Then, coming to section 5 of this Act, the question is whether we are not obliged to hold the same with regard to it. It seems to me that this case is outside the Act of Parliament according to its true reading, and that the learned judge had no jurisdiction to make the order appealed against.

FRY, L.J.—In my judgment this order cannot be made, and ought not to be made under the statute. It is analogous to a bill of discovery against a mere witness. Now is such an order as that within the meaning of the statute 6 & 7 Vict. c. 82? In my judgment it plainly is not. That statute enables the court in England or Scotland or Ireland to direct a commission for the examination of witnesses—that means persons who are able to bear testimony with regard to the issues in controversy between the litigant parties. It does not mean that they may be examined with regard to the possession of documents which may be relevant to the controversy between the parties. That observation governs the whole of the section, and I think the words at the end, "for the production of any writings or documents to be mentioned in such rule or order," are only ancillary to the examination of witnesses. The words may require the production of the documents which that witness produces as a witness, but they cannot for one moment be stretched so as to enable the litigating parties to obtain discovery against a witness. It appears to me that if we were to give the slightest countenance to this proceeding we should be doing a great injustice.

It has been said that it is a remarkable thing that A., by making a series of false statements against B. and putting them on the back of a writ, or calling them a statement of claim, may obtain inspection of the books of B. That is the law, but it has never yet been carried to this extent, that by A. making a statement against B. he can obtain discovery of the books of C. This is an attempt to carry it to that extent, and therefore, in my judgment, it ought to fail.

Appeal allowed.

Solicitors for the appellants, *Parker, Garrett, & Parker.*

Solicitors for the parties to the action, *Thomas Cooper & Son.*

High Court of Justice.

Chan. Div. North. J. } May 29; June 5.

IN RE FREME.
FREME *v.* LOGAN. (*a.*)

Will—Equitable contingent remainder—Legal estate in mortgagees—Contingent Remainders Act, 1877—Acquisition of legal estate—Intermediate rents—Heir-at-law—Next of kin.

A testator devised freeholds, the legal estate in some of which was outstanding on mortgages, to his son for life, with remainder to such of the children of the son as being sons, should attain the age of twenty-one, or, being daughters, should attain that age or marry under it; he gave his residuary real and personal estate to his son absolutely. The will was executed before the passing of the Act 40 & 41 Vict. c. 33. The testator died in 1878. In 1888 the son, as tenant for life, sold part of the unincumbered freeholds, and out of the proceeds of sale paid off the mortgages on the incumbered freeholds, which were reconveyed to the uses of the will. Shortly afterwards the son died intestate, leaving three infant sons only surviving him.

Held, that the reconveyance of the mortgaged real estate did not defeat the contingent remainder created by the will.

Held, that the intermediate rents of the freeholds during the suspense of vesting of the remainder went to the estate of the son under the residuary devise as real property.

Motion for judgment.

The testator, W. P. Freme, by his will dated February, 1877, and executed before the passing of the Act to amend the law as to contingent remainders (40 & 41 Vict. c. 33), devised certain freehold and bequeathed certain leasehold estates to his son, James Freme, for life, and to receive and take the rents and profits thereof accordingly, and from and after his decease he devised and bequeathed the same unto and amongst all the children of his said son James as he should by deed or will appoint, and in default of appointment amongst all the children of his said son James who, being sons, should attain the age of twenty-one, or, being daughters, should attain that age or marry under it, equally between them. The testator also devised and bequeathed all his residuary real and personal estate unto his said son James absolutely.

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

At the date of the testator's death in 1878 some of the freehold estate was mortgaged and some was unincumbered. The leaseholds were mortgaged. In 1887 trustees were appointed of the settlement created by the will of the testator for the purposes of the Settled Land Act, 1882.

In 1888 James, as tenant for life, sold a part of the unincumbered freehold estate, and out of the proceeds paid off the mortgages on the other part of the freehold estate, and on the leasehold. The freeholds so discharged from incumbrances were reconveyed to the uses of the will, and the leaseholds to the trustee of the will.

James died in 1888, intestate and a widower, without having exercised his power of appointment. He left three infant sons only surviving him.

The plaintiffs were his two younger sons; the defendants were the trustee of the will, the eldest son of James. the trustees for the purposes of the Settled Land Act, and the executor of the will.

The action was brought to determine (*inter alia*) the following questions arising on the administration of the estate of W. P. Freme:

(1) Whether the effect of the reconveyance of the mortgaged freeholds was, by converting an equitable into a legal estate, to defeat the remainders limited in them by the will of the said W. P. Freme?

(2) Who (if the remainders had not failed) was entitled to the intermediate rents of the said freeholds during the suspense of vesting?

S. Hall, Q.C., and *E. S. Ford*, for the plaintiffs.—An equitable contingent remainder in these properties was created by the will, which was not destructible: *Astley* v. *Micklethwaite*, 28 W. R. 811, 15 Ch. D. 59. In 1888 a legal contingent remainder was created by the reconveyance of the freeholds, by virtue of a reference to the uses of the will, which would have failed but for the operation of the Contingent Remainders Act of 1877, which preserves it. The rents and profits of the freeholds so reconveyed go to the devisee, James, under the general devise, but as personal estate, and on his death go to his personal representatives, and not to his heir-at-law: 1 Jarm. on Wills. 313; *Sewell* v. *Denny*, 10 Beav. 315; *Burley* v. *Evelyn*, 16 Sim. 291; *Halford* v. *Staines*, *Ibid.* 496.

Cozens-Hardy, Q.C., and *Arkle*, for the heir-at-law of James Freme.—The contingent remainder was created by the will, and the deed of 1888, whereby the legal estate was reconveyed to the uses of the will, simply clothed the remainder with the legal estate, with whatever consequences may result from that clothing. The deed of 1888 itself created no contingent remainder. If the remainder has not failed the intermediate rents go to the heir-at-law of James Freme as real estate.

Benn, for the trustee of the will and the executor.

Napier Higgins, Q.C., C. Ashworth James, and *Dibdin*, for the trustees for the purposes of the Settled Land Act.

NORTH, J., held that all that was created by the will was an equitable contingent remainder that was not subject to the defect of failure by reason of the absence of a sufficient freehold to support it. His lordship did not think that the subsequent acquisition of the legal estate by the deed of 1888 could have the effect of causing the limitation to fail, whatever effect it might have produced had the deed been dated before the time when the Act in question came into operation. In addition to that, his lordship's impression was that there was another answer to this case—namely, the point of fact that the contingent remainder, being equitable only, was not subject to being defeated by the absence of any freehold to support it, and that, in effect, was to be gathered from what fell from Malins, V.C., in *Astley* v. *Micklethwaite*. His lordship was also of opinion that the rents during the suspense of vesting of the remainder went to James' estate under the residuary devise, as between his heir-at-law and next of kin, as real, and not as personal estate.

Solicitors for the plaintiffs, *Chester, Mayhew, & Co.*, for *Peele & Peele*, Shrewsbury.

Solicitors for one trustee for the purposes of the Settled Land Act, *Bridges, Sawtell, & Co.*

Solicitors for the other parties, *Field, Roscoe, & Co.*, for *Gibbons & Arkle*, Liverpool.

Chan. Div. } April 22; June 20.
Stirling, J. }

In re MERVIN.
MERVIN *v.* CROSSMAN. (*a.*)

Will—Construction—Gift—Remoteness—Gift at twenty-five years of age—Maintenance clause—Vested or contingent gift.

A testator gave his real and personal estate to trustees upon trust for sale, conversion, and investment, and upon trust to hold such investments and the income thereof, "and to pay and divide the same equally between the present children of my son J. M." (naming them), "and any other children who may be hereafter born as and when they shall respectively attain the age of twenty-five years," with power in the meantime to apply the whole or any part of the income, for the maintenance and education of such grandchildren during their minority. The will also contained an advancement clause.

J. M. survived the testator, who died in 1879. *At the testator's death J. M. had five children living; one child was born four months later, and two more subsequently. The eldest attained twenty-five in* 1890.

Held, that J. M.'s children did not take vested interests in the fund; that the gift was to a class, to be ascertained when the eldest child attained twenty-five; and that the gift was void for remoteness.

In re Parker, Barker *v.* Barker, 16 *Ch. D.* 44, *followed.*

Elliott *v.* Elliott, 12 *Sim.* 276, *discussed.*

Adjourned summons.

In this case the point arose whether a bequest to the children of John Mervin, the son of the testator, was void for remoteness.

Richard Peter Mervin, the testator, who died on the 4th of March, 1879, by his will, dated the 1st of October, 1848, devised his real estate, and bequeathed his residuary personal estate to trustees upon trust for sale and conversion, and investment of the proceeds thereof. And he directed his trustees to stand possessed of such investments and the annual income thereof upon trust to pay various annuities and make certain payments, and continued: "Subject to the hereinbefore bequests I direct my trustees to stand possessed of the said investments and the annual income and produce thereof upon trust to pay and divide the same equally between the present children of my son John Mervin—viz., Richard Peter Mervin, Elizabeth Wilson Mervin, Mary Harriet Mervin, Arthur Wilson Mervin, John William Mervin, and any other children who may be hereafter born, as and when they shall respectively attain the age of twenty-five years, with power to my said trustees in the meantime to pay and apply the whole or any part of the remainder of the income of the said investments for the maintenance and education of such grand-

(*a.*) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

[illegible] the age of twenty-five years.

[illegible] the testator's surviving children [illegible] the eldest of the children who were living at the date of the testator's death [illegible] the testator's children [illegible] the age of twenty-five in January [illegible] the [illegible] in action for the administration of the testator's estate.

[illegible] the eldest child [illegible] share of the fund [illegible] the age of twenty-five years [illegible] the question now arising.

[illegible] the son and the child [illegible] the testator's death.—The gift is not [illegible] The interests of the grandchildren were vested at the time of the testator's death. The gift may be contingent in form if the intention for maintenance [illegible] the interest in the testator that the shares were vested at his death [illegible] v. [illegible] 27 W. R. [illegible] 3 Beav. [illegible] The power of advancement [illegible] v. [illegible] 1 Beav. [illegible] It is a gift of residue, and there is no gift over. The children living at the death of the testator were intended to take [illegible] v. [illegible] 27 W. R. [illegible] 30 Beav. [illegible] It is not a gift to the children as a class. It is not a gift to such of the children of them as shall attain twenty-five, as in [illegible] 2 Mer. [illegible] but to each of those living at the testator's death, as individuals, of an absolute share, as and when they shall attain twenty-five. The gift is good as regards the children living and the child in ventre sa mère at the testator's death. [illegible] v. [illegible] 1 W. R. [illegible] 30 Beav. [illegible]

If [illegible] for the two youngest children.—It is a gift to a class, to be ascertained when the eldest child attains twenty-five, which event happened within the time allowed by the rule against perpetuities, so the two youngest children who were living then are included in the class.

Gift over, for the next of kin.—The gift is void for remoteness. The natural meaning of the words is, that all the children are to take who are born before the eldest child attains twenty-five; that might not be one of those living at the testator's death at all, and might not happen until after the limit allowed by the rule. The whole income is not given by the maintenance clause, it is given during the minority of the children only. The case is thus distinguishable from *Ferens* v. *Elliott* and *For* v. *For*.

Warrington referred to *Butler* v. *Lane*, 10 Sim. 317; and *In re Wennall's Estate, Wennall* v. *Wennall*, 36 W. R. 466, 37 Ch. D. 266, in reply.

Cur. adv. vult.

June 30.—STIRLING, J., after referring to the facts.—The first question raised was whether the children of John Mervin took vested or contingent interests. The rule which must guide me in deciding the questions which arise is thus stated by Lord Selborne in *Pearce* v. *Moseley*, 29 W. R. 1, 5 App. Cas. 714, 719. The rule which has always been applied to cases of remoteness is this: "You do not import the law of remoteness into the construction of the instrument by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean that, in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say that, if the construction of the words is one about which a court would have no doubt, though there was no law of remoteness, that construction cannot be altered or corrected to something different for the purpose of escaping from the consequences of that law."

It was not disputed that the trust "to pay and divide between the present children" of the son "and any other children who may be hereafter born, as and when they shall respectively attain the age of twenty-five years," if it stood alone, would confer contingent interests only on the children; but it was contended that the power to the trustees, in the meantime, to pay and apply the whole or any part of the remainder of the income for the maintenance of such grandchildren during their minority was sufficient to vest the shares of the children; and, in support of that contention, *For* v. *For* and other cases of the same class were relied on. In *For* v. *For* the testator gave the investments of one-fifth of £[illegible] to trustees upon trust to pay the income to his son for life, and after his death to his widow during widowhood, and after her death or second marriage to divide and transfer the one-fifth of the £[illegible] to and amongst the children of the son equally as and when they should respectively attain the age of twenty-five; applying, from time to time, the income of the presumptive share of each child, or so much thereof respectively as the trustees or trustee for the time being should think proper, to and for his and her maintenance and education until such share should become payable as aforesaid. Jessel, M.R., held that the children of the testator took vested interests. There, however, the fund was divided into as many shares as the son had children, and the income of each share was directed to be applied for the maintenance of the particular child for whom the share was destined. Here the income of the whole fund is made applicable for the maintenance of all the children. Now in *In re Parker, Barker* v. *Barker*, the testatrix gave her residuary estate to trustees upon trust to pay the income, or such part thereof as her trustees should deem expedient, in the maintenance and education of her children until they should attain their respective ages of twenty-one years; and from and after their attaining their respective ages of twenty-one years upon trust to pay, assign, and transfer the estate unto her said children in equal shares. There Jessel, M.R., held that the children did not take vested interests. He distinguished *For* v. *For*, and said: "In my opinion, when a legacy is payable at a certain age, but is, in terms, contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given; and not the less so when there is superadded a direction that the trustees shall pay the whole or such part of the interest as they shall think fit. But I am not aware of any case where, the gift being of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the meantime for their maintenance has been

ld to create a vested interest in a member of the ass who does not attain that age." I think that plies to the present case, and consequently that the ildren of John Mervin did not take vested interests. There was some suggestion that the gift was not ne to a class. I am unable to accede to this view. authority on this point be required I refer to *In re ckson, Spiers* v. *Ashworth*, 32 W. R. 194, 25 Ch. D. 32. This being so, the question arises at what eriod the class is to be ascertained.

Where a will contains an immediate gift to the ildren of a living person, and nothing more, and here are children living at the death of the testator, hose children only take: *Viner* v. *Francis*, 2 Cox, 90; *Davidson* v. *Dallas*, 14 Ves. 576. If, however, he period of distribution is postponed, the gift will pply, not only to the children living at the death of he testator, but also to those born before the period f distribution: *Andrews* v. *Partington*, 3 Bro. C. C. 01; *In re Emmet's Estate, Emmet* v. *Emmet*, 28 W. R. 101, 13 Ch. D. 484; those living at the death of the estator taking vested interests, liable to be divested *pro tanto* by the birth of each additional child: *Oppenheim* v. *Henry*, 10 Hare, 441; *Baldwin* v. *Rogers*, 3 De G. M. & G. 649. In *Andrews* v. *Partington* the bequest was to the children of A., the daughters' shares to be paid at twenty-one or marriage, and the sons' shares at twenty-one. It was, therefore, a case where the gift and direction as to payment was distinct. The same rule has been applied in cases where the gift is contingent. In such cases all who come into existence before the first member attains a vested interest will, if the contingency is satisfied as regards them, be entitled to share: *Whitbread* v. *St. John*, 10 Ves. 152; *Gilbert* v. *Boorman*, 11 Ves. 238; *Clarke* v. *Clarke*, 8 Sim. 59; *Gillman* v. *Daunt*, 3 K. & J. 48. In the present case the gift is contained in the direction to pay and divide, and according to this rule the class would be ascertained when the first child of John Mervin attained twenty-five.

It was, however, contended that the class was to be ascertained at the death of the testator, and in support of this contention two cases were cited: *Elliott* v. *Elliott* and *In re Coppard's Estate*. In *Elliott* v. *Elliott* the testator gave a legacy of £1,000 to his daughter, Elizabeth Elliott, and all other his personal estate and effects unto and among all and every the children, sons and daughters, of his said daughter in equal shares and proportions, as and when they should attain their respective ages of twenty-two years; and he directed the interest on their respective shares to be accumulated and to be paid to them as and when the principal should be payable. The Vice-Chancellor held that the gift was to such of the children of the testator's daughter as were living at his death. The judgment is as follows:—"I see no objection in principle to holding that, by the description 'all and every the children, sons and daughters, of my daughter Elizabeth Elliott,' the testator meant those children who were then living, or might be living, at his death; and then there is no objection to the gift. When a testator speaks of the children of his daughter, the reasonable construction is that he means such children as his daughter has at his death, at which time the will speaks."

This is hardly satisfactory. The Vice-Chancellor does not refer to the attainment of twenty-two. No notice is taken of the rule established by such cases as *Andrews* v. *Partington* and *Whitbread* v. *St. John*, which had been followed by the same Vice-Chancellor in *Clarke* v. *Clarke*. It is to be observed, however, that the will contained a direction that the interest on the respective shares of the children should be accumulated and paid to them as and when the principal should be payable. It may be that it was considered that the children of Elizabeth Elliott took vested interests at the death of the testator, and that the case fell within the previous decision of the Vice-Chancellor in *Kevern* v. *Williams*, 5 Sim. 171. This direction as to interest appears to me to distinguish *Elliott* v. *Elliott* from the present case.

As regards *In re Coppard's Estate*, it purports to be based on *Elliott* v. *Elliott*, and I am sure was not intended to go beyond it.

I come to the conclusion, therefore, upon the ordinary rules of construction, that the class to take is to be ascertained when the first of the children of John Mervin attained twenty-five.

Now in applying the rule against perpetuity the period of time to be regarded is the death of the testator, and it is to be observed that in this respect the rule in *Andrews* v. *Partington* may operate not unfavourably to the validity of such gifts as are here in question. Thus, where a testator gave his estate to the children of his daughters who should attain twenty-five, and at his death one of the daughters had a child who had attained twenty-five, it was held that the class to take was to be ascertained at the death of the testator, and, consequently, that the gift was valid: *Picken* v. *Matthews*, 10 Ch. D. 264, 27 W. R. Dig. 234. Here, however, at the death of the testator, none of the children of John Mervin had attained twenty-five. All then living might have died without attaining twenty-five, so that it might have happened that the class to take was not ascertained until after the expiration of a life or lives in being and twenty-one years afterwards, beyond the limit allowed by the rule against perpetuities.

In my judgment the gift, according to the rule established in *Pearks* v. *Moseley*, is void for remoteness, and there must be a declaration accordingly.

Solicitors, *Crossman & Pritchard; The Solicitor to the Treasury.*

Chan. Div.
Stirling, J. } April 11, 21.

In re FOREIGN AND COLONIAL GOVERNMENT TRUST CO. (LIMITED). (*a.*)

Company—Alteration of memorandum—New business—Companies (Memorandum of Association) Act, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-sections* 3, 5 (d).

The court has power, under sub-section 5 (d) *of section* 1 *of the Companies (Memorandum of Association) Act,* 1890, *to confirm, either wholly or in part, resolutions of a company extending the powers of investment in its memorandum of association; but, in exercising its discretion, the court, under sub-section* 3 *of section* 1, *may impose such conditions as it may think necessary.*

In re Government Stock Investment Co., ante, *p.* 375, [1891] 1 *Ch.* 649, *distinguished.*

Petition.

This was a petition by the Foreign and Colonial Trust Co. (Limited) to obtain the confirmation by the court of resolutions altering its memorandum of association.

The company was incorporated on the 15th of March, 1879, under the Companies Acts, 1862 to 1877, with a nominal capital of £2,499,983 10s., divided into 92,872 preferred and deferred shares.

Its objects, as defined in section 3 of its memorandum, were, among others, as follows:—"(*c*) To invest money in the purchase of, or otherwise acquire

(*a.*) Reported by H. M. CHARTERS MACPHERSON Esq., Barrister-at-Law.

and hold any bonds, stocks, obligations or securities of foreign or colonial or British Governments, States, dominions, sovereigns, provinces, municipalities, or ruling or public authorities, or the shares or obligations of foreign railways or other undertakings having the guarantee of or subsidized by a foreign or colonial or British Government, State, dominion, sovereign, province, municipality, or ruling or public authority, or any other security for the payment of which the credit or any property or revenue of any such Government, &c., is pledged, charged, or made liable."

At an extraordinary general meeting of the company, held on the 6th of February, 1891, a resolution was passed that the memorandum of association should be altered by extending the powers of investment so as to enable the company to lend their moneys "on the security of, or otherwise to acquire and hold any bonds, debentures, debenture stock, obligations, or mortgages of any companies or corporations formed or incorporated under British, foreign, or colonial law."

This resolution was confirmed at a subsequent general meeting held on the 23rd of February, 1891, and registered, on the 16th of March, with the Registrar of Joint-Stock Companies.

There was evidence that the company could no longer advantageously invest its capital in the class of securities authorized by the memorandum; that there were practically no creditors, or debentures or debenture-stock holders; and that the resolution was carried unanimously.

Buckley, Q.C., and *C. Cecil*, for the petition.—In *In re Government Stock Investment Co.*, *ante*, p. 375, [1891] 1 Ch. 649 (then only in W. N., 1891, p. 48) the attention of Chitty, J., was not called to sub-clause (*d*) of this sub-section 5 of section 1, under which we are now applying.

April 21.—STIRLING, J. [after stating the facts, continued:—] I have to see whether the case falls within sub-section 5 of section 1 of the Act, which is in these terms:—"The court may confirm, either wholly or in part, any such alteration as aforesaid with respect to the objects of the company if it appears that the alteration is required in order to enable the company" to do certain things, which are arranged under heads (*a*) to (*e*). The present application is under (*d*), which is:—"To carry on some business or businesses which, under existing circumstances, may conveniently or advantageously be combined with the business of the company." Now I think the business of this company is the investment of its assets in the limited class of securities mentioned in clause (*c*) of section 3 of the memorandum of association. In that respect I take the same view as that which I understand to have been expressed by Chitty, J., in *In re Government Stock Investment Co.* That being so, is what is proposed to be done the carrying on of "some business or businesses which, under existing circumstances, may conveniently or advantageously be combined with the business of the company?" What is proposed to be done is to enable the company to invest its money and assets in another class of securities; and if the business of the company be, as I think, the investment of money in one limited class of securities, it appears to me that the investment of its money in another limited class of securities must also be a business which may be combined with that already carried on by it.

As to the decision in *In re Government Stock Investment Co.*, I am satisfied, upon seeing the full report and after communication with the learned judge, that he expressed no opinion whatever in that case as to the meaning of sub-clause (*d*), and I think that the proposed alteration may here be made under that sub-clause, the evidence showing that under present circumstances the large capital of the company can no longer be advantageously invested in the limited class of securities specified in clause (*c*) of section 3 of the memorandum of association.

Under sub-section 3 of section 1 of the Act the court has power to confirm the alteration "on such terms and subject to such conditions as to the court seems fit." I think there is one condition which ought to be imposed here; and that is, that the name of the company ought so to be altered that it may not mislead or be liable to mislead persons who deal with the company without taking the trouble to examine the altered memorandum of association. The petition must therefore stand over generally to enable the company to take the necessary steps to alter its name, with liberty to apply.

Solicitors, *Norton, Rose, Norton, & Co.*

Q. B. Div. (Denman and Wills, JJ.) June 9, 10.

BOARD OF WORKS FOR THE PLUMSTEAD DISTRICT v. ECCLESIASTICAL COMMISSIONERS FOR ENGLAND. (*a*.)

Metropolis management — New street — Liability for expense of paving—"Owner" of land—Land vested in Ecclesiastical Commissioners for purposes of Church Building Acts—Site of a church—Part left unconsecrated—Divesting—Church Building Acts—58 *Geo.* 3, *c.* 45, *s.* 33—59 *Geo.* 3, *c.* 134, *s.* 34—3 *Geo.* 4, *c.* 72, *s.* 34—8 *&* 9 *Vict. c.* 70, *s.* 13—*Metropolis Local Management Act*, 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolis Local Management Act*, 1862 (25 *&* 26 *Vict. c.* 102), *s.* 77.

Where land has been conveyed to the Ecclesiastical Commissioners for the purposes of the Church Building Acts as a site for a new church, and a church has been built on part of such land, the effect of the consecration of the church and part of such land is to vest the whole of the land conveyed in the incumbent for the time being of such church, under 8 *&* 9 *Vict. c.* 70, *s.* 13. *The commissioners, therefore, are not liable to contribute to the expenses of paving a new street upon which the unconsecrated part of such land abuts, as "owners" of such unconsecrated land within the meaning of the Metropolis Local Management Acts*, 1855 *and* 1862.

Special case.

This was an action brought for the recovery of two sums, one of £123 15s., and the other of £9 15s., amounting together to £133 10s., being the amounts respectively of two demands made by the plaintiffs on the defendants for an apportioned part of the expense of paving a new street under the provisions of the Metropolis Local Management Acts, 1855 and 1862.

The following statement of the material facts is taken from the special case which was stated by consent of the parties under Rules of the Supreme Court, order 34:—

The plaintiffs are the board of works for the Plumstead district and are constituted as such board under the said Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 105), and the lands, roads, and street hereinafter mentioned are situate within their district and jurisdiction.

The defendants are the Ecclesiastical Commissioners for England, to whom, under the provisions of 19 & 20 Vict. c. 55, were transfered all the powers and obligations of the Church Building Commissioners.

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

By a deed of conveyance, dated the 18th of October, 1886, and made between and executed by Thomas George, Earl of Northbrook, Viscount Baring, and Henry Markby, and the defendants, the said Thomas George, Earl of Northbrook, with the concurrence of the said Viscount Baring and Henry Markby, conveyed unto the defendants and their successors the fee simple in possession of a piece of land situate at Lee, in the county of Kent, for the purposes of the Church Building Acts, and to be appropriated as and for a site for a then intended new church, with surrounding yard and enclosure thereto, to be called "St. Augustine's Church, Grove Park," and to be devoted when consecrated to ecclesiastical purposes for ever, by virtue of and according to the true intent and meaning of the said Acts. All necessary things were done and consents given for the vesting of the said premises in the defendants, subject to the terms and conditions of the said deed.

Prior to the 24th of October, 1886, the erection of a building intended for the purposes of Divine worship according to the rites of the Church of England was completed upon a portion of the said piece of land, and on the 24th of October, 1886, the Bishop of Rochester duly consecrated the said building as a church for the purposes of divine worship according to the rites of the Church of England by the name of "St. Augustine's Church, Grove Park," and also consecrated a portion of the land immediately adjoining the said building.

The remainder of the said piece of land described in and conveyed by the said deed of conveyance has not been consecrated, and remains still vested in the defendants, subject to the terms and conditions of the said deed of conveyance, unless the consecration of the said building and adjoining land has divested the defendants of the same. The unconsecrated portion of the said piece or parcel of land has not since the date of the said sentence of consecration been let or occupied, and has not been built upon. At the date of the said deed of conveyance there existed, and there still exists, a sewer underneath the surface of and across the said unconsecrated portion. Between the 18th of October, 1886, the date of the said deed of conveyance, and the 24th day of October, 1886, the date of the said sentence of consecration, a wire fence was put up across the said unconsecrated portion, but was not completed as it now stands until the month of November, 1886.

Section 105 of the Metropolis Local Management Act, 1855, provides for the payment of the expenses of paving a new street by the owners of the houses forming such street.

By section 77 of the Metropolis Local Management Act, 1862 (25 & 26 Vict. c. 102), which recited that it was expedient to amend the said Act of 1855, it was enacted as follows:—"Where any vestry or district board shall, under the powers given by the 105th section of the firstly recited Act" (that is to say, the said Act of 1855) "have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein."

By section 250 of the said Metropolis Local Management Act, 1855, it is enacted (*inter alia*):—"The word 'owner' shall mean the person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent."

In February, 1890, the plaintiffs resolved that the Bromley-road, on which the said piece of land abuts, should be paved to their satisfaction, and that the owners of houses forming the said road (which was a new street within the Acts above mentioned), and of land abutting thereon, should pay the amount of the estimated expenses of such paving. The amount of the said estimated expenses was accordingly determined, and the total amount to be contributed by the owners of the unconsecrated portion of the said piece of land was fixed at £133 10s.

The plaintiffs duly made a demand in writing on the defendants for payment of the said sum, but the defendants refused to pay the same, or any part thereof, on the following grounds, viz.:—(1) That they are not, and never were, "owners of land" within the meaning of those words in the Metropolis Local Management Act, 1862, s. 77; (2) that if they were such "owners of land" they ceased to be owners of the said unconsecrated portion on the consecration of the church.

No sum has been, or is intended to be, charged or apportioned as the amount to be contributed by the owners of the consecrated portion of the said piece of land.

The question for the opinion of the court was whether the defendants, in respect of the unconsecrated portion of the said piece of land, were at the date of the plaintiffs' demand "owners of land" within the meaning of those words in the Metropolis Local Management Acts, 1855 and 1862.

The following sections of the Church Building Acts were referred to during the argument:—

58 Geo. 3, c. 45, s. 35, whereby it is enacted that "it shall be lawful for the said commissioners" (*i.e.*, the Church Building Commissioners) "to accept and take . . . any lands, tenements, and hereditaments proper for sites of additional churches or chapels not exceeding in quantity in any one place what may be sufficient for building of a church or chapel, providing a churchyard, and making a proper and sufficient access or approach thereto from any persons willing to give the same; and every such site, when conveyed to the said commissioners and the church erected thereupon, and notice thereof given to the bishop of the diocese, shall become for ever thereafter devoted to ecclesiastical purposes only."

Section 51, whereby the commissioners are empowered to resell such lands, or such parts thereof, as shall not be wanted for the purposes of the Act.

8 & 9 Vict. c. 70, s. 13, which provides "that in all cases the freehold of the site of every church of which her Majesty's said commissioners may have accepted, or shall accept, a conveyance under the provisions of the hereinbefore-recited Acts, or any of them (as to any church not yet consecrated when the same shall be consecrated), shall vest in the incumbent for the time being of such church."

Channell, Q.C. (*H. A. Forman* with him), for the plaintiffs.—The commissioners are "owners" of this land within the definition of "owner" in section 250 of the Metropolis Local Management Act, 1855. The Church Building Acts do not prohibit them from letting at a rack rent the unused portions of land conveyed to them as a site for a church, and they are empowered to sell such unused portions by 58 Geo. 3, c. 45, s. 51. They have the ordinary rights of ownership, and are liable to contribute to the expenses of paving this new street: *Bowditch* v. *The Wakefield Local Board*, L. R. 6 Q. B. 567, 19 W. R. Dig. 66, approved by the Court of Appeal in *Wright* v. *Ingle*, 34 W. R. 220, 16 Q. B. D. 379. This land is not the site of a church, and its beneficial use has not been destroyed: *Great Eastern Railway Co.* v. *Hackney Board of Works*, 31 W. R. 769, 8 App. Cas. 687; *Angell* v. *Paddington*, L. R. 3 Q. B. 714.

Meadows White, Q.C. (*T. T. Paine* with him), for

the defendants.—The commissioners are not the owners of this land in any sense. The effect of 8 & 9 Vict. c. 70, s. 13, is to vest the whole of the land conveyed in the incumbent for the time being upon the consecration of the church. The word "site" in that section means the whole of the land conveyed for the purposes of the Church Building Acts, not merely the ground upon which the church stands. Therefore, when this church was consecrated, the commissioners were divested of their ownership, and are not now liable to contribute as "owners."

Forman, in reply.—"Site" means the ground on which the church stands. with perhaps a few feet surrounding it. The Act 3 Geo. 4, c. 72, has not been repealed, and it contemplates that all the land originally conveyed may not be required for the purposes of the Church Building Acts, and by section 34 empowers the commissioners in such a case to deal with the land which they do not require. Amongst other things they are authorized "to reconvey . . . any such land, or ground, or any part thereof, in case only a part of any such land or ground shall have been applied to the purposes of the said recited Acts or this Act, to the grantor or grantors thereof." If the commissioners have power so to deal with the land it cannot be vested in another.

DENMAN, J.—The point upon which Mr. White has insisted is one which was not at first seriously argued upon the other side; but it has been made clear to me, in spite of the obscurity in which these Acts are involved, that in this case the commissioners are not liable to the charges which it is sought to impose upon them, and that they are not liable, not because of the particular character of this land, nor because they are not owners of it in the particular sense intended by the Metropolis Management Acts, but because they are not owners of it in any sense. They are created by Act of Parliament in succession to other commissioners, and they have the same duties, rights, and liabilities.

The origin of the ownership upon which the plaintiffs rely is to be found in the Act 58 Geo. 3, c. 45, s. 33. [His lordship read the part of the section above set out, and continued:—] That being the law, in the present case a nobleman conveyed a piece of land to the commissioners for the purposes of the Church Building Acts. The defendants contended that that piece of land was a "site," and that the Act 8 & 9 Vict. c. 70, s. 13, had had the effect of vesting the whole of it in the incumbent of the church which has been built on part of it. There are, no doubt, difficulties in the way of this construction, but it is intelligible, and the difficulties which are involved in the contrary view are greater still.

The enactment which has raised the greatest doubt in my mind is section 34 of the Act 3 Geo. 4, c. 72. It seemed to me strange that the commissioners should have power to vest in another, land which was not vested in them. But that difficulty is cleared away when one considers that when the land is first granted to them the commissioners are to have the power, in certain cases, of vesting it in another; but that, when the land becomes vested in someone else by operation of the Act 8 & 9 Vict. c. 70, this power of vesting under section 34 of 3 Geo. 4, c. 72, ceases. 8 & 9 Vict. c. 70, s. 13, was relied upon to show that the defendants are not in any sense the owners of this land, because it is vested in the incumbent of the church. That section plainly enacts that "the freehold of the site of every church" of which the commissioners have accepted a conveyance under the Church Building Acts "(as to any church not yet consecrated, when the same shall be consecrated) shall vest in the incumbent." In the present case the commissioners have accepted a conveyance of a certain piece of freehold land for the purposes of these Acts. I think that the freehold of the site of a church includes the site so conveyed to the commissioners within the meaning of the Acts for the purpose of building a church, and not merely the site inclosed within the four corners of the actual building.

In the present case the church was built, and a portion only of the site conveyed was consecrated. I do not think that the fact that a part of the site has not been consecrated prevents it from being the site of a church within the Act. Any other construction would lead to great difficulties and anomalies. The result is that Mr. White's contention is right, and the whole of the land given and accepted as the site of a church vested upon the consecration in the incumbent, and the commissioners were thereupon divested. I do not wish to say anything that would prevent the incumbent from raising the whole question if any attempt should be made to impose this rate on him. Our judgment is entirely confined to the point raised by Mr. White.

WILLS, J.—I am of the same opinion. The question arises upon the construction of the Church Building Acts, enactments which have been the despair of those who have tried to extract an intelligible meaning from them. The first statute with which we have to deal is 58 Geo. 3, c. 45. The effect of section 33 of that Act is that immediately after the conveyance to the commissioners the land becomes stamped with the character of ecclesiastical land; it is to be "for ever thereafter devoted to ecclesiastical purposes only, in order that the same may be consecrated by the bishop to public worship," &c. It does not seem to have been noticed that it was possible that the area of the site conveyed might not coextend with the consecrated area. It was not long before it was found out that some of the land might remain unconsecrated, for in the following year the Act 59 Geo. 3, c. 134 was passed, which provides (section 34) that if any lands acquired by the commissioners under the Acts shall remain unconsecrated at the end of ten years such unconsecrated lands shall be immediately vested in his Majesty to be applied to the uses for which they were acquired under the direction of his Majesty in Council, unless and until any other provision respecting the same shall be made by authority of Parliament. It was, therefore, the view of the Legislature that the land was vested in the commissioners and could not be divested without an Act of Parliament.

The next enactment on the subject is the statute 3 Geo. 4, c. 72, s. 34, which enacts what cannot take place unless there is land granted for the purposes of the Acts which is not to be used for such purposes; in such a case the commissioners are to deal with it by reconveying it to the grantors or in one of the other modes mentioned in the section, and the land would not then vest in the incumbent. No provision as to vesting the site in the incumbent was made until the passing of the Act 8 & 9 Vict. c. 70, s. 13. That completes the scheme and vests the land upon consecration in the incumbent. The only question is whether the word "site" is used in the sense in which it is used in the initial Act—whether it means all the land conveyed or only that part which has been consecrated. It must be remembered that this is an amending Act, and if inconsistent with the earlier Acts must prevail. But I do not think that it is inconsistent. The possibility of more land being conveyed than was necessary for the church to stand upon had not occurred to the framers of the first Act, and they spoke of the whole of the land conveyed as the "site." I do not see why "the freehold of the

ite" in the last mentioned Act should be cut down o the narrower meaning which was contended for. It seems to me to be more in accordance with the scheme of these Acts that the "site" should continue to mean the whole of the land which has been accepted by the commissioners for the purpose of building a church. I am, therefore, of opinion that this land was not vested in the commissioners when this rate was made.

Judgment for the defendants.

Solicitor for the plaintiffs, *George Whale.*

Solicitors for the defendants, *White, Borrett, & Co.*

C. C. R. May 14.

REG. *v.* MARSDEN. (*a.*)

Criminal law—Carnal knowledge of girl under the age of thirteen years—Evidence—Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 4.

In order to prove the offence of carnally knowing a girl under the age of thirteen years, under section 4 *of the Criminal Law Amendment Act,* 1885, *it is not necessary to prove emission.*

Case stated by Wright, J., as follows:—

James Marsden was convicted before me at Manchester, on the 28th of April, 1891, upon an indictment containing a single count for the felony created by the statute 48 & 49 Vict. c. 69 (Criminal Law Amendment Act, 1885), s. 4—namely, carnal connection with a female under thirteen years.

The jury were satisfied of penetration, but I directed them that there was no evidence of emission, and that, under the circumstances of the case (interruption), it could not be presumed. At the trial I reserved the question whether the prisoner could lawfully be convicted of the said felony, emission being negatived.

No counsel appeared for the prisoner.

Sir Edward Clarke, S.G., Henry Sutton, and *Overend Evans,* for the prosecution, were not called upon to argue.

[Before the year 1828 the law was that emission was a necessary ingredient in carnal knowledge: see 1 East P.C. 436, *et seq.*, and authorities there cited. In that year the Act 9 Geo. 4, c. 31 was passed, by which (section 18) penetration without emission was made sufficient evidence. That enactment was repealed by 24 & 25 Vict. c. 95, s. 1; but a similar provision was inserted in the Act 24 & 25 Vict. c. 100, s. 63, which, however, only applies to offences punishable under that Act. The Offences against the Person Act, 1875 (38 & 39 Vict. c. 94) (see section 5), was incorporated with the 24 & 25 Vict. c. 100. The Criminal Law Amendment Act, 1885, under which the present indictment was laid, repealed the Offences against the Person Act, 1875, and contains no provision as to proof of emission, and does not incorporate the 24 & 25 Vict. c. 100.]

The judgment of the COURT (Lord COLERIDGE, C.J., DENMAN, MATHEW, CAVE, and CHARLES, JJ.) was delivered by

Lord COLERIDGE, C.J.—We think it clear that this conviction was right, and must be sustained. No doubt, doubts have been entertained upon this point by some judges, amongst whom is Charles, J., who now concurs in this judgment; but we are all clearly of opinion that the offence of unlawful carnal knowledge in the Criminal Law Amendment Act, 1885, is to be considered as proved without proof of emission, and that in all cases where carnal knowledge constitutes a crime that crime is complete upon proof of penetration.

We wish to add that, in our opinion, Wright, J., was quite justified in reserving this case, in view of the doubts which have been entertained by some judges.

Conviction affirmed.

Solicitor for the prosecution, *Solicitor to the Treasury.*

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. } April 4.
Admiralty. }

"THE ELTON." (*a.*)

Practice—Writ—Service of notice of writ without the jurisdiction—Salvage—Action in personam—*Foreign owners of cargo—"Necessary and proper parties to the action"—Rules of the Supreme Court,* 1883, *ord.* 11, *r.* 1 (g).

In a suit of salvage in personam *brought against the owners of a ship and the owners of her cargo, where it appeared that the owners of the cargo were foreign subjects resident without the jurisdiction, the court being of opinion that the owners of the cargo were necessary and proper parties to the suit, and that the suit had been properly brought against the owners of the ship properly served within the jurisdiction, refused to set aside an order allowing service of notice of the writ of summons to be given to the owners of the cargo out of the jurisdiction, under sub-section* g *of ord.* 11, *r.* 1, *of the Rules of the Supreme Court,* 1883, *notwithstanding that the salved cargo had never been within the territorial jurisdiction of the court.*

This was a motion by the defendant cargo owners before the judge in court to set aside an order which the plaintiffs, in an action of salvage instituted *in personam* against the owners of the steamship *Elton* and the owners of her cargo, had obtained, allowing notice of the writ in the suit to be served on the owners of the cargo of *The Elton* out of the jurisdiction.

It appeared that the writ in the action had been duly served on the owners of *The Elton* within the jurisdiction; that the owners of the cargo of *The Elton* were foreigners residing abroad; that such cargo had never been within the territorial jurisdiction of the court; and that an order had been obtained for service of notice of the writ without the jurisdiction on the owners of the cargo of *The Elton,* under which service on them had been effected abroad.

March 24.—*Sir Walter Phillimore* and *Stubbs,* for the owners of *The Elton,* in support of the motion.—The owners of the cargo of *The Elton* are in no sense either necessary or proper parties to the claim of the salvors against the owners of *The Elton.* Ship and cargo must each pay its own share of salvage; neither can be made liable for the salvage due from the other,* and the salvors, by joining their claim for salvage against the cargo owners with their claim for salvage against the shipowners, cannot get over the difficulty that the claims are really two separate claims on separate sets of defendants having distinct

* See *The Pyrennee,* Br. & L. 189.

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

and separate liabilities. An action *in personam* for salvage in which the parties sought to be made liable were never served with a monition or citation is quite unheard of.*

J. P. Aspinall, for the plaintiffs, *contrà*.—We submit that the words of ord. 11, r. 1, sub-section *g*, of the Rules of the Supreme Court, 1883, are wide enough to cover the present case, that sub-section providing that notice of a writ of summons on a foreigner abroad may be given where "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other persons duly served within the jurisdiction."

April 14.—JEUNE, J.—In this case an action *in personam* has been brought for salvage against the owners of *The Elton* and her freight, who are within the jurisdiction, and who have been served with the writ, and the owners of her cargo; but the latter being out of the jurisdiction, an order was, on the 9th of December, 1890, obtained for service of notice of the writ on them, and the matter now comes before me on a motion to set this order aside. The only question is whether these owners of the cargo are proper parties to the action within the meaning of ord. 11, r. 1 (*g*). The case of *Massey* v. *Heynes*, 36 W. R. 834, 21 Q. B. D. 330, has placed a clear interpretation on the meaning of this sub-section, and supplies a test for determining to what persons notice of a writ may be given. Wills, J. (at p. 335), says: "I think that if, according to the regular practice of the courts of this country, supposing all parties subject to the jurisdiction, the person to be served is one who, as a matter of course, would be joined on the same writ, and be treated as one of the defendants in the action, he is a proper, if not necessary, party to the action"; and this view was confirmed by the unanimous judgment of the Court of Appeal. It may be remarked that the case of *Massey* v. *Heynes* was one in which the defendants were alternatively liable, and in which, therefore, before order 16, they could not have been made parties; and that the case, therefore, shows that all persons who could, at the option of the plaintiffs, be made parties under order 16, are proper parties within ord. 11, r. 1 (*g*). Before the case of *Massey* v. *Heynes*, the Queen's Bench Division, in *The s.s. Thanemore* (*Limited*) v. *Thompson and Others*, 52 L. T. N. S. 552; 33 W. R. Dig. 165, held that in an action against underwriters severally liable, those in Scotland might be served with the writ; and shortly after, in the *Washburn Co.* v. *The Cunard Steamship Co. and J. C. Parkes & Sons*, 5 Times Rep. 592, where the action was brought by the owners of a patent for making barbed wire to restrain the steamship company, who were carrying a consignment of such wire to Parkes & Sons in Ireland, from parting with it, Stirling, J., held that Parkes & Sons might be served with the writ. It was suggested by Sir Walter Phillimore that these last two cases referred to defendants in Scotland and Ireland, and that therefore ord. 11, r. 2, applied. This is so; and as Stirling, J., points out, it gives rise to different considerations of convenience than if the parties to be served be resident in other countries. But this only, I think, shows that there are cases when the court will not give leave, in regard to Scotch or Irish defendants, where it would if they were foreigners, not that the court can give a permission in respect of Scotch or Irish residents which it cannot in respect of persons out of the United Kingdom.

Applying the test thus furnished, it seems to me impossible to doubt that notice of this writ should be permitted to be given to the owners of the cargo. If they were within the jurisdiction, would they not be proper parties to the action? If they could be made so under order 16, and it seems to me they clearly could, the case of *Massey* v. *Heynes* is in point, and is decisive of this motion.

But the matter stands even on firmer ground because I think that by the practice of the Admiralty Court they could always have been made parties. No doubt the great mass of cases in which both owners of ship and cargo have been made defendants have been proceedings *in rem*. But although salvage suits or actions *in personam* are comparatively rare the Court of Admiralty always had jurisdiction—founded apparently on the fiction of an action in rem having been brought, and the property salved having been allowed to be taken by the owners—to entertain such suits when at least there existed a *corpus* of property salved. This is shown by the cases of *The Hope* and *The Trelawney*, 3 Rob. 215; *The Chieftain*, 6 Notes of Cases, 459; *The Meg Merrillies*, 3 Hag. 346; and the language of the present Master of the Rolls in *The Cargo ex Schiller*, 2 P. D. 145-9, 25 W. R. Dig. 270. It does not clearly appear that in any of these cases proceedings were taken against the owners of the ship and cargo as separate parties, although in *The Chieftain* and *The Meg Merrillies* this may perhaps have been the case. But I see no reason why such parties, if consisting of separate individuals, or sets of individuals, should not have been brought before the court together by monition.

It is, indeed, possible that the reason why the fiction by which the Admiralty Court maintained the proceeding *in personam* was allowed to prevail is that the facility of bringing all parties before the court gave advantages which the common law jurisdiction could not afford.

But however this may be, every consideration, both of authority and principle, points to the convenience, and indeed the justice, of the owners of the ship, freight, and cargo being all before the court when the amount of salvage is to be determined.

The case of *The Peace*, 4 W. R. 635, Swabey, 117, is an instance of the strong view taken by the Court of Admiralty on this point. In that case the ship and freight were first proceeded against, and afterwards the owners of the cargo, and Dr. Lushington ordered the cargo-owners to pay their share of the costs of the proceedings against the owners of the ship. "It is true," he said "the owners of the cargo did not come in in the original suit. They left the owners of the ship to defend the suit, and say they are now ready to pay their share of the salvage. Extreme injustice would be done if the court were to sanction that course. The owners of the cargo would lie by, and then, when the owners of the ship had obtained a reduction of the amount of salvage claimed, they would take advantage of it." A little afterwards, in the case of *The Mary Pleasants*, Swabey, 224, Dr. Lushington dwelt on the difficulty in estimating the remuneration to be paid by the ship apart from that to be paid by the cargo. This appears to be only

* The attention of the court does not seem to have been drawn to the fact that the 19th section of the Common Law Procedure Act (15 & 16 Vict. c. 76), which gave jurisdiction in certain cases over actions commenced against foreigners residing out of the jurisdiction, had no application whatever to causes in the High Court of Admiralty, or to the somewhat serious question whether any construction of ord. 11, r. 1, sub-section *g*, which would, in point of jurisdiction, extend that rule to matters not covered by the statutes in force previously to the Judicature Act, would not be a construction making the sub-section so construed *ultrà vires*.

nsonant with common sense. It is easy to imagine case, such as that of a general ship, the cargo having ossibly passed to many foreigners, in which separate ctions against each individual owner would be impossible. Again, in the case of an agreement for the mount of remuneration which ought to be made by he master on behalf of cargo as well as ship (*The Vestminster*, 1 W. Rob. 235), it would clearly be wrong, f it can be avoided, that the validity of such agreenent could be called in question in several actions, vith possibly different results. But, apart from any pecial circumstances, it would seem clear that when he question at issue depends upon one set of facts, nd is the determination of the total amount of remuneration which several persons have to pay, and which they all have to make good, by general and apportioned contribution, all such persons should, if possible, be before the court. It was argued by Sir Walter Phillimore that it would be against international comity to bring the case of these foreign owners of cargo here; but it appears to me that the principle of international comity may be more soundly invoked to sanction the determination of an inquiry in a question of salvage by the tribunal which is seised of a portion of it, especially as conflict of jurisdiction can always be prevented by compelling the plaintiff to elect under which tribunal he will proceed. I think, therefore, that this motion must be rejected.

Solicitors for the plaintiffs, *Cooper & Co.*

Solicitors for the owners of the cargo, *Stokes, Saunders, & Stokes.*

Court of Appeal.

From Chan. Div. July 18.

In re OPERA (LIMITED). (a.)

Company—Winding up—Debenture-holders—Execution creditor—Sheriff—Mistake in law—Goods seized, but not sold, by sheriff before winding up—Priority of debenture-holders.

Goods consisting of the theatrical properties of a company carrying on the business of a theatre were seized by the sheriff under writs of fi. fa. *issued by two judgment creditors of the company. On the day following the seizure a creditors' petition was presented to wind up the company, and a winding-up order was subsequently made and a liquidator appointed. Between the date of the presentation of the petition and that of the winding-up order, the sheriff, of his own accord, took the moneys paid by the public at the doors of the theatre, and thereout paid the two execution creditors the amount of their judgment debts. After the winding-up order had been made the sheriff withdrew from possession without selling the goods he had seized, and these goods were taken possession of by the liquidator, and subsequently sold by him. The sheriff, under an order made in the winding up, having been obliged to pay the whole amount of the moneys taken by him at the doors of the theatre to the liquidator, made an application that the liquidator might be ordered to repay the sheriff, out of the proceeds of sale of the goods seized by the sheriff, but given up to, and sold by, the liquidator, the sum paid by the sheriff to the two execution creditors. The sheriff's application was opposed by the liquidator, and also by debenture-holders whose debentures constituted a floating charge, payable on demand, on the undertaking and all the property, present and future, of the company.*

Held (reversing on this point the decision of Kekewich J., *reported* ante, *p.* 398, [1891] 2 *Ch.* 154), *that the goods seized, but not sold, by the sheriff were covered by the debentures, and that the debenture-holders were entitled to be paid out of the moneys in the hands of the liquidator arising from the sale of such goods, in priority to the two execution creditors, and therefore in priority to the claim for repayment made by the sheriff.*

In re Standard Manufacturing Co., ante, *p.* 369, [1891] 1 *Ch.* 627, *at p.* 641, *discussed and approved.*

Appeal from the decision of Kekewich, J. (reported *ante*, p. 398, [1891] 2 Ch. 154).

The Opera (Limited) was a company formed under the Companies Acts for the purpose of carrying on the business of Her Majesty's Theatre, Haymarket. The company had issued debentures of £100 each payable to bearer on demand, which constituted a first charge "on the undertaking and other the real and personal property, present and future, of the company by way of floating security."

On the 16th of January, 1890, the sheriff of the County of London, under a writ of *fi. fa.* issued by C. Alias, seized certain goods (consisting of theatrical properties) of the Opera Co. at the theatre.

On the 17th of January another writ of *fi. fa.* against the company was lodged with the sheriff by one Calderwood.

On the 18th of January petitions to wind up the company were presented by Alias and other creditors of the company.

From the 18th to the 27th of January the sheriff received the moneys paid by the public for entrance to the theatre, which amounted to £1,495.

On the 24th of January a provisional liquidator was appointed by the court, and on the same day the sheriff, out of the moneys which he had then taken at the doors of the theatre, paid out Alias and Calderwood the amount of their respective debts. There was no evidence to show whether this payment was made, in fact, before or after the appointment of the provisional liquidator.

On the 31st of January the theatre was closed, and on the 1st of February the usual compulsory winding-up order was made on the petitions presented of the 18th of January, and an official liquidator was appointed.

The sheriff had not sold the goods which he had seized on the 16th of January.

On the 8th of February Kay, J., ordered the sheriff to withdraw from possession as regarded any judgment or execution obtained since the presentation of the winding-up petitions; and on the 10th of February the sheriff withdrew from possession without having sold any of the goods seized by him, and the official liquidator took possession of the same, which he subsequently sold for an amount largely exceeding the amount of the judgment debts which had been paid by the sheriff to Alias and Calderwood.

On the 13th of May, North, J., ordered the sheriff to pay to the official liquidator the whole amount of the moneys taken by the sheriff at the doors of the theatre without prejudice to any rights of the sheriff against the goods seized by him before the presentation of the petitions. The sheriff accordingly paid the moneys so received by him to the official liquidator.

On the 17th of December the sheriff took out a summons asking that the official liquidator might be ordered to pay to him, out of the moneys received by the official liquidator by the sale of the goods seized by the sheriff under the writs of *fi. fa.* [illegible] the 16th and 17th of January, the amounts of [illegible] paid by

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

the sheriff to Alias and Calderwood, together with the sheriff's charges in respect thereof. The debenture-holders appeared on the hearing of this summons, and claimed to be entitled to be paid, out of the proceeds of the goods so sold by the official liquidator, in priority to the execution creditors. Kekewich, J., held that as the assets in the hands of the official liquidator had been increased by a transaction occasioned by an honest mistake of law on the part of the sheriff, the court would not allow the liquidator, its own officer, on behalf of the creditors of the company, to take advantage of the mistake; that the debenture-holders, notwithstanding their security, were in no better position than the ordinary creditors of the company, both being represented by the official liquidator, and, accordingly, that the official liquidator should pay to the sheriff the amount claimed by the summons.

The debenture-holders and the official liquidator appealed.

Marten, Q.C., E. Beaumont, and *Manby,* for the appellants.—The debentures constitute a charge on the undertaking and all the property, present and future, of the company, and the execution creditors can only take subject to that charge. The sheriff cannot by mere seizure get rid of the right of the debenture-holders to which the property seized was subject when in the hands of the company: *In re Standard Manufacturing Co., ante,* p. 369, [1891] 1 Ch. 627, at p. 641; *In re Florence Lands and Public Works Co.,* 27 W. R. 236, 10 Ch. D. 530. The case of *Willmott* v. *London Celluloid Co.,* 35 W. R. 145, 34 Ch. D. 147, is distinguishable, as there the moneys in question were the earnings of a trading company, and were not covered by the debentures.

Warmington, Q.C., and *Vernon Smith,* for the sheriff.—Here the debentures do not expressly authorize the debenture-holders to carry on the business of the company or to appoint a receiver. The debenture-holders are not entitled to any account of mesne profits or of any dealing with the property of the company while it was a going concern: *In re Panama Royal Mail Co.,* 18 W. R. 441, L. R. 5 Ch. App. 318. As the sheriff could have been paid by the company out of mesne profits, notwithstanding the existence of the debentures, so the sheriff was entitled to pay himself out of mesne profits notwithstanding the existence of the debentures. The form of the debentures in *In re Standard Manufacturing Co.* was very special.

Marten, Q.C., in reply.—The theatrical properties seized by the sheriff were never sold by him; he gave them up without selling to the official liquidator, by whom they were afterwards sold, and it is with respect to the proceeds of their sale that Kekewich, J., has made the order now under appeal. [LINDLEY, L.J.—Do you object to any order we now make being without prejudice to any future application by the sheriff for repayment out of moneys (if any) in the hands of the official liquidator not covered by the debentures?] I do not object to that, but there are, in fact, no such moneys.

LINDLEY, L.J.—This is an appeal against an order of Kekewich, J., which ordered the official liquidator of the "Opera (Limited)," out of moneys received by him from the sale of the property of the "Opera (Limited)" seized by the sheriff under two writs of *fi. fa.* lodged with the sheriff on the 16th and 17th of January, 1890, to pay to the sheriff the amount of the judgment debts in respect of which the two writs issued, and the sheriff's charges in respect thereof.

When that order came to be scanned before us, it was admitted by Mr. Warmington that there was considerable difficulty in supporting it, and unquestionably there is, because that order and the judgment of Kekewich, J., does not give effect to the fact, which appears to be the case, that the goods, the sale of which are referred to in the order, were comprised in the security of the debenture-holders; and after the decision in *In re Standard Manufacturing Co.* it seems to be tolerably plain and settled that the holders of those debentures could prevail even as against the execution creditors, at least before sale. What their position is after the property is sold and the money handed over I do not know, and I will not at this moment say. But, bearing in mind that these goods were comprised in the security of the debenture-holders, it is obvious, in my opinion—and it has been almost conceded practically—that the order, in the form in which it now stands, is erroneous.

That, however, does not conclude the case, because it may be that the sheriff is entitled to be repaid by the liquidator the sum in question out of the assets of this company (if there are any) not comprised in the debentures. As to that there is not any real contest. Mr. Marten does not object to a variation of the order in that way—*i.e.,* discharging the present order and making the discharge to be without prejudice to any fresh application which the sheriff may make for payment by the liquidator out of the property not comprised in the debentures if there be any such property. Whether there is or is not we are not in a position at present to decide. I am not satisfied whether there is or is not.

It is possible, if Mr. Warmington's argument be correct, that some of the money which the liquidator now has may be applicable towards the payment of the sheriff. With that variation I think Mr. Marten is right, and the order as it now stands is erroneous, because it overlooks the rights of the debenture-holders.

FRY, L.J.—I an of the same opinion. It is impossible not to feel some sympathy with the sheriff in this case, because he appears to have acted with great consideration and with a desire to prevent unnecessary injury to the Opera. But, at the same time, it is impossible to give effect to this sympathy at the expense of the owners of a legal or equitable charge upon the property of the company, owners who in no way influenced or induced the sheriff to do what he did. Now the order of the learned judge has directed repayment to the sheriff out of the money that has been received by the official liquidator, including property which, it is conceded at the bar, belonged to the debenture-holders; in other words, that the debenture-holders are to pay for something that was not done at their instance or by their request.

I think, therefore, that all we can do is to discharge the order, reserving to the sheriff liberty to apply hereafter, if so advised, for repayment from any money coming to the hands of the official liquidator which is not subject to or charged by the debentures of the company.

LOPES, L.J.—The order of Kekewich, J., overlooks the right of the debenture-holders, whatever they may be, and I think, therefore, that order cannot stand.

Appeal allowed.

Solicitors for the appellants, *Boxall & Boxall.*

Solicitors for the respondent, *Lewis & Lewis.*

From Chan. Div. April 23, 28.

In re NATIONAL DEBENTURE AND ASSETS CORPORATION. (a.)

Company — Memorandum of association — Number of signatories — Certificate of registration — Evidence — Winding up — Jurisdiction — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 6, 17, 18, 145.

The registrar's certificate of incorporation of a company is not conclusive evidence that the memorandum of association was in fact signed by at least seven persons; evidence can be adduced to show that in fact the memorandum was signed by less than seven persons, and, if that fact be established, the court has no jurisdiction to make a winding-up order.

In re Northumberland and Durham District Banking Co., 6 *W. R.* 527, 2 *De G. & J.* 357, *approved.*

Peel's case, 15 *W. R.* 1100, *L. R.* 2 *Ch. App.* 674, *and* Oakes *v.* Turquand, 15 *W. R.* 1201, *L. R.* 2 *H. L.* 325, *distinguished.*

Appeal from Kekewich, J.

The company in this case was registered in May, 1888, under the Companies Acts, 1862. In November, 1890, the company passed a resolution for a voluntary winding up, and appointed Mr. Hibbert as liquidator. An order was subsequently made by Kekewich, J., that the voluntary winding up should be under the supervision of the court, and the appointment of the liquidator was continued.

Persons claiming to be creditors of the company then presented a petition for a compulsory winding-up order and that the voluntary liquidator might be removed. The petitioners alleged fraud in the formation and management of the company, and as illustration of the alleged fraud, gave some evidence which tended to show that the memorandum of association had not in fact been signed by seven persons, but that one of the signatories, Henry Moore, had signed twice, once in his own name and again under the assumed name of Frederick Sanguin. The voluntary liquidator then took the objection that as, on the petitioners' evidence, only six persons had signed the memorandum of association, the company had never been legally constituted or incorporated, and, therefore, that the court had no jurisdiction to make an order on the petition.

Kekewich, J., came to the conclusion on the evidence before him that the memorandum of association had not in fact been signed by seven persons; that the certificate of incorporation of the company given by the registrar was not conclusive evidence in such a case that all the requisitions of the Companies Act, 1862, in respect of registration had been complied with; and that the court had, therefore, no jurisdiction to make the compulsory winding-up order asked for by the petition.

The petitioners appealed.

The Court of Appeal, not being satisfied that the evidence before the court below established the fact that there were less than seven signatories to the memorandum of association, gave the appellants liberty to adduce further evidence on that point.

Messrs. Kotchkie and Wickens, directors of the company, and Mr. Watson, a solicitor, were examined *viva voce* in court. From their evidence the Court were satisfied that Moore and Sanguin were in fact different persons, and that there were in fact seven signatories to the memorandum of association.

Warmington, Q.C., and *C. E. E. Jenkins*, for the appellants.

Marten, Q.C., and *Warrington*, for the liquidator.

G. White, for creditors.

The following cases, on the question of jurisdiction, were cited in the court below and dealt with by Kekewich, J., in his judgment:—*Padstow Total Loss and Collision Assurance Association*, 30 W. R. 326, 20 Ch. D. 137; *In re Nassau Phosphate Co.*, 24 W. R. 692, 2 Ch. D. 610; *In re Northumberland and Durham District Banking Co.*, 6 W. R. 527, 2 De G. & J. 357; *Wenlock* v. *River Dee Co.*, 38 Ch. D. 534, 37 W. R. Dig. 43; *Peel's case*, 15 W. R. 1100, L. R. 2 Ch. App. 674; *Oakes* v. *Turquand*, 15 W. R. 1201, L. R. 2 H. L. 325.

LINDLEY, L.J.—This is a petition of a somewhat unusual character as regards the circumstances under which it is presented, although it is common enough in point of form. A company was formed, apparently in a proper way, by the registration of a memorandum of association with seven signatures, and it was registered on the 8th of May, 1888. There has been a voluntary liquidation which has been converted into a liquidation subject to the supervision of the court. Now some of the creditors are of opinion that matters require investigation which could be more effectually done under a compulsory order, and have therefore presented a petition for a compulsory order. The case came before Kekewich, J., and he dismissed the petition upon the ground that the company in question consisted of less than seven members, and had always consisted of less than seven members, and that there was no jurisdiction to wind it up. His decision on that point was based on the construction of the 16th and 18th sections of the Companies Act, 1862; and although by the 18th section it is enacted that "a certificate of the incorporation of any company given by the registrar shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with," it was decided as long ago as the time of Knight Bruce and Turner, L.JJ., in the case of *In re The Northumberland and Durham District Banking Co.*, that the registrar could not by a certificate create a jurisdiction in himself so as to enable companies to be registered to which the Act had no application. It is a condition precedent, for example, that the company shall be registered under the Act; that it shall consist of seven members; and if it consists of four or five, the registrar cannot, by his certificate, incorporate the company. Kekewich, J., came to the conclusion that this company had not consisted of seven members, and if that had been right in point of fact, his decision would have been correct in point of law. We did not feel satisfied ourselves about that fact, and we directed the petition to stand over in order that there should be liberty to the petitioners to adduce further evidence before us on that point. That accounts for the somewhat unusual circumstance that we have had persons examined here as witnesses; and, having heard their evidence, it seems to me that there is no reason to suppose that there were not seven persons who signed that memorandum. It is quite obvious that Mr. Moore is one person, Mr. Sanguin is another person, and Mr. Kotchkie is a third person. Although doubt was thrown on the existence of seven signatories, the evidence does not, to my mind, rebut the presumption which would be, after the certificate given by the registrar, that the Act was duly complied with, and that there were seven. Therefore, the doubt which induced Kekewich, J., to refuse to make an order is dispelled by the further evidence which has been adduced before us.

It comes, therefore, now to the simple question of whether it is necessary and proper for the protection of the creditors to make a winding-up order—a compulsory order—instead of continuing the supervision order. I certainly have not heard any attack made on

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

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years carried on a publishing business, executed a deed reciting that the partners had sold their business to a limited company in consideration of certain fully paid-up shares in the company, which formed the only assets of the partnership, and that they were desirous of modifying their partnership with a view to its registration as an unlimited company under Part VII. of the Companies Act, 1862; *and containing mutual covenants between the present partners and any future members of the company, that they should be subject to certain provisions therein contained. The sole object of the deed was, in fact, to obtain registration as a company under Part VII. of the Act. This deed was produced to the Registrar of Joint-Stock Companies, and an application made to him to register the company.*

Held, reversing the decision of the Divisional Court (Cave *and* Charles, JJ.), *that the application could not succeed.*

Rule calling on the Registrar of Joint-Stock Companies to show cause why a writ of *mandamus* should not issue commanding him to register a partnership of seven persons as a company incorporated under Part VII. of the Companies Act, 1862.

In the year 1879 the bookselling and publishing business of W. H. Allen & Co. was transferred to Mr. Johnston. In 1882 two other persons were taken in by Mr. Johnston as members of the partnership, and in 1886 another person was admitted by Mr. Johnston under a contract which permitted a transfer of parts of any share or interest, not exceeding one-half of the remainder, to such persons as Mr. Johnston should think fit, subject to approval by any partner; and Mr. Johnston from time to time made sales of shares in the partnership to different persons during the years 1887 to 1889, and all these members paid either by way of purchase or brought capital into the business.

Since the 4th of December, 1889, the partnership consisted of the seven persons who now sought the registration, and the contracts relating to the partnership and constituting the same were dated the 4th of December, 1889, and the 13th of March, 1891.

The partners desiring to have the partnership registered as an unlimited company under section 180 of the Companies Act, 1862, in March, 1891, made application to the Registrar of Joint-Stock Companies to be registered under Part VII. of the Act—that is, under section 180—and they left with the registrar the papers required under sections 183 and 184 of the Act.

The registrar refused to register the partnership, holding that a partnership such as the one in question was not a company which could be registered under section 180. During the years 1881 to 1889 such partnerships were registered under that section when required. But in 1889 a different rule was adopted, and the Registrar of Joint-Stock Companies —acting on the advice of the Board of Trade—refused to register such partnerships. It was said this view was adopted by the Board of Trade in consequence of the loss of fees and stamp duty to the Crown which arose from the registration of such private partnerships under Part VII. of the Act, and that such registration was the means of evading a large amount of stamp duty.

The deed which was sent to the registrar for registration was the deed of the 13th of March, 1891. This deed recited that, "Whereas the parties hereto (hereinafter called the partners) for some time carried on business in co-partnership as private booksellers and publishers, and whereas the partners some time since sold the said business to a company incorporated under the Companies Acts with the name of W. H. Allen & Co., Limited, in consideration of 20,000 fully paid-up shares in W. H. Allen & Co., Limited, of £5 each, and the said 20,000 shares are none of the assets of the said partnership, and whereas the partners are desirous of defining the terms of their existing co-partnership with the modifications hereinafter appearing with the view to the registration of such partnership as an unlimited company under Part VII. of the Companies Act, 1862;" and the operative part witnessed, "that each of the partners doth hereby covenant with the others of them, that the partners and the several other persons, if any, who become members of the company hereby constituted, shall, whilst holding shares in the capital of such company be and continue, until dissolved under the provisions in that behalf contained, a company under the name hereinafter specified, and that such company shall be subject to the regulations following."

The following were the material regulations:—

"The name of the company is Johnston, Heathcote, Randall, Danby, Parr, Hill, and Jibb" (these being the names of the seven partners).

"Until after the registration of the company there shall not at any time be more than twenty members."

"The objects for which the company is established are to continue and carry on the co-partnership hitherto existing between the partners, and to realize and get in the assets of the co-partnership, and to satisfy all liabilities, and to do all such other things as are incidental or conducive to the attainment of the above objects."

"The capital of the company shall be £770, divided into seventy-seven shares of £10 each, and the said shares shall be divided amongst the partners as follows:—

"The said 20,000 shares of W. H. Allen & Co., Limited, shall be brought into the company by the partners. The number of directors of the company shall not be more than seven or less than three. The partners shall be the first directors of the company."

"The provisions contained in Table A. in the first schedule in the Companies Act, 1862 (except those numbered 23, 24, 25, 52, and 53—that is, those relating to conversion of shares into stock and directors), shall apply to the company, as if they were herein set forth at length."

"The company may at any time before its registration be dissolved by special resolution, and when such a resolution is passed the affairs of the company shall be wound up by the directors or otherwise as by special resolution directed."

The preamble to the Companies Act, 1862, states that, "It is expedient that the laws relating to the incorporation, regulation, and winding up of trading companies and other associations should be consolidated and amended."

Section 4 enacts: "No company, association, or partnership consisting of more than ten persons shall be formed, after the commencement of this Act, for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent; and no company, association, or partnership consisting of more than twenty persons shall be formed, after the commencement of this Act, for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries."

Section 5 states that the Act is divided into nine parts, t[illegible] [illegible]ich relates "to the constitution

and incorporation of companies and associations under this Act," and the seventh "to companies authorized to register under this Act."

By section 6: "Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company with or without limited liability."

Section 180 (which is in Part VII.) enacts: "With the above exceptions, and subject to the foregoing regulations, every company existing at the time of the commencement of this Act, including any company registered under the said Joint-Stock Companies Acts consisting of seven or more members, and any company hereafter formed in pursuance of any Act of Parliament other than this Act, or of letters patent, or being a company engaged in working mines within and subject to the jurisdiction of the Stannaries, or being otherwise duly constituted by law, and consisting of seven or more members, may at any time hereafter register itself under this Act as an unlimited company, or a company limited by shares, or a company limited by guarantee; and no such registration shall be invalid by reason that it has taken place with a view to the company being wound up."

Sir R. E. Webster, A.G., Ingle Joyce, and *H. Sutton,* showed cause against the rule.

Finlay, Q.C., and *Theobald,* in support of the rule, contended that this partnership was a company "duly constituted by law" within this section.

Cur. adv. vult.

June 17.—The judgment of the Court (Cave and Charles, JJ.) was read by

CHARLES, J.—The question we have to decide in this case is whether an ordinary partnership of not less than seven persons can be registered under section 180 of the Companies Act, 1862.

For the negative it was contended, first, that such a partnership was not a company at all; secondly, that if a company, it was not a company duly constituted by law within that section; thirdly, that this particular partnership was not a *bonâ fide* partnership, and had no object but that of winding up the firm of Allen & Co., Limited.

As to the first point. In Ogilvie's Imperial Dictionary one of the meanings of the word "company" there given is "a number of persons united for performing or carrying on anything jointly; as, a company of players; an insurance company; 'High in office in the Goldsmith's Company'—Dickens; 'A company forges the wine'—Tennyson. [The word is applicable to private partnerships or to incorporated bodies; but where there are only a few individuals associated the concern is generally called a co-partnery, the term company being usually reserved for large associations.]"

Lindley, L.J., in his Book on Partnership and Companies (4th ed., p. 4), says, "The fundamental distinction between partnerships and incorporated companies is that a partnership consists of a few individuals known to each other, bound together by ties of friendship and mutual confidence, and who, therefore, are not at liberty without the consent of all to retire from the firm and substitute other persons in their places; whilst a company consists of a larger number of individuals not necessarily acquainted with each other at all, so that it is a matter of comparative indifference whether changes amongst them are effected or not."

We have looked carefully through the Act of 1862, and we cannot find any indication that the word "company" in section 180 is used in any other sense than that indicated by Lindley, L.J. In section 199, a partnership consisting of more than seven members, and not registered under the Act, is included under the term "unregistered company." By tables B. and C. the same fee is charged for registering an existing company, except when there is an express exemption, as for registering a new company. It was also pointed out to us that the Legislature itself has used "company" and "co-partnership" as synonymous terms both in the 7 & 8 Vict. c. 113, s. 47, which is re-enacted by section 205 of the Act of 1862, and also in the 7 & 8 Vict. c. 110, s. 2, which is repealed by that Act. Section 180 fixes the number of members required to entitle a company to registration at not less than seven. The number of members of the partnership in this case is seven, and any partner may transfer his shares without the consent of the company. It is clear, therefore, that this partnership is a company within the description given by Lindley, L.J., and we are also of opinion that it is a company within the meaning of section 180.

But, secondly, it is said that if it is a company, at any rate it is not a company constituted by law. In order to determine the meaning of this expression we must read the whole sentence, which runs thus—"Any company hereafter formed in pursuance of any Act of Parliament other than this Act, or of letters patent, or being a company engaged in working mines within and subject to the jurisdiction of the Stannaries, or being otherwise duly constituted by law." On the one hand it is said that "constituted by law" is intended to distinguish and exclude companies constituted by agreement of the parties. On the other hand, it is said that "constituted by law" means constituted according to law, and a passage in Lord Justice Lindley's book on Partnership was referred to (4th ed., p. 4), where it is said:—"A corporation is a fictitious person created by special authority (and by the law of England, by the Crown, or by Parliament), and endowed by that authority," &c., where the phrase "by the law of England" is equivalent to "according to the law of England." Further, it was pointed out that of the three kinds of companies specifically referred to in that section the first is a company formed in pursuance of an Act of Parliament, the second is a company formed in pursuance of letters patent (that is, by the Crown), and the third is a company formed by voluntary agreement, and that this embraces all the ways in which companies can be formed, although only one of the kind of companies which can be formed by voluntary agreement is indicated, so that the words "otherwise constituted by law" do not point to any fourth mode of forming companies, but must refer to other companies formed by voluntary agreement which are not engaged in working mines within and subject to the jurisdiction of the Stannaries. That a cost-book mining company is formed by agreements is expressly stated by Lindley, L.J., on Partnership, 4th ed., p. 146, and was not denied by the other side. What, then, is the meaning of "otherwise constituted by law"? It was contended that these words simply exclude companies not formed according to law—as, for instance, banking companies of over ten persons—and also all companies which are illegal, whether they are so by common law or are made so by some statute, of both of which classes of cases Lindley, L.J., gives numerous specimens (Partnership, 4th ed., p. 180, *et seq.*). Moreover, it was urged that this view was supported by section 183, which requires that, before registration, there shall be delivered to the registrar a copy of any Act of Parliament, Royal charter, letters patent, deed of settlement, contract of co-partnery, cost-book regulations, or other instruments constituting or

regulating the company, and it was pointed out that the words "deed of settlement" and "contracts of co-partnery" appeared only applicable to companies formed by voluntary agreement, which are not cost-book mine companies. To these considerations must be added the remarkable fact that, for twenty-seven years after the Act passed, it never seems to have occurred to anybody that ordinary partnerships of seven or more members could not register under it, and a long list of companies has been cited to us which, although ordinary partnerships, have been allowed to register themselves under section 180.

We asked the Attorney-General to point out what inconvenience could result from allowing existing partnerships to register under section 180, and all he could say on that subject was that if it were done the Crown would lose certain fees on the transfer of the partnership property to the company, which, if the partnership can be registered, is transferred at once by the statute itself to the registered company, whereas, if a new company has to be formed to take over the business of the old partnership, fees must be paid to the Crown on the transfer of the property of the old partnership to the new company. This does not appear to us a sufficiently good reason for departing from a construction of the section which is reasonable in itself and has the sanction of twenty-seven years' usage, and consequently we hold that the contention of the prosecution on this point is correct.

The third point which was raised by Mr. Ingle Joyce was of a much narrower kind. It was urged that this particular company was not a *bonâ fide* company; that it had no business, and was simply formed for the purpose of winding up the company of W. H. Allen & Co. It would rather seem that the partnership in question is formed for the purpose of winding up itself, and it was pointed out by Mr. Theobald that by section 180, the registration is not to be invalid by reason that it has taken place with a view to the company being wound up. We see no reason to think that this was a bogus company, and we are, therefore, of opinion that this third objection fails like the others, and that the rule must be made absolute.

July 28.—The registrar appealed.

Sir R. E. Webster, A.G., Ingle Joyce, and *H. Sutton*, for the appellant, pointed out that such companies as this had, in fact, been only registered under Part VII. during the years 1881 to 1889, and not for twenty-seven years, as stated in the judgment of the court below.

Finlay, Q.C., Buckley, Q.C., and *Theobald*, for the respondents.

LINDLEY, L.J.—This is a very ingenious attempt to drive a coach and four through this Act of Parliament, but I do not think it can be successful. The facts are simple enough. There were seven partners who have been carrying on the business of booksellers and publishers, under the firm of Messrs. W. H. Allen & Co. They have sold the whole of their business to a limited company, and are partners only in this sense, that they have not formally dissolved partnership, and have not discharged their liabilities; but they are not carrying on any business, nor do they profess to do so. They desire to avail themselves of Part VII. of the Companies Act, 1862, and to get themselves in some way, if possible, registered under it, for the purpose of winding up their affairs; and with this view they executed this ingenious deed of the 13th of March, 1891. [His lordship then referred to the material portions of it.] The whole object of this deed, as appears from the provisions of it, is to obtain registration under the Act; for though the deed contains the statement that one of the objects for which the company was established was "to continue and carry on the co-partnership hitherto existing between the partners," this is deliberately untrue. Upon their taking this deed to the registrar, he refused to register the company under Part VII., and they thereupon obtained a *mandamus* from the Divisional Court compelling him to do so, on the ground that this company was within section 180 of the Act. From this the registrar has appealed.

It is necessary to look at the general scope of the Act of 1862, and its structure. [His lordship then went through the main divisions of the Act, and continued:—] This distribution of the Act is important. It seems to me it would be quite contrary to the whole scheme of the Act that a company should be formed for the sole purpose of registration under Part VII. The Act was framed on the theory that companies which were to be formed by registration under it were to be registered under Part I., and section 6 appears to me to involve this negative, that a company is not to be formed and registered under the Act except under section 6. I think it is impossible otherwise to carry out the provisions of the Act.

But that is not the object of the applicants in the present case; for they desire to be registered under section 180, saying that they come within the words "any company hereafter formed . . . . being otherwise duly constituted by law." In order then to bring the case within section 180, it must be established that we are dealing with a company (whatever that may be), and a company "duly constituted by law." To what extent and in what sense was this a "company," and "duly constituted by law"?

At first, I must confess, I did not see how they could be a company at all; because I understand a company to be an association of persons, the shares of each member of which are transferable without the consent of the others, and I cannot discover any provision to that effect in the deed. Mr. Buckley, however, has pointed out that there is a possible provision for the transference of shares under the 11th provision of the deed, which incorporates certain provisions of Table A. of the Act, some of which I will assume to be applicable, and that this, therefore, is or may be a company of some kind.

Section 180 does not state for what purpose such a company may be formed; but it is said that this being a company, is brought within the words of the section, "duly constituted by law," because there is no law against it. I will not say that there cannot be a company of less than twenty members, formed since the Act of 1862, capable of being registered under Part VII. of that Act. But even assuming that such a company formed to carry on business could be registered under Part VII., it does not carry the present case; for I can find nothing in Part VII. to warrant the notion that a company formed for no other purpose than that of registration under Part VII., and thus evading the whole of the provisions of Part I., can be thus registered. Section 180 points to a company carrying on business, and it is an entire misconstruction and misuse of the Act of Parliament to suppose that a company formed for the mere purpose of registration can be registered under Part VII.

FRY, L.J.—I take the same view as Lindley, L.J., in this case. The question mainly turns on section 180 of the Companies Act, 1862, and the words "otherwise duly constituted by law." Do these words include the case of this company? The inclination of my opinion as to these words is that I am not prepared to hold that they cover a mere pri-

the costs so incurred (being in effect the costs of taking possession of the property, obtaining and enforcing a personal judgment against the applicant, and attempting to sell the property on the mortgagee's instructions) on such of the documents in his custody as related to the title of the mortgaged property.

These documents had originally come into his possession as solicitor to the applicant, but were alleged to have afterwards been held by him on behalf of the mortgagee.

The respondent made out his bill for the abovementioned costs in the name of the applicant, but admitted at the bar that the applicant had given him no express retainer, and that he had no bill against the applicant personally. The question of lien, therefore, alone was argued.

Maidlow, for the applicant.—The mortgagee has no lien against me now, and therefore the respondent's lien being derived entirely from the mortgagee is gone: *Wakefield* v. *Newbon*, 6 Q. B. 276; *Pratt* v. *Vizard*, 5 B. & Ad. 808; *Pelly* v. *Wathen*, 1 De G. M. & G. 16.

A. J. Allen, for the respondent.—I rely upon *Ogle* v. *Story*, 4 B. & Ad. 735; *In re Jones*, 8 Beav. 479; *Ex parte Cobeldick*, 32 W. R. 239, 12 Q. B. D. 149.

Maidlow, in reply.—*Ogle* v. *Story* is virtually overruled by *Wakefield* v. *Newbon*. See also Cordery on Solicitors, 214; *Hollis* v. *Claridge*, 4 Taun. 807; *Cattell* v. *Simons*, 6 Beav. 304; Williams on Personal Property, p. 37, 12th edition.

Cur. adv. vult.

August 5.—CHITTY, J., stated the facts and continued:—I will assume in favour of the respondent that among the documents he holds there are some which relate to the title of the mortgaged property, and that though he received them originally from the applicant, the custody was changed, and that he afterwards held them as solicitor for the mortgagee.

After the admission of the respondent that he had no bill of costs against the applicant personally, it is clear that the lien claimed on the documents of title is only a lien in virtue of the right of the mortgagee to hold such documents.

But it appears from the evidence that the applicant has settled all accounts with his mortgagee, and that the mortgagee has no longer any claim against him for the costs included in the bill in question, and consequently no lien as against him on the documents of title, nor any right to withhold them from him. There is no suggestion in the evidence that the settlement of accounts between the applicant and his mortgagee (who was mortgagee in possession) was come to for the purpose of defeating any lien of the respondent, and it is unnecessary to consider what might have been the effect of such evidence if given. The question then is whether the respondent has any lien on the documents of title as against the applicant. The nature of a solicitor's lien is so well established that it is scarcely necessary to state its nature or on what grounds it is founded. It is not the result of contract; it is not an equitable charge; it is not an incumbrance affecting the estate itself (see the judgment of Lord St. Leonards in *Blunden* v. *Desart*, 2 Dr. & W., at p. 425). It does not confer on the solicitor any higher right to retain deeds than the client himself has (*Ib.* 418).

There is some error in the language attributed to the judges who decided *Ogle* v. *Story*, as reported in 4 Barn. & Ad. 735, where apparently an attorney's lien is spoken of as a pledge. In the case as reported in 2 L. J. N. S. K. B. 110, the term "pledge" does not appear. This case was cited as an authority for the respondent; but it has no bearing on the case before me. It was an action to recover money from the attorney; the true ground of the decision was, that the plaintiff had overpaid the mortgagee (Fulwood), and the plaintiff ought to have sued him and not the attorney (see the judgment of Lord St. Leonards, 2 Dr. & War., at pp. 426, 427). The nature of a solicitor's lien is stated clearly in the judgment of the court delivered by Lord Cranworth in *Pelly* v. *Wathen*. He says (*vide* 1 De G. M. & G., at p. 23): "The general lien of a solicitor is merely a right to keep back from his client the deeds and papers which he holds as solicitor until his bill of costs is satisfied. It is a right derived entirely through the client, and therefore, on the most obvious principles of justice, cannot go beyond the right of the client himself. If the client's right to the deeds which came to the hands of the solicitor is absolute, so will be the right of the solicitor. If the deeds in the hands of the client are subject to any rights outstanding in third parties, such rights will follow them into the hands of the solicitor. These consequences flow so immediately from the nature of the relation subsisting between the client and his solicitor that, even independently of authority, we should have felt bound by the principles on which they depend." And, again, at page 24, he says (in effect) that the right to hold title deeds in virtue of a solicitor's lien is subject to all rights, legal and equitable, affecting them in the hands of the person from whom he received them. These principles are illustrated by numerous authorities which it is unnecessary to cite. From these it follows that, where the mortgagor has paid to the mortgagee all that is due to him for principal, interest, and costs, and the mortgagee has given the mortgagor a release, the mortgagee's solicitor has no right to retain the deeds as against the mortgagor, even for costs due to the solicitor from the mortgagee for work done relating to the mortgaged property pending the mortgage. The equitable right of the mortgagor to have back from the mortgagee his deeds on payment of principal, interest, and costs prevails against the solicitor's lien claimed in right of the mortgagee.

In *Wakefield* v. *Newbon*, 6 Q. B. 276, there had been a reconveyance to the mortgagor, and it was held that he was entitled to recover the deeds from the mortgagee's attorney. Here the mortgagee has released the mortgagor and conveyed the property to another mortgagee by the direction of the mortgagor. The only difference between the cases is that there the mortgagor had a legal right to the deeds; here he only has an equitable right. If the new mortgagee had claimed the deeds, the result might have been different, but he has made no such claim. The documents of title having originally come into the possession of the respondent as solicitor for the applicant, the applicant is entitled to have them delivered back to him now that the lien is gone.

There is no question as to the applicant's right to have back all documents belonging to him not relating to the mortgaged property.

The order must be in the usual form, for delivery of all documents in the respondent's hands on oath. The respondent must pay the costs. Inasmuch as the documents came into the possession of the respondent originally as solicitor for the applicant, it is not necessary that an action should be brought: the order can properly be made in the matter of the solicitor.

It is unnecessary to consider the question whether by setting up wrongly a lien to retain the documents for a debt due from the applicant personally, the

spondent has not waived his lien. See *Dirks* v. *Richards*, 4 Man. & Gr. 574.

Order made.

Solicitors for the applicant, *Indermaur & Brown*, for *T. Roberts*, Newport, Monmouth.

Solicitors for the respondent, *Thomas White & Sons.*

Q. B. Div. (Cave and Charles, JJ.) June 5, 9.

OSBORNE *v.* THE SKINNERS' COMPANY. (*a.*)

Public health—Demolition of unhealthy dwelling-house—Notice to owner—Definition of "owner"—The Housing of the Working Classes Act, 1890 (53 & 54 *Vict. c.* 70), *s.* 29, *and Form C., schedule* 4.

The definition of "owner" in Part II. of the Housing of the Working Classes Act, 1890, *is that given by section* 29 *of the Lands Clauses Act,* 1845 (8 *Vict. c.* 18), *as "the person or corporation entitled to sell or convey" the property in question, and notice to such person or corporation of proceedings for demolition under the above Act of* 1890 *is sufficient, notwithstanding that the Form C. in Schedule* 4 *is drawn as applicable to an owner under the Public Health Act,* 1875, *s.* 4—*namely, a person in receipt of the rack-rent.*

Rule *nisi* for a *mandamus* to a metropolitan magistrate to hear and determine a summons under the Housing of the Working Classes Act, 1890.

Notice had been served upon the Skinners' Company by the plaintiff as clerk to the local sanitary authority for the demolition of certain dwelling-houses declared to be dangerous to health, of which the company were owners in fee. The magistrate dismissed the summons on the ground that the Skinners' Company had parted with possession of the premises upon a lease of ninety-nine years of which more than twenty-one remain unexpired, and that they were not, therefore, "owners" within the meaning of the Act.

The notice to the company was in Form C. of Schedule 4 of the Housing of the Working Classes Act, 1890, which recites that whereas the person before the court is "an owner within the meaning of the Public Health Act, 1875." The plaintiff obtained a rule *nisi* for a *mandamus.*

Poland, Q.C., and *Avory*, for the Skinners' Company, showed cause against the rule.—The form is drawn under section 32 (2) of the Act. It expressly refers to the fact of the owner, within the meaning of the Public Health Act, 1875, having had notice. By that Act and the Nuisance Removal Act, 1866 (29 & 30 Vict. c. 41), an owner is a person receiving the rack-rent. The company are not such owners: *Cook* v. *Montague*, 20 W. R. 624, L. R. 7 Q. B. 418, is applicable.

Moreton Smith, for the plaintiff, was not called upon.

CAVE, J.—This appeal must be allowed, and the rule be made absolute. The definition in section 29 of the Housing of the Working Classes Act, 1890, of the expression "owner" is, "in addition to the definition given by the Lands Clauses Consolidation Acts, to include all lessees or mortgagees of any premises required to be dealt with under this part of this Act, except persons holding or entitled to the rents or profits of such premises for a term of years of which twenty-one years do not remain unexpired."

The question here is whether this definition applies to the word "owner" in section 32, which enacts that where, on the representation of any officer of the local authority, or upon certain other information, any dwelling-house is reported to be in a state dangerous or injurious to health, or unfit for human habitation, the local authority "shall forthwith take proceedings against the owner or occupier for closing the dwelling-house under the enactments set out in the third schedule to this Act." These enactments include the Sanitary Act, 1866, as applicable to the metropolis, and the Public Health Act, 1875, as applicable to elsewhere than the metropolis.

Mr. Poland argues that the word "owner" in section 32 should be confined to the "owner for the time being receiving the rack-rents" of the dwelling-house in question under the definition in the Public Health Act, 1875, s. 4. It would be remarkable if the Legislature gave one definition in section 29 to be applicable to this part of the Act, and in this same part, on the next occasion of the use of the word, should have intended to use it in another sense. This would be still more extraordinary, seeing that this Act of 1890 is a consolidation of previous Acts, including the Artisans' and Labourers' Dwellings Act, 1868 (30 & 31 Vict. c. 130), under which the definition of "owner" is the same as under section 29 of this Act. Under the Act of 1868 notice could be given to an owner undoubtedly in the position of the Skinners' Co. here, notifying that alteration or demolition of the premises reported against would be required, and after demolition compensation could be paid to the owner. That is exactly what the local authority may do under this Part II. of the Act of 1890. It is incredible that the Legislature should retain the same definition and yet, in a similar enactment, have intended that that definition should not apply as before.

By section 33, "where a closing order has been made in respect of any dwelling-house, then the local authority, if of opinion that the dwelling-house has not been rendered fit for human habitation . . . . shall pass a resolution that it is expedient to order its demolition." Notice of such resolution is to be served on "the owner" of the dwelling-house, and unless "the owner" undertakes the demolition of it, the local authority must undertake that work; and by section 34, after deducting the expenses, the local authority shall pay to the owner the balance after the sale of the materials.

In all these sections the word "owner" must be read as applicable to a person coming within the definition of section 29. Any limitation of the word to the receiver of the rents and profits would bring about this disastrous result, among others, that an owner of a term nearing its expiration, and anxious to escape from his liability to repair, might assign his lease to some impecunious person upon whom the notice for demolition would have to be served, and who would pocket the balance handed over by the local authority, while the owner of the dwelling-house would find, on coming into his interest, that everything was demolished and that someone else had pocketed the compensation. That is only an instance of what might happen if Mr. Poland's definition were adopted in this Act. I am clearly of opinion that there was no intention under this Act to alter the definition by the Act of 1868, and re-enacted in this very Act itself.

CHARLES, J.—I am of the same opinion. Part II. of the Act of 1890 deals with "Unhealthy Dwelling Houses." By section 29, the first section of Part II., "owner" undoubtedly is made to include the present owner, whether receiver of the actual rents and profits or not. Then comes sections 32 to 34, dealing with

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

the arrangements for the demolition of unhealthy houses. Section 47 enacted that "where an owner of any dwelling-house is not the person in receipt of the rents and profits thereof, he may give notice of such ownership to the local authority, and thereupon the local authority shall give such owner notice of any proceedings taken by them in pursuance of the Act in relation to such dwelling-house." Taking the sections together, and remembering that the Act re-enacted to a great extent the Act of 1868, they formed a consistent whole. Under section 32 the local authority must give notice of demolition to an owner as defined under the Lands Clauses Acts. If such a person is not in receipt of the rents and profits he may give notice who is, and thereupon the local authority shall give such owner—that is, the owner of the rents and profits of the dwelling-house—notice of their proceedings. Before the order for demolition is made, any person properly coming under the definition of "owner" will thus receive due notice of all proceedings under the Act. The argument of the appellants depended upon the form of notice given in the fourth schedule, and cited as applicable by section 32 (2). But that form is admittedly not applicable without alteration to proceedings by local authorities within the metropolis, and though, as altered for application within the metropolis, Mr. Poland might be entitled to rely upon it in considering the purpose of the Act; and though undoubtedly the "owner" in the form is a person not within the Lands Clauses Act, but a "receiver of rents and profits" within the Public Health Act, 1875, yet too much stress must not be laid on the statutory form which is given as an example of what is more generally applicable when a special enactment is given in the body of the Act defining "owner" in a different manner.

Rule made absolute.

Solicitor for the appellant, *W. J. Ricketts.*

Solicitor for the respondents, *F. A. Rowland.*

Q. B. Div. (Denman and Wills, JJ.) June 4.

WALKER *v.* CRYSTAL PALACE DISTRICT GAS CO. (*a.*)

Practice—Costs—Refreshers—Ord. 65, *r.* 27 (48).

The trial of an action occupied less than five hours on the first day, and was concluded on the next day, having occupied altogether five hours and sixteen minutes.

Held, on taxation of costs, that a refresher fee to counsel could not be allowed.

Appeal from an order of a master as to taxation of costs, referred to the court.

The trial of the action, which took place before Lord Coleridge, C.J., lasted five hours and sixteen minutes, that is to say, it began on a Wednesday at 12.15, continued till 4 that day, was resumed at 10.45 on Thursday and finished at 12.16.

The solicitor of the plaintiff, who succeeded in the action, paid a refresher to counsel; but, on taxation between party and party, the master disallowed such payment.

The plaintiff appealed.

Atherley Jones, for the plaintiff.—Ord. 65, r. 27 (48) says:—"As to refresher fees, when any cause or matter is to be tried or heard upon *viva voce* evidence in open court, if the trial shall extend over more than one day, and shall occupy either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours, without being concluded, the taxing officer may allow, for every clear day subsequent to that on which the five hours shall have expired," certain fees. The rule means that if a case lasts more than five hours, whether those five hours are on one day of the week, or part on one day and part on another, a refresher may be allowed for every day on which the case continues after the expiration of the five hours.

He cited *Harrison* v. *Wearing*, 27 W. R. 526, 11 Ch. D. 206; and *Brown* v. *Sewell*, 29 W. R. 295, 16 Ch. D. 517 (cases decided before the making of the rule); and *Collins* v. *Worley*, 60 L. T. N. S. 748, 37 W. R. Dig. 58, and *Wicksteed* v. *Biggs*, 52 L. T. N. S. 428 34 W. R. Dig. 44 (cases decided since the rule).

Danckwerts, for the defendants, was not called upon.

DENMAN, J.—In order that this rule should be applicable it is necessary that the trial shall extend over more than one day—*i.e.*, shall begin on one day and last into another; and it is further necessary that either on the first day, or else partly on the first day and partly on the second, the trial shall occupy five hours without being concluded. The rule says that where that is the case the taxing officer may allow certain refreshers "for every clear day subsequent to that on which the five hours shall have expired." That means that when the five hours have expired, whether on the first or on the second day, and the case is not concluded, then, after the expiration of another "clear day," a refresher may be allowed. We need not decide whether such "clear day" means another period of five hours calculated like the first, or whether it means a day of the week. In neither sense did a clear day elapse in the present case, for the trial only lasted sixteen minutes beyond the five hours. I think that the order of the master must be affirmed.

WILLS, J.—In my opinion the word "day" is used all through the rule in the sense of a day of the week. If a case occupies more than five hours on Monday, on Tuesday there will be a right to a refresher. If it takes less than five hours on Monday, there will be no right to a refresher on Tuesday; but, if it lasts into Wednesday, then again there will be a right to a refresher, for the Wednesday is a "clear day," clear of the other days and subsequent to the Tuesday. Whether the whole of the clear day must be taken up, or whether a part is sufficient, it is not necessary to decide. The clear day must be one after that on which the first five hours expire. I agree that the order of the master was right.

Appeal dismissed.

Solicitors for the plaintiff, *Coburn & Young.*

Solicitors for the defendants, *Wilkins, Blyth, & Co.*

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) April 24.

FRANCE *v.* DUTTON. (*a.*)

County court—Costs—Particulars of claim—Signature of particulars by solicitor's clerk—Sufficiency of signature—Ord. 6, *r.* 10; *ord.* 27, *r.* 4 (*County Court Rules*, 1889)—*Scales of Costs, Appendix.*

In an interpleader action in a county court the particulars of claim were signed with the name of the claimant's solicitor by the solicitor's clerk, who had general

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

authority to conduct his master's business. Upon an objection taken on the taxation of costs that the particulars ought to have been signed by the solicitor himself, to entitle him to costs under the rules,

Held (*distinguishing* Reg. *v.* Cowper, 38 *W. R.* 408, 24 *Q. B. D.* 533), *that the signature of the solicitor's name by the clerk was a sufficient signature by the solicitor, and that the solicitor was entitled to his costs.*

Appeal, by leave of the judge, from Clerkenwell County Court, the learned judge having refused to direct a review of the taxation of the claimant's costs in an interpleader issue in which the claimant had been successful.

The registrar disallowed as costs items of 12s. and 3s. 4d. for drawing particulars of claim and fair copies, and for attending lodging same, respectively.

These particulars were signed by the solicitor's clerk with the solicitor's name, and on the taxation of the costs the above items were disallowed by the registrar upon the ground that the particulars ought to have been signed by the solicitor himself, and that the signature of the solicitor's name by the clerk was not a sufficient signature of the particulars, according to the decision in the case of *Reg.* v. *Cowper*, 38 W. R. 408, 24 Q. B. D. 533.

On appeal, the learned judge, in a considered judgment, upheld the decision of the registrar, and decided that, according to *Reg.* v. *Cowper*, the particulars ought to have been signed by the solicitor himself, the signing of the solicitor's name by the clerk not being a sufficient signature within the meaning of the rules.

The claimant appealed, and the question now was whether the signature by the clerk was a sufficient signature.

W. Whately, for the appellant.—The case of *Reg.* v. *Cowper*, which the learned judge thought he was bound to follow, was different from the present case. In that case the particulars of claim were filled in on a form which contained the name of the solicitor lithographed and put on, long before the particulars were filled in. That makes a great distinction between *Reg.* v. *Cowper* and the present case, where the signature by the clerk was put on after the particulars had been filled in and completed. A second point of distinction between the two cases is that this case does not come within the same rules as *Reg.* v. *Cowper*. This is an interpleader issue, and comes under ord. 27, r. 4 (County Court Rules, 1889), which does not contain any provision that the particulars should be signed by a solicitor, whereas *Reg.* v. *Cowper* was an ordinary summons and plaint, coming under ord. 6, r. 10, which expressly provides that the solicitor shall indorse his name to the particulars. The signature of the solicitor's name by his authorized clerk is a sufficient signature by the solicitor, within the meaning of the rules. *In re Hirst*, 22 W. R. 857, L. R. 18 Eq. 704, and *Reg.* v. *The Justices of Kent*, 21 W. R. 635, L. R. 8 Q. B. 305, are authorities for that proposition. In the latter case it was held that a notice of appeal signed in the appellant's name by the clerk to his attorney with the appellant's authority was sufficient, on the principle which was held applicable to the case, "*qui facit per alium facit per se.*" That case really governs the present case, and shows that the signature of the solicitor's name by his clerk, acting with his master's general authority, was a sufficient signature by the solicitor.

Jelf, Q.C. (*Muir Mackenzie* with him), for the respondent.—It is necessary to have the actual mind of the solicitor brought to bear upon the particular subject-matter in question. That is the meaning of these rules requiring these particulars to be signed by the solicitor, and that has not been so here. The *ratio decidendi* in *Reg.* v. *Cowper* was that the mind of the solicitor must follow the particular matter required, and as that had not been so there, the court held the signature insufficient for that reason. Here the same defect exists. The rules require that there must be the actual signature of the actual solicitor on the rolls; here the whole document was written out by the clerk.

Lord COLERIDGE, C.J.—I am of opinion that this is not within the authority of *Reg.* v. *Cowper*. The question is whether a solicitor is or is not entitled to charge for certain particulars which were not signed by himself with his own hand, but were signed by his clerk, who had his general authority; and the question is whether there are any words in the Act of Parliament which make it necessary that this act should be done by the solicitor personally. I agree with the decision of the court in the case of *Reg.* v. *The Justices of Kent*, where it was laid down by Blackburn, J., that the principle applicable was the principle "*qui facit per alium facit per se*," though he also said that there may be cases where the statutes themselves show on the face of them that some particular act is to be done by a particular person, and then that act must be done by that person and no one else.

It is not denied here that these particulars are binding on the parties, and the sole question is whether they are properly signed by the solicitor within the meaning of the rules. Ord. 6, r. 10, of the County Court Rules, 1889, says that "the solicitor of a plaintiff suing by a solicitor shall indorse on the particulars his name," &c. Has this rule been complied with? In *Reg.* v. *Cowper*, it was held that indorsement in this rule meant signature, as it was important to show that the document had come under the actual notice of the solicitor, and that he had adopted it. In that case the signature was a lithographed signature, and the question was whether the particulars had been properly signed by the solicitor within the meaning of the rule; and it was there held that a lithographed signature, placed on a form by a lithographer, was not a signature by the solicitor. We have a different state of things here. We have a document which purports to be signed by the solicitor, and is in fact signed by his clerk, who has his general authority to conduct the business for his master, and who signed in the name of his master. Does this come within the principle "*qui facit per alium facit per se*"? I think it does. The solicitor authorized his clerk to do this particular act, and the act was done by the clerk within the scope of his authority. These two things take the case out of the case of *Reg.* v. *Cowper*, and therefore *Reg.* v. *Cowper* is not in point here. We think, therefore, that the items disallowed were not properly disallowed.

MATHEW, J.—I am of the same opinion. This document purports to come from the solicitor and to have been signed by him. Was it so signed by him? It was signed by the solicitor, inasmuch as it was signed by the clerk properly authorized for the purpose of so signing. The distinction between this case and the case of *Reg.* v. *Cowper* is perfectly obvious, as in that case there was a form—a lithographed form—prepared beforehand, and there was no security of any kind that the document was prepared for that particular purpose; it was, in fact, only one of a large number of forms already prepared with the solicitor's name lithographed upon it. The distinction between the two cases is sufficient to

justify us in holding that these costs should have been allowed.

Appeal allowed.

Solicitor for the appellant, *George Castle.*

Solicitors for the respondent, *Cooper & Bake.*

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) May 13; June 22.

In re ONWARD BUILDING SOCIETY. (*a.*)

Company—Order for compulsory winding up—Purchase of shares after date of order—Right of purchaser to be placed on list of members—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 35, 98, 153.

A person who purchases shares in a company after an order has been made by the court for the compulsory winding up of the company is not entitled, under section 35 *of the Companies Act,* 1862, *to be placed on the register of members of the company, as section* 35 *is not applicable to transfers after the date of a winding-up order made by the court.*

Appeal from the Darlington County Court.

The facts and arguments are sufficiently stated in the judgment, the question being whether the appellant, Mr. Broad, who had purchased shares in the Onward Building Society after the date of a compulsory winding-up order made by the court, was entitled, in respect of such shares, to be placed on the list or register of members of the society under section 35 of the Companies Act, 1862.

Sir Henry James, Q.C., and *W. A. Meek,* for the appellant.

Seward Brice, Q.C., and *Howland Jackson,* for the respondent, the official liquidator of the society.

Cur. adv. vult.

June 22.—The written judgment of the COURT (Lord COLERIDGE, C.J., and MATHEW, J.), was read by

MATHEW, J.—This was an appeal from the decision of the county court judge of Darlington, who had refused an application for an order directing the liquidator of the Onward Building Society to place on the register of members the name of the appellant, Mr. Broad. The society had been ordered to be wound up compulsorily, and the question was whether Mr. Broad, who purchased shares after the date of the order, was entitled, under section 35 of the Companies Act, 1862, to have his name substituted on the register for that of his vendor. Though the society had been unable to fulfil its engagements, the assets turned out to be more than sufficient to meet all liabilities, and it appeared that a considerable surplus would remain for distribution among the members. The applicant and others had made large purchases of shares, and were desirous of having their names placed on the list of members for the purpose of securing the most favourable realization of the assets, and of submitting, if necessary, their views to the court under section 91 of the Act upon any matter relating to the winding up.

The learned county court judge refused to make an order under section 35, on the ground that he had no jurisdiction. Upon the argument before us it was contended that the statute did not prohibit dealing in shares after the winding-up order had been made by the court, and it was urged that a buyer would not reap the full benefit of his contract if his name did not appear on the register of members, and that under section 35 he was entitled, as of right, to have the register rectified. The case of *Rudge* v. *Bowman,* L. R. 3 Q. B. 689, was cited in support of the argument for the appellant. On the other hand, it was argued for the liquidator that, although the statute contained no express provision on the subject, the intention of the Legislature was clear, that after the order for the winding up by the court had been made the provisions of section 35 did not enable a member to alter his *status* as a contributory.

It was not disputed that under the peculiar circumstances of this case the substitution of one name for another on the register would not prejudice the position of creditors. But it was pointed out that the case in which there were assets for distribution among contributories was altogether exceptional, and that, as a general rule, an order for winding up involved the payment of calls which under the Act were intended to be borne by those who were liable to be placed on the list of contributories at the date of the order. Thus, section 98 provides as the first duty of the court after the order for winding up, that a list of contributories should be settled, with power to rectify the register in all cases where rectification is required in pursuance of the Act; and this being done, the court is required to order the assets to be collected and applied in discharge of liabilities. The powers of the liquidator, under section 95, are confined to steps taken with the sanction of the court for winding up the affairs of the society and distributing the assets, and among the acts that he is empowered to do no provision is made for the alteration of the list of contributories when once settled by the court.

The learned counsel for the appellant could point to no section, except section 35, in support of the application. But it seems clear that section 35 is not applicable to transfers after the date of a winding-up order made by the court, because it contemplates a proceeding instituted without leave of the court against the society, and not against the liquidator. But once the order has been made, the leave of the court would seem to be indispensable under section 95. But it was contended that no leave was necessary because of the provisions contained in section 153. Under the terms of that section it was argued that a transfer of shares or alteration in the *status* of a member between the commencement of the winding up and the order could only be made with the sanction of the court; but after that date, it was said, the sanction of the court was not necessary. It followed that section 35 must be construed to apply to all such subsequent transfers. But it seems to us that the true meaning of the 153rd section is to permit, with the sanction of the court, dispositions of shares for the time specified in the section, and to prohibit all subsequent alteration of the *status* of members or contributories. If this be not the true construction, the most inconvenient consequences would follow in cases where calls had to be made on contributories. There would be no limit to the number of times in which transfers of shares might be made in the course of the winding up. It would be difficult to say what the position of the parties to such transaction would be; and in providing for the liabilities of the society the liquidator would be hopelessly embarrassed and delayed.

The alteration of the register under section 35 might involve most troublesome and expensive inquiry and litigation, and as a liquidator who acted properly ought not to be made responsible for costs, the expense must be cast on the assets of the society, which are already appropriated under the winding-up order to the society's creditors.

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

We have come to the conclusion that the judgment the county court judge was right, and must be firmed, with costs.

Appeal dismissed.

Solicitors for the appellant, *Linklater & Co.*, for *ucas, Hutchinson, & Meek*, Darlington.

Solicitors for the respondent, *Jackson & Jackson*, for *. N. Watson*, Darlington.

C. C. R. April 25.

REG. v. GRIFFITHS. (a.)

riminal law—Offence by bankrupt—Petition presented by bankrupt himself—Act creating criminal offence—Prospective effect—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 11, *sub-sections* 14, 15—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 26.

The Debtors Act, 1869, *s.* 11, *sub-sections* 14, 15, *akes certain acts misdemeanours if committed by a ankrupt "within four months next before the presentation of a bankruptcy petition against him." The Bankruptcy Act*, 1890 (*which received the Royal Assent m the* 18*th of August*, 1890, *and came into operation on he* 1*st of January*, 1891), *by section* 26 *substitutes for he above words in section* 11 *of the Debtors Act*, 1869, *he words "within four months next before the presentation of a bankruptcy petition by or against him."*

The defendant committed certain of the acts specified in sub-sections 14 *and* 15 *in the year* 1890; *and within four months, but after the* 1*st of January*, 1891, *presented his petition, and was adjudged bankrupt.*

Held, that he could not be convicted of offences under the above sections, for that section 26 *of the Bankruptcy Act*, 1890, *was not retrospective, and that, to constitute an offence under that section, the acts must have been committed after the* 1*st of January*, 1891.

Case stated by the recorder of the city of Worcester.

The defendant was tried at the quarter sessions for the city of Worcester, held on the 6th of April, 1891, on an indictment containing several counts charging him with offences under the Debtors Act, 1869, s. 11, sub-sections 13-15, amended by the Bankruptcy Act, 1890, s. 26.

It was proved that the defendant traded in Worcester as a boot and shoe dealer, and that, at various times in November, 1890, under the false pretence of carrying on business and dealing in the ordinary way of his trade, he, with intent to defraud, obtained a quantity of boots and shoes on credit, and had not paid for them. It was also proved that on several days in November and December, 1890, with a like intent, he pawned the goods so obtained.

On the 1st of January, 1891, the Bankruptcy Act, 1890, came into operation.

On the 14th of January, 1891, the defendant presented a petition that he might be adjudged bankrupt, and thereupon a receiving order was made, and he was duly adjudged bankrupt.

It was contended on behalf of the defendant that the acts charged against him were committed before the Bankruptcy Act, 1890, came into operation, and that, as no bankruptcy petition had been presented against him, he could not be convicted of the offences defined in the 11th section of the Debtors Act, 1869.

The learned recorder reserved the question of law, and left the case to the jury.

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

The jury found the defendant guilty on all the harges, and he was admitted to bail to come up for cudgment if the conviction should be affirmed.

The question for the opinion of the court was jwhether the conviction could be sustained.

The Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11, enacts that any person adjudged bankrupt shall be deemed guilty of a misdemeanour in each of the following cases:—

Sub-section 14: "If, within four months next before the presentation of a bankruptcy petition against him, . . . he, being a trader, obtains, under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit, and has not paid for the same, unless the jury is satisfied that he had no intent to defraud."

Sub-section 15: "If, within four months next before the presentation of a bankruptcy petition against him, . . . he, being a trader, pawns, pledges, or disposes of otherwise than in the ordinary way of his trade, any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud."

By section 26 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), it is enacted that "section 11 of the Debtors Act, 1869, shall have effect as if there were substituted therein for the words 'if within four months next before the presentation of a bankruptcy petition against him,' the words 'if within four months next before the presentation of a bankruptcy petition by or against him.'"

Vachell, for the defendant.—These acts were committed in the year 1890, at which time they were not misdemeanours, for there had been no bankruptcy petition "against" the defendant. It was decided in *Ex parte Wood, In re Burden*, 36 W. R. 896, 21 Q. B. D. 24, that the court had no power to order a prosecution for offences under section 11 of the Debtors Act, 1869, in cases where the debtor had filed his own petition. The Bankruptcy Act, 1890, came into force on the 1st of January, 1891, and is not retrospective; in order to bring a case under that statute all the acts which constitute the offence must be done after the 1st of January, 1891.

Amphlett, for the Crown.—There is no hardship to the defendant in holding that this is an offence under the Act of 1890. That Act gave ample notice of its effect; it received the Royal Assent on the 18th of August, 1890, and it was intended that when it did come into operation on the 1st of January following it should be retrospective: *Towler* v. *Chatterton*, 6 Bing. 258; *Reg.* v. *Leeds, &c., Railway Co.*, L. R. 18 Q. B. 343.

Lord COLERIDGE, C.J.—In this case I am not prepared to say that there is not matter to be fairly adduced in argument on both sides. But on the whole I think that it is safer to hold that section 26 of the Bankruptcy Act, 1890, is not retroactive; and that in the case of a person who is accused of an offence under this Act all the ingredients constituting the crime must have taken effect subsequently to the 1st of January, 1891. The Act was not to come into operation until that day, and therefore it seems to me that the words in section 26 "shall have effect," must be read as "shall from the 1st of January, 1891, have effect." Now it is admitted that, if the words in section 11 of the Debtors Act, 1869, had not been altered, the acts complained of here would not have constituted any of the crimes with which the defendant is charged, because no bankruptcy petition had been presented against the defendant at that time. The alteration of the words in the earlier Act to "if within four months next before the presentation of

a bankruptcy petition by or against him" by the later Act, makes for the future the offences alleged here offences against that Act, and the question is, from what period has it done so? I am of opinion from the 1st of January, 1891. I think also that that construction receives considerable support from the fact that in the 14th and 15th sections of the Debtors Act, 1869, a person is entitled to be acquitted of the offences mentioned therein if he can show that he had no intent to defraud. That defence would have been open to the defendant at the time the offences were committed. It would be a strong thing to say that a defence which was open to the defendant at the time the offence was committed has been taken away by an Act which came into operation afterwards. No authority for so holding has been shown to us. I think it is safer to hold that these acts, which were not crimes when done in November, 1890, have not been made so by the coming into operation of the Bankruptcy Act, 1890, in January, 1891. I am of opinion, therefore, that this conviction must be quashed.

DENMAN, J.—I am of the same opinion. I think that full effect is given to the section by holding that it applies to acts committed after January, 1891. That is, in my opinion, the proper way to give effect to a section in relation to a criminal matter. For by giving any other construction to it we should violate the rule of law that criminal offences are not to be created by giving to a statute a retroactive effect. I am, therefore, of the same opinion as my lord.

MATHEW, J.—I am of the same opinion.

CHARLES, J.—I am of the same opinion, and only desire to add that I think it is safer to hold that in order to constitute a crime under section 26 of the Bankruptcy Act, 1890, it is necessary that all the ingredients of the offence should have been committed after the coming into operation of that Act.

VAUGHAN WILLIAMS, J.—I only wish to add that as to the question whether these words should be construed as having a prospective effect only, I think that that is so, and that the distinction between this case and those cited, in which similar words have been held to have a retrospective effect, is that in this case no gap in the law is created by construing this section as we are doing.

Conviction quashed.

Solicitor for the prosecution, *G. W. Bentley*, Worcester, for *The Solicitor to the Treasury*.

Solicitor for the defendant, *Dreaper*, Worcester.

[THE END.]

THE

WEEKLY REPORTER DIGEST

OF ALL THE

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE;

WITH

APPEALS TO THE HOUSE OF LORDS AND PRIVY COUNCIL;

ALSO OF

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE AND COURT OF BANKRUPTCY IN IRELAND;

FROM THE 24TH OF OCTOBER, 1890, TO THE 12TH OF AUGUST, 1891.

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A DIGEST

OF ALL THE

CASES DECIDED IN ENGLAND AND IRELAND,

FROM

THE 24TH OF OCTOBER, 1890, TO THE 12TH OF AUGUST, 1891,

AS REPORTED IN

VOL. XXXIX. OF THE WEEKLY REPORTER, 1890-91;

AND IN

OTHER LEGAL REPORTS DURING THE SAME PERIOD,

TOGETHER ALSO WITH CERTAIN OTHER CASES REPORTED THEREIN DURING THE SAME PERIOD, BUT DECIDED PREVIOUSLY THERETO.

*** In the following Digest the letters H.L. after a case indicate the HOUSE OF LORDS; P.C., the PRIVY COUNCIL; C.A., the COURT OF APPEAL; LUN., LUNACY; CH.D., the CHANCERY DIVISION; KAY, J., Mr. JUSTICE KAY; CHI., J., Mr. JUSTICE CHITTY; NOR., J., Mr. JUSTICE NORTH; STI., J., Mr. JUSTICE STIRLING; KEK., J., Mr. JUSTICE KEKEWICH; ROM., J., Mr. JUSTICE ROMER; WILL., J., Mr. JUSTICE WILLIAMS; Q.B.D., the QUEEN'S BENCH DIVISION; Q.B.D., BKCY., the QUEEN'S BENCH DIVISION sitting in BANKRUPTCY; P.D. & A.D., the PROBATE, DIVORCE, AND ADMIRALTY DIVISION; C.C.R., the COURT FOR CROWN CASES RESERVED; C. OF A.C., COURT OF THE ARCHBISHOP OF CANTERBURY; C.A. (Ir.), the COURT OF APPEAL IN IRELAND; M.R. (Ir.), the MASTER OF THE ROLLS IN IRELAND; V.C. (Ir.), the VICE-CHANCELLOR OF IRELAND; L.J. (Ir.), the LAND JUDGE, IRELAND; Q.B.D. (Ir.), the QUEEN'S BENCH DIVISION, IRELAND; EX.D. (Ir.), the EXCHEQUER DIVISION, IRELAND; P. & M.D. (Ir.), the PROBATE AND MATRIMONIAL DIVISION, IRELAND; C.C.R. (Ir.), the COURT FOR CROWN CASES RESERVED, IRELAND; BKCY. (Ir.), the COURT OF BANKRUPTCY, IRELAND; LAND COM. (Ir.), LAND COMMISSION, IRELAND.

*** THIS DIGEST CONTAINS THE NAMES OF ALL CASES REPORTED UP TO THE END OF AUGUST, 1891.

ACCIDENT INSURANCE.—See INSURANCE, ACCIDENT.

ACCOUNT STATED:—

Promise by legatee of chattel real, on being let into possession, to pay legacy charged thereon—Personal liability.—A testator devised his farm, held under a yearly tenancy, to his son, charged with certain legacies. Before the grant of probate the executors asked the son if he would take possession and pay the legacies, to which the son assented, and went into possession of the farm. In an action by one of the legatees against the son for the amount of his legacy, the jury found that the son promised to pay in consideration of being allowed by the executors to take possession,

Held, that there was sufficient consideration for the son's promise to pay the legacies, and that the legatee was entitled to judgment.—*Barry* v. *Barry*, Q.B.D. (Ir.)—28 L. R. Ir. 45.

ACTION.—See FRIENDLY SOCIETY, 2.

ADMINISTRATION:—

1. *Costs—Jurisdiction—Trustee—Personal profit.*—Under an order made on further consideration of an administration action, costs were paid to solicitors. The solicitors paid over half the profit costs to a defendant, a trustee of the estate being administered.

Held, that there was no jurisdiction on summons in the action to order the defendant trustee to pay into court the amount so paid to him.—*In re Thorpe, Vipont* v. *Radcliffe*, CH.D. NOR., J.—[1891] 2 Ch. 360; 60 L. J. Ch. 529; 64 L. T. 554.

2. *Costs—Real and personal estate—Order on further consideration—Costs ordered to be paid primarily out of several funds in court, of which some represented personalty only—No further consideration reserved—Liberty to apply—Subsequent application on behalf of charity legatees for apportionment of burden of costs between funds representing realty and personalty.*—A testatrix devised real estate upon trust for sale, and left a mixed fund, composed of the proceeds and of pure personalty, to a legatee for life, with remainder to a charity. An action having been brought to administer the estate, the order made on further consideration directed that certain non-charitable

legacies and the costs of the action should be paid primarily out of four several funds in court, some of which represented pure personalty, and that, so far as such four funds were together insufficient, the balance should be made up from another fund, representing realty only. In carrying out the order the entirety of the funds made primarily liable was exhausted, and a portion of the said fund representing realty only, was also required. No question was reserved upon that further consideration, but the order directed the income of the residue to be paid to the tenant for life, with liberty to apply. The tenant for life having died, the testatrix's heir-at-law and his assignee petitioned, nearly ten years after the order on further consideration, that the residue of the last-mentioned fund should be paid out to them.

Held, by Kay, J., that the order on further consideration was binding and conclusive as to the funds by which the costs were to be ultimately borne, and that the residue, as consisting of the proceeds of realty only, must therefore be paid to the petitioners.

Held, by Cotton and Bowen, L.JJ., that the costs of adminstering the real estate ought to be borne ultimately by the funds representing real estate only, and (reversing the decision of Kay, J.) that the order on further consideration had not finally decided the question by what funds the costs must ultimately be borne, but that, the residue fund being still under the control of the court, it was not too late properly to adjust the incidence of the costs, which must accordingly be done.

Held, by Fry, L.J., that, no subsequent further consideration and no question as to the ultimate incidence of the costs having been reserved by the order on further consideration, that order ought to be taken to have finally determined such incidence.

Sheppard v. *Sheppard*, 32 Beav. 129, discussed.—*In re Roper, Taylor* v. *Bland*, C.A. 101—45 Ch. D. 126; 63 L. T. 434.

3. *Dower—Real estate—Proceeds of sale in court—Payment of capitalized value to doweress.*—In an administration suit, real estate subject to dower was sold, and the proceeds paid into court.

Held, that the doweress was entitled to be paid the capitalized value of her dower out of the funds liable to the same.—*Gleeson* v. *Byrne*, V.C. (Ir.)—25 L. R. Ir. 361.

4. *Injunction to protect assets—Bankruptcy of administrator carrying on business of deceased—Submission to jurisdiction of Bankruptcy Court.*—A testator, who carried on business as a miller and farmer as "M. H. & Son," by his will bequeathed his mills, farm, stock, &c., to his son M., and he appointed M. executor, but gave no authority to carry on the business. The will was never proved. M. entered into possession and carried on the business until his death. On M.'s death intestate J., another son of the testator, entered into possession, and continued the business under the title of "M. H. & Son." J. had never been in partnership with the testator or M. He took out administration to M., and administration with the will annexed to the testator. J. was subsequently adjudicated bankrupt on the petition of a creditor who had sold him goods for the purpose of carrying on the business, and the official assignee seized all the property in his possession. The plaintiffs applied to the Bankruptcy Court to stay the realization of the property, on the ground that proceedings were pending in the Chancery Division for the administration of the testator's estate, but no rule was made. An order was made in the Chancery Division for the administration of the estates of the testator and of M. The property seized was acquired by J. in the course of carrying on the business of the testator. Upon an application for an injunction to restrain the assignee from realizing or intermeddling with the property seized,

Held, (1) that the application by the plaintiffs to the Bankruptcy Court did not constitute a submission to the jurisdiction of that court so as to disentitle them to the relief asked for; (2) that the property seized was assets of the testator; (3) that an injunction should be granted, as the proper court for deciding any question in relation to the testator's assets was the court where the estate was being administered and not the court where J. was adjudicated bankrupt.—*In re Hickey's Estate*, M.R. (Ir.)—27 L. R. Ir. 65.

5. *Married woman—Separate estate—Restraint on anticipation—Order for payment of costs by married woman—Order that arrears of income of married woman be not immediately paid to her—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1 (2), 19.—A married woman was entitled, under the will of a testator whose estate was being administered in an action commenced before the passing of the Married Women's Property Act, 1882, to part of the income of his estate for life for her separate use, without power of anticipation. In 1889 she, in her own name, without a next friend, first commenced an action in the Queen's Bench Division, and subsequently took out a summons in the administration action, for certain relief against the trustees of the will. Both her action and summons were dismissed, and she was ordered to pay the trustees their costs thereof respectively, both orders (being in the usual form as settled in *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120) limiting execution to her separate property not subject to restraint against anticipation, unless, by virtue of section 19 of the Married Women's Property Act, 1882, such property should be liable to execution notwithstanding such restraint.

At the date of these orders the trustees had in their hands a sum representing arrears of the married woman's income, which had accrued due since the date of the summons, and which was more than sufficient to pay the costs.

The trustees having applied for leave to retain their costs of the Queen's Bench Division action and of the summons out of the money in their hands,

Held (affirming the decision of Kekewich, J.), that such leave ought to be granted.

In re Glanvill, 34 W. R. 118, 309, 31 Ch. D. 532, considered and distinguished.

The principle of law on which *Pike* v. *Fitzgibbon*, 29 W. R. 551, 17 Ch. D. 454, was decided—viz. that the general engagements of a married woman can only be enforced against separate estate to which she was entitled free from any restraint on anticipation at the time such engagements were entered into—has been altered by the Married Women's Property Act, 1882.

An order of the court made merely for convenience of administration, and in effect directing that money representing arrears of income which have actually accrued due to a married woman should not be immediately paid to her, does not render such arrears "property subject to restraint against anticipation," and consequently such arrears can be taken in execution under an order made in the form settled in *Scott* v. *Morley*.—

Cox v. *Bennett* (*No.* 2), C.A. 401—[1891] 1 Ch. 617; 64 L. T. 380.

6. *Overpayment to beneficiary—Liability of trustees—Costs.*—A testator gave his residuary estate upon trust for his wife for life, and after her death he gave one-fourth to each of his two sons, and the other two-fourths upon trust for his two daughters and their children respectively, and appointed his wife and two sons trustees and executors. His widow and sons proved the will, but the administration of the estate was left to the widow, who distributed large sums among the beneficiaries in respect of their shares, but not equally; and one son, who was an executor and trustee, especially received considerably more than the others. Ultimately, after the death of the widow, the estate was found to be insufficient to give the other beneficiaries as much as the son had received. There was no evidence to show that the deficiency had not arisen from depreciation subsequent to the payments to the son, which *primâ facie* appeared probable.

Held, in an action to administer the testator's estate, that the surviving executors were not liable for the overpayment made by the widow to the son, and that the son was not bound to refund the amount he had been overpaid, but was not entitled to receive his separate costs, as the overpayment exceeded the amount of such costs.—*In re Winslow, Frere* v. *Winslow*, CH.D. NOR., J. 120—45 Ch. D. 249; 60 L. J. Ch. 20; 63 L. T. 485.

7. *Secured creditor — Insolvent estate — Rules of Bankruptcy—Judicature Act*, 1877 (40 & 41 *Vict. c.* 57), *s.* 28, *sub-section* 1.—In the administration of an insolvent estate a secured creditor is only entitled to interest on the amount at which he values his security from the date of valuing it, and not from the judgment for administration, which is the equivalent for an adjudication in bankruptcy. Money received by secured creditors on foot of such interest before the estate was found to be insolvent deducted from the amount payable to them for principal.—*Ross* v. *Ross*, V.C. (Ir.)—25 L. R. Ir. 362.

8. *Separate account—Stop order—Contribution*—Res judicata—*Breach of trust—Priority.*—A fund was carried over to the separate account of the defendant in an administration action, and her issue, with a direction to pay the dividends to the defendant for life, and the defendant mortgaged her interest under the order to persons who had obtained stop orders. It was afterwards discovered that when the order was made the defendant was jointly liable with the testator for a breach of trust, which had been made good out of the testator's estate. The plaintiff, a beneficiary, sought to obtain contribution from the defendant to the extent of a moiety of the liability, and to have this claim satisfied out of the funds carried over to the separate account notwithstanding the stop orders.

Held, that as between the plaintiff and the incumbrancers the matter was *res judicata*, and that the incumbrancers were entitled to rely on the order releasing the fund in question from the general questions in the action, and that under the order the defendant had a clear title, and the incumbrancers were entitled to priority.—*In re Eyton, Bartlett* v. *Charles*, CH.D. CHI., J. 135—45 Ch. D. 458; 59 L. J. Ch. 733; 63 L. T. 336.

9. *Voluntary charge—Equitable reversionary interest—No assignment of fund—Creditors for value—Volunteer—Priority.*—A mere voluntary charge on an equitable reversionary interest, although coupled with covenants for payment and further assurance, cannot be held equivalent to an assignment *pro tanto* so as to give the volunteer claiming thereunder priority as against creditors for value.

Donaldson v. *Donaldson*, 2 W. R. 691, Kay, 711, discussed.—*In re Earl of Lucan, Hardinge* v. *Cobden*, CH.D. CHI., J. 90—45 Ch. D. 470; 60 L. J. Ch. 40; 63 L. T. 538.

See also EXECUTOR; PRACTICE (IRELAND), 13, 17.

ADMINISTRATION, GRANT of.—See PROBATE, 1—10.

ADMIRALTY:—

1. *Practice—Collision—Delay in instituting action in rem—Maritime lien—Change of interest—Statute of Limitations—Interest on damages.*—In 1878 a collision occurred in the North Sea between a Norwegian steamer and a British vessel, in which the latter sunk. The name and place of business of the Norwegian company owning the steamer were known to the owners of the British vessel, and for one or more days, on forty-seven occasions during the following eleven years, the Norwegian steamer put into ports in the United Kingdom. During the same period there were changes in the capital and in the shareholders of the Norwegian company.

In 1889 the plaintiffs, the owners of the British vessel, instituted an action *in rem* against the Norwegian steamer. The owners of the Norwegian steamer, as defendants, pleaded, in bar of the action, that the claim of the plaintiffs, their rights (if any), and their maritime lien (if acquired) had been lost by *laches*, and that it would be otherwise inequitable to allow the action to proceed, as there had been changes of interest in the ownership of the steamer, the rights of third parties had intervened, and the greater part of the crew of the steamer were not now available to give evidence.

Held, that the plaintiffs were entitled to prosecute their claim for damages, for in each case the particulars and circumstances must be looked at to see whether it would be inequitable to entertain the suit, considering the period of time that had elapsed since the collision, the opportunities of arresting the vessel, the loss of witnesses, the loss of evidence, and the change of property, and in this case, though the defendants would be entitled to every presumption which could fairly be made in their favour by reason of the absence of any witness, the defendants had failed to show that the merits could not be gone into.

The action was subsequently compromised on the terms that the defendants should pay to the plaintiffs one-half of the damages proceeded for. In assessing such damages the registrar awarded interest on the amount at four per cent. from the time the British vessel would probably have reached her destination (May 1, 1878) until payment.

On objection to the registrar's report, on the ground that no interest was due at all on an amount which had not been ascertained until the institution of the action, or that no interest was due under the circumstances of this case, as no claim had been made for eleven years, or that the interest should be limited to six years by analogy to the Statute of Limitations,

Held, that the interest was properly awarded for the whole period according to the practice in admiralty.—*The Kong Magnus*, P.D. & A.D.—[1891] P. 223; 63 L. T. 715.

2. *Practice—Costs—Collision—High Court—County court—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *ss.* 3 *and* 9.—Where successful plaintiffs in a collision action in the High

Court recovered less than £300 they were allowed no costs, although they claimed more than the county court limit.—*The Herald*, P.D. & A.D.—63 L. T. 324.

3. *Practice—Costs—Collision—High court—County court—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *sub-section* 3; *s.* 9. —In the absence of special circumstances justifying proceedings in the Admiralty Division of the High Court, a plaintiff will not be allowed costs when, in an action of damage by collision, although he claims more, he does not recover an amount exceeding £300, that being the limit of the county court jurisdiction under section 3, sub-section 3, of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71).—*The Asia*, P.D. & A.D.—[1891] P. 121; 60 L. J. P. D. & A. 38; 64 L. T. 327.

4. *Practice—Costs—Damage to ship—Negligence of dock official—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 3—*County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 4. — By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 3, "Any county court having admiralty jurisdiction shall have jurisdiction to try the following causes . . . (3) as to any claim for damage . . . by collision . . . in which the amount claimed does not exceed three hundred pounds."

By the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 4, "The third section of the County Courts Admiralty Jurisdiction Act, 1868, shall extend and apply to all claims for damage to ships whether by collision or otherwise, when the amount claimed does not exceed three hundred pounds."

The plaintiffs brought an action *in personam* in the Probate, Divorce, and Admiralty Division (Admiralty) of the High Court of Justice against a dock company for injuries to the amount of £221 4s. 6d. to their steamship by a collision with the dock wall, occasioned by the negligence of the servants of the dock company. The court found the dock company liable, and on the application of the defendants to disallow the costs of the action,

Held, that the plaintiffs must be refused the costs of the action, as it fell within the words of section 4 of the County Courts Admiralty Jurisdiction Act, 1869, and therefore might have been brought in a county court exercising admiralty jurisdiction.—*Turner* v. *Mersey Docks and Harbour Board, The Zeta*, P.D. & A.D.—[1891] P. 216.

5. *Practice—Default—Action* in rem—*Judgment—Registrar and merchants.*—In a default action *in rem* the Admiralty Court will not before judgment refer the plaintiff's claim to the registrar for assessment.—*The Titia*, P.D. & A.D.—64 L. T. 148.

6. *Practice—Evidence—Matters of nautical skill—Damage to cargo—Screw alley—Trinity Masters.*—In admiralty actions, where the court is assisted by nautical assessors, evidence as to matters of nautical skill and knowledge is not admissible, and hence, where in a damage to cargo action the judge found on the advice of his assessors that all screw alleys, however well made, may emit smells which may damage sensitive cargo stowed in the vicinity, the Court of Appeal, being assisted by assessors, refused to allow the appellants, the shipowners, at the hearing of the appeal, to call evidence to show that the particular screw alley did not emit a smell, on the ground that it was a question of nautical skill about which evidence could not be given.—*The Assyrian*, C.A.—63 L. T. 91.

7. *Practice—Evidence—Transcript of shorthand notes of evidence taken before examiner—Incorrect transcript—Application to take transcript off the file.* —In an admiralty action the transcript of the shorthand notes of the evidence of witnesses directed to be examined before an examiner becomes, on being filed in the registry, evidence in the cause, and such transcript cannot be taken off the file without an order of the court.

Accordingly, in a case where the transcript of the shorthand notes of the evidence of a witness examined before an examiner was shown to be incorrect, the judge in court granted a motion ordering the transcript to be taken off the file and returned to the examiner for amendment.—*The Knutsford*, P.D. & A.D. 559—[1891] P. 219; 64 L. T. 352.

8. *Practice—Solicitor's undertaking—Appearance—Attachment—Ord.* 9, *rr.* 1 *and* 10.—Where in a collision action *in rem* solicitors for the defendants accept service of the writ and indorse it with the words, "We accept service on behalf of the defendants, the owners of *The A.*, and undertake to put in bail in a sum not exceeding the value of the said barque *A.*," and in consequence of their authority being withdrawn by the defendants they do not enter an appearance, they do not thereby commit a breach of their undertaking so as to render themselves liable to attachment, inasmuch as they have never expressly undertaken to appear.—*The Assa and Bertha*, P.D. & A.D.—64 L. T. 332.

9. *Practice—Writ—Service of notice of writ out of jurisdiction—Salvage—Action* in personam—*Foreign owners of cargo—"Necessary and proper parties to the action"—Rules of the Supreme Court*, 1883, *ord.* 11, *r.* 1 (g).—In a suit of salvage *in personam* brought against the owners of a ship and the owners of her cargo, where it appeared that the owners of the cargo were foreign subjects resident without the jurisdiction, the court being of opinion that the owners of the cargo were necessary and proper parties to the suit, and that the suit had been properly brought against the owners of the ship properly served within the jurisdiction, refused to set aside an order allowing service of notice of the writ of summons to be given to the owners of the cargo out of the jurisdiction, under sub-section *g* of ord. 11, r. 1, of the Rules of the Supreme Court, 1883, notwithstanding that the salved cargo had never been within the territorial jurisdiction of the court.—*The Elton*, P.D. & A.D. 703—[1891] P. 265; 60 L. J. P. D. & A. 69.

See also COUNTY COURT, 1, 2.

ADULTERATION:—

1. *Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 25—*Sale by servant on behalf of master—Information against servant.*—An information for selling food not of the nature, substance, and quality of the article demanded, under section 6 of the Sale of Food and Drugs Act, 1875, may properly be laid against a person who merely sells as a servant on behalf of his master; and such servant, not having himself purchased the article, cannot rely for his defence on section 25.—*Hotchin* v. *Hindmarsh*, Q.B.D. 607—[1891] 2 Q. B. 181.

2. *Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 9—*Sale of Food and Drugs Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 3—*Separate informations—Adulteration of milk—Daily supply of milk under a contract—Samples taken from separate cans—Separate*

informations in respect of samples found to be adulterated—Evidence as to other samples—Effect of contract.—The appellant entered into a contract with the guardians of a union to furnish a daily supply of milk at a certain price; the milk was to be tested on each delivery, and a reduction was to be made in the price if there should be less than a certain proportion of cream. An inspector of weights and measures, acting under section 3 of the Sale of Food and Drugs Act, 1879, procured a sample from each of five cans in which the daily supply was being delivered. Two of the samples being found to be deficient in cream, two separate informations were laid against the appellant under section 9 of the Sale of Food and Drugs Act, 1875, one in respect of each of the two samples.

Held, that it was right to lay separate informations; that the inspector was justified in taking separate samples; that the justices were justified in rejecting evidence as to the three other samples; and that, notwithstanding the contract, an offence had been committed against the statute.—*Fecitt* v. *Walsh*, Q.B.D. 525—[1891] 2 Q. B. 304; 60 L. J. M. C. 143.

3. *Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 25—*Written warranty—Contract to supply milk for fixed period—Label on can.*—The appellants bought milk under a written contract with a vendor for a supply of milk to them for six months, the vendor by the contract warranting each and every supply of milk to be delivered under the contract to be pure, genuine, and new milk, unadulterated, and with all its cream on. The milk was delivered at the railway terminus in cans, each can with a label stating that the milk was warranted genuine new milk with all its cream on.

Held, that this was a warranty within the meaning of section 25 of the Food and Drugs Act, 1875, and protected the appellants.—*Farmers and Cleveland Dairy Co.* v. *Stevenson*, Q.B.D.—60 L. J. M. C. 70; 63 L. T. 776.

ADVANCEMENT.—See WILL, 1.

AGENT-GENERAL of COLONIAL GOVERNMENT.—See JURISDICTION.

AGRICULTURAL HOLDINGS ACT.—See LANDLORD AND TENANT, 1.

AIR.—See EASEMENT, 1.

ANIMALS, CRUELTY to. — See CRUELTY TO ANIMALS.

ANNUITY.—See WILL, 3, 4, 5.

APPORTIONMENT:—

1. *Tenant for life and remainderman—Deficiency in mortgage security—Interest in arrear.*—Money in settlement was invested by trustees on a mortgage. The interest fell into arrear, and a receiver was appointed over the lands, pending sale. In the opinion of the court the security was likely to prove deficient.

The tenant for life having died,

Held, that the moneys brought in by the receiver should be apportioned between the representatives of the tenant for life of the settled money and the persons entitled in remainder, in the proportion which the arrears of interest at the death of the tenant for life and the amount due for principal and interest on the mortgage since his death bore to one another.—*In re Ancketill's Estate*, L.J. (Ir.)—27 L. R. Ir. 331.

2. *Tenant for life and remainderman—Power of appointment over reversionary fund subject to settlement—Appointment of fund as part of appointor's residuary estate—Time of falling into residue.*—By a settlement made in 1815, A., on the marriage of his son, settled two several sums of £10,000 upon trusts for the son for life, and after the son's decease for the son's wife for life, and in default of issue of the marriage as A. should by deed, will, or codicil referring to the settlement, appoint. By his will in 1832 (not referring to the settlement) A. directed that his residuary personal estate, or the produce thereof, should be invested and held upon trust for his son for life, and, in default of issue of the son, for A.'s daughters and their children, the daughters taking life interests. By a codicil in 1833 A. appointed that the two several sums of £10,000 mentioned in the settlement should form part of his residuary personal estate, and be paid to his executors and trustees accordingly. A. died in 1834; the son in 1850 without having had issue; and the son's wife in 1889. At her death a sum of £25,400 Consols represented the two sums of £10,000.

Held, that, on the true construction of the codicil, the two several sums of £10,000 only became a part of the testator's estate when the amount became payable to his executors and trustees, and not before, and therefore there was no question of apportionment.

Decision of Kay, J. (62 L. T. Rep. N. S. 216), reversed.—*In re Flower, Matheson* v. *Goodwyn*, C.A.—63 L. T. 201.

3. *Tenant for life and remainderman—Trust fund—Will—Insufficient assets.*—A trust fund being insufficient to pay the arrears of income and the *corpus* in full,

Held, that the total amount of income and capital actually received in respect of the trust estate must be divided between the tenant for life and the remaindermen in the proportion of the two sums which they would have respectively received if the fund had been sufficient to pay them in full; the tenant for life giving credit for the amount of income actually received by her.—*In re Foster, Lloyd* v. *Carr*, CH.D. KAY, J. 31—45 Ch. D. 629; 60 L. J. Ch. 175; 63 L. T. 443.

APPRENTICE:—

1. *Corporation — Contract of apprenticeship to — Industrial and Provident Societies Act*, 1876 (39 & 40 *Vict. c.* 45), *s.* 11, *sub-section* 12 (a)—5 *Eliz. c.* 4—54 *Geo.* 3, *c.* 96, *s.* 2.—A trading corporation registered under the Industrial and Provident Societies Act, 1876, can enter into a legal and binding contract of apprenticeship.—*Burnley Equitable Co-operative and Industrial Society* (*Limited*) v. *Casson*, Q.B.D. 124—[1891] 1 Q. B. 75; 60 L. J. M. C. 59; 63 L. T. 652.

2. *Covenant by infant—Deed of apprenticeship—Liability of infant to be sued after age on the covenant—Necessaries—Education.*—An action can be maintained against an apprentice upon a bond entered into by him when an infant, provided that the bond was a single bond, and that the plaintiff shows that the consideration under the bond was for the supply of necessaries, that necessaries were so supplied, and that the charge for the same was reasonable and proper.

Education in a trade may be a "necessary" for an infant.—*Walter* v. *Everard*, C.A. 676—[1891] 2 Q. B. 369.

3. *Felony by apprentice—Refusal of master to carry out covenants under the deed.*—In an action against a master for a breach of covenant by him, under an apprenticeship deed, in refusing to continue to

keep, teach, and maintain an apprentice, the defence went to prove that the apprentice was an habitual thief.

Held, that this was a good defence, on the ground that the master impliedly covenanted to teach the apprentice how to carry on the particular trade honestly, and that the apprentice, by becoming an habitual thief, had rendered the fulfilment of such a covenant impossible by his own default.—*Learoyd* v. *Brook*, Q.B.D. 480—[1891] 1 Q. B. 431; 60 L. J. Q. B. 373; 64 L. T. 458.

4. *Validity of apprenticeship deed—Covenant to serve—Negative covenant—Validity of deed.*—A deed of apprenticeship, whereby an infant apprentice is bound for a term not to accept employment except from the master or with his consent, and which contains no co-relative covenant by the master to provide employment for the apprentice, and which may be terminated by the master only, is invalid, as being unreasonable and not for the benefit of the infant.—*De Francesco* v. *Barnum*, CH.D. FRY, L.J. 5—45 Ch. D. 430; 60 L. J. Ch. 63; 63 L. T. 438.

ARBITRATION :—

1. *Costs—Power of arbitrator to award costs—Submission before, arbitration after, the 1st of January, 1890—Submission silent as to costs—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 2, 25.—Where an arbitration took place after the commencement of the Arbitration Act, 1889, pursuant to a submission which had been entered into before the commencement of that Act, and which contained no power to the arbitrator to deal with the costs of the reference and award.

Held, that the combined effect of sections 2 and 25 of the Act was to give the arbitrator power to deal with them.—*In re Williams and Stepney*, C.A. 533—[1891] 2 Q. B. 257.

2. *Costs—Verdict in pursuance of an award—Powers of court and taxing master.*—Where by a consent decree arbitrators were directed to return a general award on the whole declaration for a sum certain, and such award was thereby directed to be entered as a verdict whereon final judgment might be signed, and costs of the action, reference, and award were directed to follow the verdict so entered.

Held, that, the appellants having thereunder obtained a verdict for a portion of the sum claimed by them, which verdict carried costs as above directed, the court could not give the respondent a verdict for the residue of the sum claimed, and then delegate to the taxing master the duty of ascertaining, by the evidence of the arbitrators and others, as to what part of the appellants' claim the respondent had succeeded with a view to the apportionment of costs.

Held, further, that such evidence would be inadmissible as tending to explain or contradict the award.

Duke of Buccleuch v. *Metropolitan Board of Works*, L. R. 1 H. L. 418, followed.—*O'Rourke* v. *The Commissioner for Railways*, P.C.—15 App. Cas. 371; 59 L. J. P. C. 72; 63 L. T. 66.

3. *Setting aside award—Action—Order of reference by consent of "all matters in difference"—Jurisdiction of court—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 14, 15.—An action having been brought to recover certain instalments due in respect of work done under a contract, upon an application for judgment under order 14, other instalments having become payable under the contract, an order was made by consent that "all matters in difference between the parties" should be referred to the award of an arbitrator.

The arbitrator having made his award, the defendants moved to set it aside, contending that, under section 15 of the Arbitration Act, 1889, the award was equivalent to the verdict of a jury.

Held, by the Queen's Bench Division, that section 15 did not affect the finality of an award, and that the application must be refused.

Held, by the Court of Appeal, that as the order of reference was of "all matters in difference between the parties," section 15 was not applicable; and the award could not be set aside in the same way as the verdict of a jury.—*Darlington Wagon and Engineering Co.* v. *Harding*, C.A. 167—[1891] 1 Q. B. 245; 60 L. J. Q. B. 110; 64 L. T. 409.

4. *Setting aside award—Misconduct—Admission—Evidence—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 11 (2).—On a motion to set aside an award, on the ground of the misconduct of the arbitrator, it was alleged that he had been bribed. The only evidence of the truth of this allegation adduced at the hearing was that of witnesses who had heard the arbitrator himself admit the fact in a conversation, at which R. (the other party to the arbitration) was not present.

Held, that the admission was not sufficiently proved to enable the court to set aside the award as against R.—*In re Whiteley and Roberts*, CH.D. KEK., J. 248—[1891] 1 Ch. 558; 60 L. J. Ch. 149; 64 L. T. 81.

5. *Staying proceedings—Application to stay proceedings on counter-claim—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4—"*Step in the proceedings.*"—By section 4 of the Arbitration Act, 1889, it is provided that "if any party to a submission . . . commences any legal proceedings in any court against any other party to the submission in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings, or taking any other steps in the proceedings, apply to that court to stay the proceedings.

The plaintiff brought an action for work done under a building contract, which contained a general submission to arbitration of all disputes arising out of the contract. The defendant counter-claimed for damages arising out of breaches of the contract. Subsequently to the delivery of the counter-claim the defendant took out a summons for directions under order 30 for the purpose of obtaining discovery from the plaintiff. On the hearing of the summons the plaintiff applied for and obtained, under rule 2 of that order, leave to administer interrogatories to the defendant. The plaintiff subsequently discontinued his action, and proposed to refer the whole matter to arbitration, and upon the defendant refusing to allow the counter-claim to be referred, took out a summons under section 4 of the Arbitration Act, 1889, to stay the proceedings on the counter-claim,

Held, that the plaintiff's application for leave to administer interrogatories was a step by him in the proceedings, and there was, consequently, no jurisdiction to make the order.

Semble, that the delivery of a counter-claim is "the commencement of a legal proceeding" within the meaning of the section.—*Chappell* v. *North*, Q.B.D.—[1891] 2 Q. B. 252; 60 L. J. Q. B. 554.

6. *Submission—Breach of warranty—Right to reject goods—Invalid award—Jurisdiction of arbitrators.*—G. & Co., on the 31st of July, 1889, entered into a contract to buy from B., W., & Co. 1,000

cases of tinned salmon. The contract contained, amongst other things, the following provisions: "Quality guaranteed good merchantable, and equal to the average of the spring pack of 1889 season C. R. salmon, at 22s. per case, ex quay Liverpool. . . . Usual examination for customary allowances and general broker's conditions. Any dispute to be settled by arbitration."

On the 3rd of April, 1890, G. & Co. wrote to the agents of B., W., & Co. that they did not consider the tender (as per samples examined) equal to contract guarantee, and therefore must call for arbitration. An arbitrator was appointed on each side, and the parties went to arbitration. The arbitrators' award was dated the 11th of April, 1890, and was, so far as is material, as follows: "That the buyers accept the salmon, and that the sellers make an allowance to the buyers of one shilling and sixpence per case." The arbitrators, according to their evidence, had proceeded on the understanding that they were not merely to find whether the salmon was inferior in quality, but, if they found it was so, were to decide whether it should be rejected or not. G. & Co. moved to restrain B., W., & Co. from proceeding to enforce the award, and also that the award might be set aside or remitted to the arbitrators for reconsideration.

Held, that the submission extended to nothing except the question whether the goods were up to guarantee, and that, if the goods were not of the guaranteed quality, the buyers were entitled to reject them, the sale not being of specific goods; that the arbitrators had exceeded their jurisdiction in dealing with a question not submitted to them; and that the matter must be referred back to them.

Decision of Kay, J. (63 L. T. 97), affirmed.—*In re Green & Co. and Balfour, Williamson, & Co.*, C.A.—63 L. T. 325.

7. *Submission—Power of court to compel appointment of arbitrator*—9 & 10 *Will.* 3, *c.* 15, *s.* 1—3 & 4 *Will.* 4, *c.* 42, *s.* 39—52 & 53 *Vict. c.* 49.—An agreement to refer disputes to arbitration contained a provision that the matters in dispute should be referred to three arbitrators, one to be appointed by each of the parties, and the third by the two so appointed. A dispute having arisen, one of the parties refused to appoint an arbitrator.

Held, that the court had no power to compel him to do so.—*In re Smith & Service and Nelson & Sons*, C.A. 117—25 Q. B. D. 545; 59 L. J. Q. B. 533; 63 L. T. 475.

See also BUILDING SOCIETY, 1; PARTNERSHIP, 1; POOR LAW, 3; SCOTCH LAW, 1.

ARMY:—

Pay and retiring allowances—Royal warrant—Secretary of State for War—Mandamus—*Army Act*, 1881 (44 & 45 *Vict. c.* 58), *s.* 136.—A *mandamus* will not lie against the Secretary of State for War to compel him to carry out the terms of a royal warrant regulating the pay and retiring allowances of the officers and soldiers of the army, inasmuch as no legal duty in relation to such officers and soldiers is imposed upon the Secretary of State either by statute or by common law.—*Reg.* v. *Secretary of State for War*, C.A.—[1891] 2 Q. B. 326; 60 L. J. Q. B. 457; 64 L. T. 764.

ARREST:—

Reward for—Information leading to conviction of offender—Publication of offer—Communication of information.—On the 29th of May the defendant instructed his printers to print handbills, offering a reward of £25 to the person who should give information to a superintendent of police, named Penn, leading to the conviction of the perpetrator of a certain crime. The plaintiff, a police officer, on the same morning, before the instructions to print the handbills had been given by the defendant, had communicated the desired information to a fellow police officer named Coppin, with instructions to forward it to Superintendent Penn, and Coppin thereupon communicated the information, in accordance with the rules of the force, to his own immediate superior officer, Inspector Lennan, who sent it on the same evening to Superintendent Penn, whom it reached in due course on the following morning, the 30th of May, after the time when the said handbills had been delivered to and had been distributed by him to the neighbouring police stations.

Held, that the plaintiff was entitled to the reward, the messengers, Coppin and Lennan, through whom such information was conveyed to Superintendent Penn being the plaintiff's agents to convey, and not Penn's agents to receive the said message.—*Gibbons* v. *Proctor*, Q.B.D.—64 L. T. 594.

ASSAULT.—See DIVORCE, 13, 14.

ASSIGNMENT of DEBT:—

Assignment subject to a trust—Assignment of debts for purpose of suing—Right of assignee to sue—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6.—By a deed made between the plaintiff and certain creditors of the defendant, which recited that the plaintiff had agreed to take an assignment of the debts due from the defendant to the creditors upon the terms that he should forthwith proceed to recover the same, and, upon recovery, should pay to the creditors respectively the amount of their debts, or such part thereof as might have been recovered, the creditors assigned the debts to the plaintiff absolutely. Notice of the assignment was given to the defendant.

Held, that this was an "absolute assignment not purporting to be by way of charge only" within section 25, sub-section 6, of the Judicature Act, 1873, and that the plaintiff was entitled to maintain the action.—*Comfort* v. *Betts*, C.A. 595—[1891] 1 Q. B. 737; 64 L. T. 685.

ATTACHMENT.—See ADMIRALTY, 8; SOLICITOR, 18.

AUCTIONEER.—See TROVER.

BAILMENT:—

Jus tertii—*Bailor's title assigned to third party—Action of detinue by bailor—Right of bailee to dispute bailor's title.*—The defendants sold certain copper to the plaintiffs, but continued to hold it as warehousemen for them. The plaintiffs sold it to a third party, who was indebted to the defendants. On the defendants refusing to deliver the copper to the plaintiffs, the plaintiffs brought an action against them for wrongful detention of the copper. The defendants defended the action, not by authority of the third party, but on their own behalf.

Held, that the plaintiffs were entitled to recover from the defendants the copper or its value.—*Rogers* v. *Lambert*, C.A. 114—[1891] 1 Q. B. 318; 60 L. J. Q. B. 187; 64 L. T. 406.

BANKER:—

1. *Overdraft—Compound interest—Accounts with half-yearly rests—Security for fixed sum—Inconsistent parol agreement.*—In 1879 S. was allowed by his bank to overdraw his account to the amount of

£1,500 upon an agreement that the account was to be subject to all charges and interest, and in the event of his death such interest and charges were to continue until the account was paid off. In 1880 S. obtained a further advance of £6,500, and assigned a mortgage upon his estate for £5,000 to the bank, with interest at four per cent., the mortgagee being paid off. The deed was in form an absolute assignment of the mortgage to the bank, and did not show the existence of any banking account; but it was proved that the assignment was intended as a collateral security for the account which was to be overdrawn, and not merely for the £5,000. Compound interest at the bank rate, with a minimum of five per cent., was regularly charged upon the overdraft with half-yearly rests, and paid by S. from 1880 until his death in 1889, accounts being regularly stated and settled between them. At his death S. had overdrawn to the amount of £6,100.

In a suit for the administration of the estate of S.,

Held, (1) that by the agreement compound interest must be paid by the executors of S. on the balance due at his death; (2) that the assignment of the mortgage for £5,000 was in law a distinct transaction, having no connection with the banking account, and that the inconsistent parol agreement could not alter or contradict the legal effect of the deed; (3) that as accounts were regularly stated and settled by S. with full means of knowledge of his rights, and as the bank might have closed the account if S. had insisted on these rights, it would be inequitable to allow the executors to open the settled transactions.

Held, further, that an account should be taken to ascertain the minimum sum to the debit of S. at any time after the assignment of this mortgage, and that this sum, if not more than £5,000, should be treated as the principal sum due on the security at the date of the last settlement, and that interest at four per cent. should be calculated on it till payment.—*Stewart* v. *Stewart*, M.R. (Ir.)—27 L. R. Ir. 351.

2. *Overdraft — Current account — Promoters of exhibition—Limited company.*—The promoters of an exhibition opened an account at a bank in the name of the exhibition. The exhibition was subsequently incorporated as a limited company, and a copy of the articles of association was left with the bank. The account was kept under the same title as before, and the cheques drawn in the same names as before. The exhibition having been ordered to be wound up, the bank sued the promoters to recover an overdraft.

Held, that under the circumstances of the case the bank never contemplated the personal liability of the promoters, and did not look upon them personally as their customers, and that therefore the promoters were not liable.—*Coutts & Co.* v. *Irish Exhibition in London*, CH.D. KEK., J.—63 L. T. 489.

See also BANKRUPTCY, 11; BILL OF EXCHANGE, 2; CHEQUE; NEGOTIABLE INSTRUMENT.

BANKRUPTCY:—

ACT OF BANKRUPTCY—

1. *Assignment of whole of property—Mortgage to secure further advances—Ship—Fraudulent preference —Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52). *ss.* 4, 43, 48, 49.—A mortgagor who conveys all his property with the main object of securing further advances, does not thereby commit an act of bankruptcy, even though the mortgage also secures a past debt due from the mortgagor to the mortgagee.

Where under a mortgage of a ship to secure further advances, an advance is made on the date of a receiving order against the mortgagor, who is subsequently adjudicated bankrupt in respect of acts of bankruptcy committed prior to the execution of the mortgage, the mortgagee is entitled, under section 49 of the Bankruptcy Act, 1883, as against the trustee in bankruptcy, to recover such advance, where before the date of the receiving order there was an existing contract between mortgagor and mortgagee to make further advances and a positive promise by the mortgagee to make this specific advance.

A. mortgaged his shares in a ship to B., to secure further advances, and also a small past debt due from A. to B. Prior to the mortgage, A. had committed acts of bankruptcy in respect of which he was subsequently to the date of the mortgage adjudicated bankrupt. B. had no notice or knowledge of the acts of bankruptcy, and made advances to enable A. to carry on his business. On the date of the receiving order, B. made A. an advance of £250 in consequence of a prior agreement between them to make future advances, and a positive promise to advance this specific sum. In an action by B. to establish the validity of his mortgage and recover against the respondent the amount of his loans.

Held, that the mortgage was valid, and that B. was entitled, as against the trustee in bankruptcy, to recover not only all advances prior to the date of the receiving order, but also the advance of £250 made on the date of the receiving order, as it was made in consequence of the contract and promise made before the date of the receiving order.—*The Thames*, P.D. & A.D.—63 L. T. 353.

2. *Bankruptcy notice — Final judgment — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4.—On the 17th of April, 1888, an order was made in the Chancery Division that a certain investment made by P. and T., trustees under a settlement, was a breach of trust, and P. and T. were ordered to pay the moneys represented by the investment, less their own taxed charges and expenses, into court. It was further ordered that T. was entitled to indemnity from P. with costs. The amount of such indemnity was fixed by an order made on the 15th of July, and, on nonpayment, application was made for leave to issue a bankruptcy notice for the same against P. The registrar refused the application.

Held, that the orders of the 17th of April and the 15th of July constituted a final judgment within section 4 of the Bankruptcy Act, 1883, on which a bankruptcy notice could be issued.—*In re Poole, Ex parte Twisaday*, Q.B.D., BKCY.—63 L. T. 321.

3. *Bankruptcy notice—Final judgment—Form of judgment—Judgment for taxed costs—Amount not filled in.*—Judgment having been given for the defendant in an action, the judgment was drawn up in the ordinary form, with a blank left for the amount of the costs. The costs were subsequently taxed and a certificate given for the amount, but the blanks in the judgment were not filled up. A bankruptcy notice was issued under section 4 for the amount of the taxed costs, on which a petition was presented, and a receiving order made against the debtor. On appeal by the debtor against the receiving order,

Held (allowing the appeal), that inasmuch as no execution could issue on the judgment as it then stood, nor upon the taxing master's certificate alone, there was no final judgment, and therefore

the receiving order made against the debtor must be set aside.—*In re Crump, Ex parte Crump*, Q.B.D., BKCY.—64 L. T. 799.

4. *Bankruptcy notice—Judgment debt—Right of judgment creditor to include claim for interest*—1 & 2 *Vict. c.* 110, *s.* 17—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g)—*Bankruptcy Rules* 1886, *r.* 136.—A judgment creditor, in issuing a bankruptcy notice against a debtor under section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, is entitled to include in such bankruptcy notice a claim for interest on the judgment debt.—*Ex parte Hasluck, In re Lehmann*, Q.B.D., BKCY. 16.

5. *Bankruptcy notice—Judgment debt—Power to include more than one judgment debt—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g) —*Bankruptcy Rules*, 1886, *rr.* 136, 137; *Appendix, Part I., Forms* 5, 6.—A bankruptcy notice cannot be issued in respect of more than one judgment debt.—*Ex parte Argentine Gold Fields, In re Low*, C.A. 181—[1891] 1 Q. B. 147; 60 L. J. Q. B. 265; 63 L. T. 694.

6. *Bankruptcy notice—Judgment debt—Non-compliance with bankruptcy notice—Payment of judgment debt—Right of another creditor to present petition—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g).—The act of bankruptcy committed by a debtor by reason of his non-compliance with the requirements of a bankruptcy notice duly served on him under section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, is not put an end to by payment of the judgment debt; but a bankruptcy petition founded on that act of bankruptcy may be presented by another creditor, although the debt of the creditor by whom the bankruptcy notice was served has been paid.

Ex parte Wier, In re Wier, 19 W. R. 1042, L. R. 8 Ch. App. 875, has no application to an act of bankruptcy committed under the Bankruptcy Act, 1883.—*Ex parte Powell, In re Powell*, Q.B.D., BKCY. 656—[1891] 2 Q. B. 324; 64 L. T. 800.

ANNULMENT—

7. *Rejection of proof by trustee—"Act done by trustee"—Debt and judgment—Execution issued on judgment—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 81.—The defendant having been adjudicated a bankrupt under the Bankruptcy Act, 1869, the plaintiff sent in a proof for £4,084 in respect of an alleged debt. The trustee in bankruptcy rejected the proof. The plaintiff had, prior to the adjudication in bankruptcy, signed judgment against the defendant by consent for the above sum of £4,084, but the plaintiff did not send in any proof in respect of the judgment. The adjudication in bankruptcy having been subsequently annulled, the plaintiff issued execution upon the judgment.

Held, that, inasmuch as, in bankruptcy, there is power to go behind the judgment and to inquire into the consideration upon which it is founded, the proof upon the simple contract debt must be considered the same as the proof upon the judgment debt; that the rejection of the proof was an "act done by the trustee" within section 81 of the Bankruptcy Act, 1869, and remained valid upon the annulment of the adjudication; and that, therefore, the plaintiff was not entitled to issue execution upon the judgment.—*Brandon* v. *McHenry*, C.A. 372—[1891] 1 Q. B. 538; 60 L. J. Q. B. 448; 64 L. T. 59.

APPEAL—

8. *Deposit—Appeal from order made in county court—Deposit as security for costs of appeal—Withdrawal of appeal—Right of appellant to return of deposit—Bankruptcy Rules*, 1886, *r.* 131—*Practice.*—On an appeal being brought from an order made in the county court, the sum of £20 was lodged in the High Court by the appellant as security for the costs of the appeal, in pursuance of rule 131 of the Bankruptcy Rules, 1886. The appeal was afterwards withdrawn, the costs of the respondent in respect of it being paid; but an application by the appellant for a return of the deposit was opposed by the respondent, on the ground that certain costs incurred by the appellant in the county court had not been paid.

Held, that the appellant was entitled to have the deposit paid out, and that the respondent could not claim the deposit as security for the costs incurred by the appellant in unsuccessfully contesting the motion in the county court.—*Ex parte Scott, In re Scott & Mitchell*, Q.B.D., BKCY. 32.

9. *Deposit—Security for appeal—Application to dispense with deposit by creditor—Bankruptcy Rules*, 1886, *r.* 131.—By the Bankruptcy Rules, 1886, r. 131, the Court of Appeal may in any special case dispense with the deposit of £20 which a party intending to appeal is required to lodge at the time of entering his appeal.

A creditor in receipt of 30s. weekly wages recovered judgment in the county court for £50 for injuries received from A., a fellow labourer. On A. becoming bankrupt, the creditor applied to the county court to order the bankrupt to set aside a portion of his weekly wages to meet the judgment debt. The court refused the application.

The creditor, under the above rule, then applied to the Divisional Court to dispense with the deposit of £20 required to be lodged before appealing.

Held, that under the circumstances the application would be granted, the deposit dispensed with, and the time for appealing extended.—*In re Jones, Ex parte Lloyd*, Q.B.D., BKCY.—64 L. T. 803.

ASSETS—

10. *Charge on salary of chaplain of workhouse—Validity—Public policy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 97.—The bankrupt, who was chaplain of a workhouse, prior to his bankruptcy gave a charge upon his salary to secure payment of a loan. Upon the bankruptcy taking place, the official receiver, as trustee, applied for an order declaring that the salary of the bankrupt as chaplain vested in him, and to restrain the person to whom the charge had been given from receiving any portion of the salary, on the ground that any assignment of the bankrupt's stipend was void or voidable as being contrary to public policy, because the bankrupt was a public officer holding a public appointment, and paid out of the public funds, and because he was a clerk in holy orders, and his salary was payable to him in respect of the cure of souls and the conduct of the services of the church.

Held, that the charge was not invalid upon the ground alleged, a clergyman having the cure of souls not being a public officer within the meaning of the principle of public policy.—*In re Mirams*, Q.B.D., BKCY. 464—[1891] 1 Q. B. 594; 60 L. J. Q. B. 397; 64 L. T. 117.

11. *Money stolen by cashier of bank—Purchase of shares—Right of bank to shares purchased.*—The bankrupt, who was the cashier in a bank, misappropriated moneys intrusted to him by his employers for banking purposes, and purchased therewith certain shares. The bankrupt absconded, and an application by the bank for an order that they were entitled to the shares purchased with the

stolen money was refused by the county court judge.

Held, on appeal, that the order of the county court must be reversed, and that the trustee in bankruptcy must deliver up the shares to the bank. —*Ex parte Manchester and County Bank, In re Hutton*, Q.B.D., BKCY. 303.

12. *Salary or income—Power to order payment to trustee—Wages of workman—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 53, *sub-section* 2.—Wages earned by a workman employed in a colliery are not "salary or income" within the meaning of section 53, sub-section 2, of the Bankruptcy Act, 1883, and therefore no order can be made under that section for payment of any part of such wage to the trustee in bankruptcy of the person by whom the wages are earned.

Ex parte Benwell, In re Hutton, 14 Q. B. D. 301, followed.—*In re Jones, Ex parte Lloyd* (*No.* 2), Q.B.D., BKCY.—[1891] 2 Q. B. 231; 64 L. T. 804.

13. *Transfer of shares in company—Transfer not signed by transferee nor presented to company—Property in the shares.*—In a box left on the bankrupt's premises after he had absconded, which purported to contain the securities of C., who had placed money in the bankrupt's hands to invest, was found a transfer by the bankrupt to C. of certain shares in consideration of the sum of £500 together with the share certificates. The transfer was not executed by C., and had not been presented to the company. The trustee in bankruptcy claimed the shares.

Held, that the shares were the property of C., and not of the trustee.—*In re Dodds, Ex parte Trustee*, Q.B.D., BKCY.—64 L. T. 476.

COSTS—

14. *Small bankruptcy—Costs out of the estate—Lower scale—Bankruptcy Rules*, 1886, *r.* 112—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55. —On application by the trustee in the bankruptcy for leave to disclaim a lease, the landlord appeared and opposed the application, but leave was given to the trustee to disclaim, with costs both of the landlord and of the trustee out of the estate. The costs of the trustee's solicitor were allowed at £21, but an objection to this sum was taken by the Board of Trade, on the ground that, the assets of the bankrupt being under £300, the costs ought to be allowed on the lower scale, under rule 112 of the Bankruptcy Rules, 1886.

Held, that rule 112 applied, and that the solicitor was only entitled to three-fifths of the ordinary charges.—*In re Procter*, Q.B.D., BKCY. 655—[1891] 2 Q. B. 433.

15. *Solicitor of debtor—Petition by debtor—Refusal of trustee to pay costs—Previous payments made by debtor to solicitor—Alleged fraudulent preference—Bankruptcy Rules*, 1886, *r.* 125.—A trustee in bankruptcy cannot refuse to pay out of the estate the taxed costs of the solicitor appearing for the debtor on the filing of his own petition, by reason of the fact that certain payments have been made by the debtor to such solicitor shortly before the bankruptcy, which the trustee is of opinion amount to a fraudulent preference; but in such case the trustee must pay the taxed costs of the solicitor, and move the court to set aside the previous payments in the ordinary way.—*Ex parte Raphael, In re Coster & Tack*, Q.B.D., BKCY. 190.

DECEASED DEBTOR—

16. *Resident abroad—Deceased debtor resident out of England for six months preceding death—Jurisdiction—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 95, 125, *sub-sections* 1, 4, 6, 10—*Bankruptcy Rules*, 1886, *Form* 11.—The words "unless the context requires it" in sub-section 10 of section 125 of the Bankruptcy Act, 1883, comprise the whole context of the Act, and are not limited to the context of section 125.

In the case of a debtor residing at his decease, and for the greater part of the six months previously, out of England, the provisions of section 95 will apply, giving jurisdiction to the High Court—i.e. the Court of Bankruptcy—over the estate in England of a debtor not resident in England.—*In re Evans* (*Deceased*), *Ex parte Evans*, C.A. 98—[1891] 1 Q. B. 143; 60 L. J. Q. B. 143; 64 L. T. 242.

DISCHARGE—

17. *Absolute refusal—Second application for discharge—Right of bankrupt to apply* de novo—*Practice—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 104.—Where the discharge of a bankrupt has been refused absolutely, the bankrupt is not entitled to apply to the court *de novo* for an order of discharge. But the court has power, under section 104 of the Bankruptcy Act, 1883, to entertain an application by the bankrupt for a review, and may thereupon rescind or vary its former order if it thinks fit.—*Ex parte Tobias, In re Tobias & Co.*, Q.B.D., BKCY. 399—[1891] 1 Q. B. 463; 60 L. J. Q. B. 244; 64 L. T. 115.

18. *Application under Act of* 1883—*Effect of Bankruptcy Act*, 1890—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 38—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 8—*Practice.*—In all cases in which adjudication has been made under the Bankruptcy Act, 1883, the bankrupt has a right to have his application for an order of discharge dealt with under section 28 of that Act, and not under section 8 of the Bankruptcy Act, 1890.—*Ex parte Railson, In re Railson*, Q.B.D., BKCY. 271—60 L. J. Q. B. 206; 63 L. T. 709.

19. *Conditional discharge—Entering up judgment—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52, *s.* 28. —A debtor being possessed of a life interest under a settlement which by the law of Scotland could not be attached by creditors, was adjudicated bankrupt in England. On the application by him for his discharge the county court judge granted the discharge on condition that he should consent to judgment for £2,200. There was no evidence that the debtor was possessed of any other property except the life interest, or that he would have any after-acquired property.

Held, that the order must be varied, and the discharge granted unconditionally.

Held, also, that a condition as to entering up judgment ought not as a rule to be imposed unless there is some expectation of the debtor coming into property in the future, which but for such an order he would be able to enjoy without paying his debts. —*In re Goud, Ex parte Goule*, Q.B.D., BKCY.—63 L. T. 292.

20. *Omission to keep proper books—"Business"—One or two transactions—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-section* 3 (a).—When a court of bankruptcy is considering whether a bankrupt has "omitted to keep such books of account as are usual and proper in the business carried on by him" within the meaning of section 28, sub-section 3 (*a*), of the Bankruptcy Act, 1883, proof that he engaged in one or two building transactions is sufficient proof that he carried on the business of a builder if it be shown that he intended the one or two transactions to be followed by similar trans-

actions.—*Ex parte Board of Trade, In re Griffin*, C.A. 156—60 L. J. Q. B. 235.

21. *Rash and hazardous speculations—Stock Exchange transactions—Gambling for differences—Refusal of discharge—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28.—On application by the bankrupt for discharge, the official receiver reported that the bankrupt had been guilty of rash and hazardous speculations in buying on the Stock Exchange for clients who were speculating for the differences, and had no intention of making *bonâ fide* investments, and that the bankruptcy was caused by such clients not paying up their differences at the time, owing to sudden and heavy falls in the markets in which the operations were carried on. The discharge of the bankrupt was absolutely refused by the county court judge, on the ground that to buy for a client who was intending to pay or receive the differences was a transaction of a more rash and hazardous nature than to buy for one who was intending to take up and pay for the shares, and that contracts for differences were in themselves immoral.

Held, on appeal, that the risk of a purchase by a stockbroker for a client did not depend upon whether the bargain was a bargain for differences or whether it was a purchase for investment, but upon whether the client had the means to pay the differences which might be expected to result; that it was not the duty of the Bankruptcy Court to take into consideration the general morality of transactions for differences; and that, having regard to the particular facts, the case would be sufficiently met by a suspension of the discharge for three years.—*Ex parte Jenkins, In re Jenkins*, Q.B.D., BKCY. 430.

22. *Undue preference—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-section* 3 (f); *s.* 48.—Where a bankrupt has, within three months preceding the receiving order, given an undue preference to any of his creditors, the court may punish him by refusing or suspending an order for his discharge under section 28, sub-sections 2 and 3 (*f*), of the Bankruptcy Act, 1883, though he has not been guilty of a fraudulent preference within the meaning of section 48.

A debtor, on whose premises there were three mortgages, having been served with three writs in separate actions brought by the three mortgagees to recover their mortgage debts, handed the two writs issued by the second and third mortgagees to the solicitors of the first mortgagee, who thereupon entered appearances for him to those two writs, and signed judgment by default in the action by the first mortgagee.

Held, that such conduct on the part of the debtor was an undue preference within section 28, sub-section 3 (*f*).—*Ex parte Skegg, In re Skegg*, C.A. 72—25 Q. B. D. 505; 59 L. J. Q. B. 546; 63 L. T. 90.

23. *Withdrawal of application for—Leave to withdraw—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-section* 2.—The Bankruptcy Court has the same inherent jurisdiction as other courts to give leave for the withdrawal of any application previously made to it, and there is no exception in the case of an application by a bankrupt to withdraw a previously-made application for a discharge under section 28 of the Bankruptcy Act, 1883.—*Ex parte Board of Trade, In re Wallis*, C.A. 453—60 L. J. Q. B. 455.

EXAMINATION—

24. *Examination by creditor—Right to examine witness as to debtor's affairs—Action pending against witness by creditor—Ulterior object of creditor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 27.—By section 27 of the Bankruptcy Act, 1883, the court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it any person who can give information respecting the debtor, his dealings, or property.

The court has power to summon a witness to be examined under this section on the application of a creditor, but such power is not to be used for the purpose of enabling the creditor to obtain materials to assist him in a private action which he has against the witness whom he is seeking to examine.—*In re Easton, Ex parte Davis*, Q.B.D., BKCY.—64 L. T. 798.

EXECUTION—

25. *County court—Motion by trustee against high bailiff of county court—Formal notice—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 53, 54, 186—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 45.—Where a motion made in the county court by the trustee in the bankruptcy for an order declaring that he was entitled to certain property of the bankrupt which had been seized by the high bailiff under a writ of execution was dismissed by the county court judge on the preliminary objection being taken that formal notice of the motion had not been given,

Held, that the provisions of section 53 of the County Courts Act, 1888, by which, before an action is commenced against any person for anything done in pursuance of the Act, formal notice in writing must be given to the defendant, do not apply to a motion made in a bankruptcy; and that the case must go back to the county court judge to be heard upon the merits.—*Ex parte Poppleton, In re Lock*, Q.B.D., BKCY. 15—62 L. T. 942.

26. *Garnishee order—Postponement of payment under garnishee order—Liability of debtor to bankrupt's estate—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 45, *sub-section* 1.—A garnishee, by an arrangement with the judgment creditor, obtained an extension of time for the payment of the attached debt. Subsequently to the garnishee order being made absolute, but before the extended time for payment had expired, the judgment debtor was adjudicated bankrupt. The garnishee, subsequent to this adjudication, paid the attached debt under the above arrangement to the judgment creditor.

Held, that the garnishee order became ineffectual under the provisions of section 45, sub-section 1, of the Bankruptcy Act, 1883, by reason of the intervention of the bankruptcy of the judgment debtor before the attached debt had been actually paid by the garnishee to the judgment creditor, and consequently that the garnishee remained liable to the estate of the bankrupt for the amount of the debt.—*In re Trehearne, Ex parte Ealing Local Board*, C.A. 116—60 L. J. Q. B. 50; 63 L. T. 798.

ORDER AND DISPOSITION—

27. *Custom of trade—Iron safes—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.—A custom exists amongst the manufacturers of iron safes to send safes to retail ironmongers upon sale or return or to sell as agents, so as to exclude the doctrine of reputed ownership.—*Ex parte Poppleton, In re Lock* (*No.* 2), Q.B.D., BKCY. 384.

PETITION—

28. *Petitioning creditor's debt—Infant sued on bill of exchange—Necessaries supplied—Indorsee of bill as petitioner—Non-liability of infant—Infants' Relief Act*, 1874 (37 & 38 *Vict. c.* 62)—*Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 22.—The indorsee

of a bill of exchange cannot sue or present a petition in bankruptcy against a person upon his acceptance, whilst an infant, of the bill, even though the original consideration for the bill were the supply of necessaries to the infant.—*Ex parte Margrett, In re Soltykoff*, C.A. 337—[1891] 1 Q. B. 413; 60 L. J. Q. B. 339.

29. *Petitioning creditor's debt—Trustee as to part of debt—Beneficially interested as to remainder—Joinder of* cestui que trust.—A petition in bankruptcy may be presented by a creditor who is beneficially interested in part of a debt and trustee as to the other part without adding the *cestuis que trustent* as co-petitioners.

The rule laid down in *Ex parte Dearle, In re Hastings*, 33 W. R. 440, 14 Q. B. D. 184, only applies to a bare trustee having no beneficial interest.—*Ex parte Ward, In re Gamgee*, C.A. 579—60 L. J. Q. B. 574; 64 L. T. 730.

PROOF—

30. *Contingent liability—Creditor's estimate—Assent of trustee—Annuity—Death of annuitant before dividend—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37, *schedule* 2, *r.* 2—*Bankruptcy Rules*, 1886, *rr.* 219, 228.—A proof tendered by a creditor alleged that the debtor was indebted to her in the sum of £7,000, being the value of an annuity of £1,440 payable to her by the debtor during the residue of her natural life, and the proof further stated the creditor's age, and that the annuity was valued accordingly. The proof was not admitted or rejected by the trustee within twenty-eight days, nor did he require further evidence in support of it; but four months after the proof had been tendered, and before any dividend had been declared or anything further done, the creditor died. The executors of the creditor were thereupon requested by the trustee to withdraw the original proof and to make an amended proof limited to the payments of the annuity due to the date of the creditor's death, and, on their refusal to do so, the proof was rejected by the trustees, on the ground that the annuity had been determined by the death of the creditor. On application by the executors to reverse the decision of the trustee, and to direct him to admit the proof for the full amount,

Held, that, although the trustee must be taken to have admitted the existence and amount of the annuity, the omission to deal with the proof was not equivalent to an acceptance of the creditor's estimate, which, by section 37 of the Bankruptcy Act, 1883, was to be made by the trustee, and not by the creditor, and that it was open to the trustee to place an estimate on the value of the annuity after the death of the creditor, the true value of the annuity being the amount of the payments due and unpaid at the time of the creditor's death.—*Ex parte Executors of Vaughan, In re Dodds*, Q.B.D., BKCY. 125—25 Q. B. D. 529; 59 L. J. Q. B. 403; 62 L. T. 837.

31. *Covenant to pay out of estate six months after death—Claim barred by bankruptcy proceedings—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37, *sub-section* 3.—By a deed made between R. D. K. of the one part and E. B. of the other part, R. D. K. covenanted that his executors and administrators would pay E. B. the sum of £3,000, with interest at five per cent. from the date of the death of R. D. K., within six months from his death. R. D. K. subsequently filed his petition in bankruptcy, and an order was made thereunder. E. B. knew of these proceedings, but abstained from proving in respect of this liability. R. D. K. died, and E. B. commenced this action against the executors under the covenant in the deed.

Held, that this was a debt which fell within section 37 of the Bankruptcy Act, 1883, and any proceedings under the deed were barred by the proceedings in bankruptcy.—*Barnett* v. *King*, C.A. 39—[1891] 1 Ch. 4; 60 L. J. Ch. 148; 63 L. T. 501.

32. *Gambling debt—Judgment in respect of—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52).—In an action by A. against B. to recover money won by betting, B. obtained unconditional leave to defend, and A. appealed against that order. Before the appeal was heard A. signed judgment upon default by B. in delivering a defence, and B. took out a summons to set aside that judgment. A. was meanwhile threatening to post B. as a defaulter, and it was agreed that, in consideration of A.'s not posting B., the latter should abandon his summons, and the former his appeal, and that the judgment should stand.

Held (affirming the decision of Cave, J.), that the judgment debt was not a debt provable in bankruptcy.—*In re Deerhurst, Ex parte Seaton*, C.A.—60 L. J. Q. B. 413 n; 64 L. T. 273.

33. *Proxy—Attestation of instrument of proxy by person appointed proxy—Validity—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Schedule I., rr.* 15, 16—*Bankruptcy Rules*, 1886, *rr.* 245, 247—*Appendix, Forms* 75, 76.—Under the Bankruptcy Act, 1883, a proxy cannot be an attesting witness to the instrument of proxy by which he is appointed.—*Ex parte Cullen, In re Parrott*, Q.B.D., BKCY. 543—[1891] 2 Q. B. 151; 60 L. J. Q. B. 567; 64 L. T. 801.

34. *Surety for bankrupt—Proof for purpose of voting at first meeting—Proof before payment of debt—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Schedule* 1, *r.* 9.—A surety for a bankrupt is not entitled to prove for the purpose of voting at the first meeting of creditors unless he has paid the debt for which he is surety.—*Ex parte Whittaker, In re Parrett*, Q.B.D., BKCY. 400—63 L. T. 777.

PROTECTED TRANSACTIONS—

35. *Notice of act of bankruptcy—Solicitor—Notice given to managing clerk—Sufficiency of notice.*—Where a solicitor, with the consent of the client, puts his managing clerk in his place to conduct and manage the matter which the solicitor was retained to conduct, notice of an act of bankruptcy to the managing clerk will be notice to the solicitor.

But, apart from any question of substitution, the mere fact that a man is a managing clerk will not constitute notice to him notice to his principal.—*Ex parte McGowan, In re Ashton*, Q.B.D., BKCY. 330—64 L. T. 28.

37. *Notice of bankruptcy petition—Notice served on sheriff of bankruptcy petition against or by debtor—Execution creditor—"Sheriff"—Man in possession—"Officer charged with the execution of a writ or other process"*—46 & 47 *Vict. c.* 52, *s.* 168—53 & 54 *Vict. c.* 71, *s.* 11, *sub-section* 2.—A man who seizes, keeps possession of, and sells the goods of a judgment debtor by direction of the sheriff is not an "officer charged with the execution of a writ or other process," and therefore is not a "sheriff" within the meaning of section 168 of the Bankruptcy Act, 1883, and therefore notice to him within fourteen days after sale of a bankruptcy petition having been presented against or by the debtor is not notice to the sheriff within the meaning of section 11, sub-section 2, of the Bankruptcy Act.

1890, and does not entitle the official receiver or trustee in bankruptcy to the balance of the proceeds of sale under that section.

Opinion of the Court of Appeal in *Ex parte Warren, In re Holland*, 15 Q. B. D. 48, followed.—*Bellyse* v. *M'Ginn*, Q.B.D., BKCY.—[1891] 2 Q. B. 227.

SCHEME OF ARRANGEMENT—

37. *Approval of scheme by court—After-acquired property of debtor—Order of discharge—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18, 28, 44.—In a liquidation by scheme of arrangement or composition under the Bankruptcy Act, 1883, it is matter of contract between the creditors and the debtor what property shall vest in the trustee for the creditors, and at what date the debtor shall be discharged.

Accordingly, in the absence of any stipulation in the scheme approved by the court to the contrary, the scheme only operates to convey to the trustee property to which the debtor is entitled at the date of the approval of the scheme by the court, and the approval by the court operates as a discharge of the debtor.—*In re Croom, England* v. *Provincial Assets Co.*, CH.D. KEK., J. 286—[1891] 1 Ch. 695; 60 L. J. Ch. 373; 64 L. T. 53.

TRUSTEE—

38. *Committal—Nonpayment of interest under section* 74—*Nonpayment of costs—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 74, *sub-section* 6.—The court has power to commit a trustee in bankruptcy for disobedience to an order of the Board of Trade to pay penal interest at twenty per cent. per annum, under section 74, sub-section 6, of the Bankruptcy Act, 1883, upon all moneys in excess of £50 retained by him for more than ten days.

A trustee in bankruptcy having failed to comply with an order to pay penal interest under the provisions of section 74, sub-section 6, of the Bankruptcy Act, 1883; and also having failed to pay the costs of two motions brought against him by the Board of Trade, application was made by the Board of Trade to commit him.

Held, that the court had jurisdiction to commit for disobedience to the order as to the interest, but not as to the costs; that the convenient course under the circumstances was for the Board of Trade to issue a debtor summons for the whole amount, and to apply afterwards to commit in case of non-compliance with the summons.—*In re Nicholson, Ex parte The Board of Trade*, Q.B.D., BKCY.—63 L. T. 322.

VOLUNTARY SETTLEMENT.—

39. *Purchaser under—Possible claim by trustee in bankruptcy of settlor*—Onus *of proof*—"*Parties claiming under the settlement*"—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.—A purchaser under a trust for sale in a voluntary settlement is included in the term "parties claiming under the settlement" in section 47 of the Bankruptcy Act, 1883, and, consequently, has cast upon him the burden, if the settlement should be impeached by the trustee in bankruptcy of the settlor, of proving that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement.—*In re Briggs and Spicer*, CH.D. STI., J. 377—[1891] 2 Ch. 127; 60 L. J. Ch. 514; 64 L. T. 187.

See also CONFLICT OF LAWS, 2; CRIMINAL LAW, 2; DIVORCE, 23; PRACTICE, 55; WILL, 15.

BANKRUPTCY (IRELAND):—

1. *Arrangement with creditors — Disclaimer of lease—Election*—35 & 36 *Vict. c.* 58, *ss.* 97, 98.—A debtor made an arrangement with his creditors under the Bankruptcy Act, 1872. The debtor's landlord was a creditor for £120, being a half-year's rent accrued due prior to the petition, and also for £1,000, being the estimated value of the covenant to pay rent under the lease. Subsequently the landlord issued a writ against the debtor for a half-year's rent accrued due subsequent to the filing of the petition. The debtor having moved in the Bankruptcy Court to restrain the action.

Held, that sections 97 and 98 of the Bankruptcy Act, 1872, do not apply to proceedings in arrangements, and that the motion must be refused.

In re Somerville, 1 L. R. Ir. 293, approved.—*In re M., an arranging debtor*, C.A. (Ir.)—27 L. R. Ir. 1.

2. *Arrangement with creditors—Composition after bankruptcy—Bankrupt's solicitor obtaining judgment for costs—Restraining execution.*—The solicitor for an undischarged bankrupt, who had made a composition with his creditors after the bankruptcy, but without annulment of the bankruptcy, brought an action and recovered judgment for costs incurred in those proceedings.

The court granted an injunction restraining the solicitor from issuing execution on the judgment.—*In re M'Donald*, BKCY. (Ir.)—27 L. R. Ir. 83.

3. *Order and disposition—Shares standing in bankrupt's name—Deposit of certificate with bank*—20 & 21 *Vict. c.* 60, *s.* 313.—The certificates of shares in a public company were deposited by the owner with a bank by way of security. By section 12 of the Companies Act, 1845, the certificates were *primâ facie* evidence of the title of the shareholder to the shares, but nevertheless the want of such certificate would not prevent the shareholder from disposing of the shares. The owner of the shares absconded and was adjudicated bankrupt. The bank did not give notice to the company of the deposit of the certificates until four months after the act of bankruptcy, and the name of the bankrupt remained as the registered owner of the shares.

Held, that, whether the bank had or had not notice of the act of bankruptcy, the shares were in the order and disposition of the bankrupt within 20 & 21 Vict. c. 60, s. 313.—*In re Stevenson*, BKCY. (Ir.)—27 L. R. Ir. 309.

4. *Order and disposition—True owner—Policy of assurance—Assignment—Verbal notice of*—30 & 31 *Vict. c.* 144.—A policy of assurance on the life of the bankrupt, who was then manager of the Dublin branch of the insurance company with whom the policy had been effected, was subject to a condition that all notices of assignment or charge upon the policy should be given "in writing at the principal place of business" of the company. The bankrupt, while manager, assigned the policy. No notice of the assignment was given at the head office of the company, which was in London.

Held, that the policy was in the order and disposition of the bankrupt with the consent of the true owner.

Semble, verbal notice of assignment would not have been sufficient.—*In re Young*, BKCY. (Ir.)—25 L. R. Ir. 372.

5. *Preferential debts—Harbour dues—Local rates—Bankruptcy (Ireland) Act*, 1872 (35 & 36 *Vict. c.* 58), *s.* 49.—By section 5 of the Cork Harbour Commissioners Act, 1883, the commissioners are empowered to demand and take, in respect of every vessel entering or using the port, dues from the owner or master.

Held, that these dues were not local rates within section 49 of the Bankruptcy (Ireland) Act, 1872,

so as to be entitled to preferential payment.—*In re H. & Co., arranging debtors*, BKCY. (Ir.)—27 L. R. Ir. 271.

BETTING.—See GAMING.

BILL of EXCHANGE:—

1. *Acceptance—Qualified or general—Negotiability of bill—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 19.—A bill of exchange was drawn by one Flipo payable to himself and directed to the defendants as drawees. The defendants accepted the bill as follows:—"In favour of Flipo only. Accepted payable at Alliance Bank, London." The words "In favour of Flipo only" were in writing, and underneath them the rest of the acceptance was impressed with an ordinary stamp.

Held, that the acceptance was a general, and not a qualified, one, and did not restrict the negotiability of the bill.—*Decroix, Verley, et Cie.* v. *Meyer & Co. (Limited)*, C.A. 2—25 Q. B. D. 343; 59 L. J. Q. B. 538; 63 L. T. 414.

2. *Forgery of name of payee—Negligence—Payee "a fictitious or non-existing person"—Knowledge of acceptor—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 7, *sub-section* 3.—A clerk in the service of the respondents forged numerous bills to a large amount, purporting to be drawn upon the respondents by one of their correspondents to the order of another, and he also forged letters of advice as to these bills. The respondents accepted these bills, payable at the appellants' bank, and the clerk then forged the indorsement of the person named as payee, and received payment in cash across the counter to himself.

Held, by Lord Halsbury, L.C., and Lords Watson, Herschell, Macnaghten, and Morris (Lords Bramwell and Field dissenting), that the payee was "a fictitious or non-existing person" within the meaning of section 7, sub-section 3, of the Bills of Exchange Act, 1882, so as to make the bills payable to bearer, and that, consequently, the appellants were entitled to debit the respondents with the amount of the bills.

Also by Lord Halsbury, L.C., and by the Earl of Selborne and Lords Watson and Macnaghten (Lords Bramwell and Field dissenting), because of the conduct of the parties.

Decision of the Court of Appeal (37 W. R. 640, 23 Q. B. D. 243) reversed.—*Bank of England* v. *Vagliano Brothers (No. 2)*, H.L. (E.) 657—[1891] A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353.

See CRIMINAL LAW, 4.

BILL of SALE:—

1. *Absolute assignment—Assignment and hire and purchase agreement—True nature of the transaction—Bills of Sale Acts*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4, *and* 1882 (45 & 46 *Vict. c.* 43).—The plaintiff having applied to the defendants for an advance of £30 upon the security of his furniture, it was arranged that the landlord, to whom the plaintiff owed £25 for rent, should put in a friendly distress, when the defendants would buy the goods from him. The landlord accordingly, at the plaintiff's request, distrained upon the goods in question for £25 rent due, and the goods seized were appraised at £29 5s. The broker then, at the request of the plaintiff, sold the goods to the defendants at the condemned price. The next day the defendants produced an agreement by which the goods were to be hired to the plaintiff's wife upon the terms that, on payment of £50 by monthly instalments, the goods were to become her property, the defendants to have power to take possession upon non-performance of any of the provisions of the agreement. The plaintiff objected to pay £50 for an advance of £29 5s. upon which the defendants said that they had bought the goods, and that the plaintiff knew whether they were worth £50 or not. The plaintiff then said that he saw how he was placed, and his wife signed the hiring agreement. This agreement was not registered as a bill of sale. Default having been made, the defendants took possession, and the plaintiff brought this action to recover damages for trespass to the goods.

Held, that the true inference from the facts was that by the purchase from the landlord the property in the goods passed to the defendants, subject to a resulting trust in favour of the plaintiff until the execution of the hiring agreement; that, as the beneficial interest in the goods remained in the plaintiff until the execution of that agreement, the defendants had no title to the goods independently of that agreement; and that, as the agreement was not registered under the Bills of Sale Acts, the plaintiff was entitled to recover.

Judgment of Cave, J. ([1891] 1 Q. B. 1), reversed.—*Beckett* v. *Tower Assets Co.*, C.A. 438—[1891] 1 Q. B. 638; 60 L. J. Q. B. 493; 64 L. T. 497.

2. *Absolute assignment by deed—Hiring agreement—Fictitious transaction—Loan upon security—Grantor not estopped from showing true nature of transaction—Bills of Sale Acts*, 1878 (41 & 42 *Vict. c.* 31) *and* 1882 (45 & 46 *Vict. c.* 43).—A transaction purported to be an absolute assignment by deed of certain chattels by the plaintiff to the defendants, followed by an agreement in writing whereby the plaintiff hired the chattels from the defendants upon the terms that, upon a certain sum being paid by the plaintiff to the defendants by weekly instalments, the chattels were to belong to the plaintiff, and, upon default in payment of any instalment, the defendants were to be entitled to resume possession.

Held, that, notwithstanding the deed, the plaintiff was not estopped from showing that the true nature of the transaction was a loan upon the security of the chattels, and not an absolute assignment; and that the documents were void under the Bills of Sale Act (1878) Amendment Act, 1882, for want of registration.—*Madell* v. *Thomas, Sons, & Co.*, C.A. 280—[1891] 1 Q. B. 230; 60 L. J. Q. B. 227; 64 L. T. 9.

3. *Attesting witness—Two attestation clauses—Address and description—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 9, 16; *Form in schedule.*—Where there are two or more grantors and two or more attestation clauses in a bill of sale given by way of security, the bill of sale is not rendered void under the Bills of Sale Act, 1882, by reason of the address and description of the attesting witness not being repeated in the second and subsequent attestation clauses, provided that it is clearly apparent upon the face of the bill of sale itself that the attesting witness is the same person in each case.

Parsons v. *Brand*, 38 W. R. 388, 25 Q. B. D. 110, distinguished.—*Bird* v. *Davey (March, Claimant)*, C.A. 40—[1891] 1 Q. B. 29; 60 L. J. Q. B. 8; 63 L. T. 741.

4. *Debenture—Company—Registration—Bills of Sale Acts*, 1854 (17 & 18 *Vict. c.* 36); 1878 (41 & 42 *Vict. c.* 31); *and* 1882 (45 & 46 *Vict. c.* 43), *s.* 17—*Registration under Companies Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 16), *s.* 45, *and Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 43.—Debentures

of a joint-stock company limited which create a charge on the floating real and personal property of the company are, by section 17 of the Bills of Sale Act, 1882, expressly excluded from the operation of that Act, and therefore do not require registration under it.

The *dictum* of Grove, J., in *Jenkinson* v. *Brandley Mining Co.*, 35 W. R. 834, 19 Q. B. D. 568, that the words "or other incorporated company" in section 17 of the Bills of Sale Act, 1882, are limited to companies *ejusdem generis* with mortgage and loan companies, disapproved; but

Held, that, even if that *dictum* were right, any incorporated company which is authorized to raise money on loan or mortgage is, for the purposes of that section, *ejusdem generis* with a mortgage or loan company.

Although debentures answering to the description given above (which applies to companies' debentures in the ordinary form) are agreements "by which a right in equity" to a "charge or security" on "personal chattels" is "conferred," within the definition of bills of sale in section 4 of the Bills of Sale Act, 1878; yet, upon the true construction of that Act, the mortgages or charges of any incorporated company for the registration of which statutory provision has been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not bills of sale within the scope of the Bills of Sale Act, 1878.

Read v. *Joannon*, 38 W. R. 734, 25 Q. B. D. 300; *John Welsted & Co.* v. *Swansea Bank*, 5 Times L. R. 332; *Edmonds* v. *Blaina Furnaces Co.*, 35 W. R. 798, 36 Ch. D. 215; and *Levy* v. *Abercorris Slate and Slab Co.*, 36 W. R. 411, 37 Ch. D. 260, approved.

Decision of Bristowe, V.C., reversed.—*In re Standard Manufacturing Co., Ex parte Lowe and Others*, C.A. 369—[1891] 1 Ch. 627; 60 L. J. Q. B. 52; 64 L. T. 487.

5. *Form in schedule—Address of attesting witness—Name and description of grantee—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 9.—The execution of a bill of sale was attested by "C., clerk to the D. Bank, D.-street, Charing-cross." The affidavit made by the attesting witness, and filed with the bill of sale, gave the private residence of the witness as his address.

Held, by the Court of Appeal (differing on this point from North, J.), that the address of the attesting witness as given in the bill of sale was sufficiently in accordance with the statutory form.

A bill of sale was expressed to be granted to "the D. Bank, of 6, D.-street, Charing-cross (of which said bank S., of the same place, is the sole proprietor)." The chattels comprised in the bill of sale were thereby assigned to "the said bank and its assigns," and the bill of sale contained no further mention of S.

Held, that no irresistible inference could be drawn from the bill of sale itself that the "D. Bank" was in fact S., and accordingly that the bill of sale was void, on the ground that the name and description therein contained of the grantee was not in accordance with the statutory form.

Bird v. *Davey*, 39 W. R. 40, [1891] 1 Q. B. 29, distinguished.—*In re Heseltine, Woodward* v. *Heseltine*, C.A. 405—[1891] 1 Ch. 464; 60 L. J. Ch. 357; 64 L. T. 303.

6. *Form in schedule—Power to sell on or off the premises—Whether such power invalidates bill of sale—"Necessary for the maintenance of the security"—Bills of Sale Act*, 1882.—A clause in a bill of sale giving the grantee "power to sell the goods by private treaty or public auction on or off the premises" is a clause necessary for the maintenance of the security, and does not vitiate the bill of sale.—*Bourne* v. *Wall* (*Wall, Claimant*), Q.B.D. 510—64 L. T. 530.

7. *Form in schedule—Repayment of principal—Unequal instalments—Interest on unpaid instalments—Rate of interest—Alleged ambiguity—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.—A bill of sale dated March 6, 1889, was granted to secure the repayment of a sum of £30, with interest thereon at the rate of sixty per cent. per annum. The grantor thereby agreed to pay the said principal sum by the following instalments:—*i.e.*, "the sum of £5 on the 9th of March, 1889, the sum of £2 on the 6th of April, 1889, and the sum of £2 on the 6th day of every succeeding month until the 6th of February, 1890, and the balance of the said principal sum on the 6th of March, 1890; and on the said 6th day of March, 1890, to also pay the interest which shall have accrued at the rate aforesaid upon the said principal sum, and, in case default shall be made in payment of any of the said instalments of the principal sum, the same shall until payment continue to bear interest at the rate aforesaid."

Held, on the authority of *Goldstrom* v. *Tallerman*, 35 W. R. 68, 18 Q. B. D. 1, that the bill of sale was in accordance with the statutory form contained in the schedule to the Bills of Sale Act, 1882.

Decision of the Divisional Court (Lord Coleridge, C.J., and Lord Esher, M.R.) reversed.—*Haslewood* v. *Consolidated Credit Co.*, C.A. 54—25 Q. B. D. 555; 60 L. J. Q. B. 12; 63 L. T. 71.

8. *Form in schedule—Repayment of principal and interest—Instalments—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.—By a bill of sale, dated the 26th of September, 1887, and given as security for an advance of £50 and interest thereon at the rate of five per cent. per month, the grantor agreed that he would pay to the grantee the principal sum, together with the interest then due, as follows:—The sum of £2 10s. on the 26th of October, 1887, and the like sum of £2 10s. on the 26th of each and every succeeding month until the 26th of September, 1889; then the balance and interest as aforesaid was to be paid.

Held, that, upon the true construction of the bill of sale, the monthly payments of £2 10s. were in respect of interest only, and not of principal, and that the principal sum of £50 was not repayable until the 26th of September, 1889; and that the bill of sale so drawn was in accordance with the statutory form.

Held, further, that, apart altogether from its construction, the bill of sale was in accordance with the form, and was therefore valid.

Goldstrom v. *Tallerman*, 35 W. R. 68, 18 Q. B. D. 1, distinguished.—*Edwards* v. *Marston*, C.A. 165—[1891] 1 Q. B. 225; 60 L. J. Q. B. 202; 64 L. T. 97.

9. "*Marriage settlement*"—*Ante-nuptial agreement for a settlement—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4.—An agreement for a marriage settlement comes within the term "marriage settlement" in the exception contained in section 4 of the Bills of Sale Act, 1878, and is, therefore, not a bill of sale within the meaning of the Act.

Judgment of the Queen's Bench Division (39 W. R. 301, [1891] 1 Q. B. 634) affirmed.—*Wenman* v. *Lyon & Co.* (*Honeywill, Claimant*), C.A. 519—[1891] 2 Q. B. 192.

10. *Pledge—Transference of property, but not of possession—Document regulating terms of holding.*—The goods of A. having been seized by the sheriff under a *fi. fa.*, the defendant agreed to pay out the sheriff and to hold the goods as a security for the

advance, and that the sheriff's officer should remain in possession of the goods on his behalf. This agreement was reduced into writing and signed by the defendant. The sheriff acquiesced in the terms, and his officer remained in possession of the goods. A. having subsequently executed a bill of sale of the same goods to the plaintiff,

Held, by Lindley and Lopes, L.JJ. (Lord Esher, M.R., dissenting), that the agreement, being essential for the proof of the defendant's title to the goods, was a bill of sale, and therefore void for want of registration.—*Mills* v. *Charlesworth*, C.A. 1—25 Q. B. D. 421; 59 L. J. Q. B. 530; 63 L. T. 508.

11. *Pledge—Registration—Delivery order—Parol contract—Document essential to the transaction—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 3, 4—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 8, 9.—The plaintiff, as owner of goods in a warehouse, subject to a charge of £100, agreed verbally with the defendants for a loan of £250 on the security of the goods. He also gave them a promissory note for £255 and a written agreement for payment of further interest. The £100 was paid off and the inventory of the goods handed to the defendants, the balance being paid to the plaintiff. The warehousemen refusing to transfer the goods till their charges were paid, the plaintiff gave the defendants an order on the warehousemen for the delivery of the goods on payment of their charges. The defendants paid the charges, and the goods were transferred into their names in the warehouse books, the plaintiff giving them a promissory note for the amount of the charges and a written agreement for further interest.

Held, that the transaction was one of pledge, and was not affected by the Bills of Sale Acts.—*Grigg* v. *National Guardian Assurance Co.*, CH.D. KEK., J. 684—64 L. T. 787.

12. *Registration—Non-re-registration—Avoidance ab initio—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 41), *s.* 11—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 8.—A bill of sale, duly registered, had been granted in 1884. It was not, however, re-registered within five years as required by section 11 of the Bills of Sale Act, 1878.

Held, that, having regard to sections 3 and 8 of the Bills of Sale Act, 1882, the effect of non-re-registration was to render the bill of sale void as between the parties to it, and not merely void as against the persons enumerated in section 11 of the Act of 1878.—*Fenton* v. *Blythe* (*Collard, Claimant*), Q.B.D. 79—25 Q. B. D. 417; 59 L. J. Q. B. 589; 63 L. T. 453.

13. *Registration—Covenant in lease—"Licence to take possession of personal chattels as security for a debt"—Power of distress for recovery of debt in respect of goods supplied by a landlord to a tenant—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Practice — Motion for judgment — Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 2.—Motions for judgments upon the verdict of a jury must, by section 2 of the Judicature Act, 1890, be made to the judge who tried the case, and such motions will not in the future, even by consent of parties, be heard by the Court of Appeal.

In an agreement for a lease by a brewer, as landlord, to the tenant of "a tied house" a covenant was inserted to the effect that the landlord "should have the same rights, powers, and remedies as landlords ordinarily possess in case of rent in arrear, for any amount due by the tenant for any liquors or other goods sold, or for any money advanced by him to the tenant not exceeding in the whole £200 over and above any rent then due, and should be at liberty to seize and distrain any furniture, stock, or effects in respect of any such debts, and sell the same as, by law, landlords are empowered to do for rent."

Held, that the covenant, in spite of there being no existing debt at the date upon which it was made, amounted to a bill of sale within the meaning of section 4 of the Bills of Sale Act, 1878, as "a licence to take possession of personal chattels as security for a debt," and was void for want of registration.

Pulbrook v. *Ashby & Co.*, 35 W. R. 779, approved.—*Stevens* v. *Marston*, C.A. 129—60 L. J. Q. B. 192; 64 L. T. 274.

15. "*True owner*"—*Successive assignments of same chattels—Consideration not truly stated—Undisclosed trust or condition—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-section* 3—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 5.—H., being already indebted to T. on earlier securities, including a bill of sale over certain goods, and desiring to obtain a further advance, executed a bill of sale to T. upon the same goods, on the understanding that he should afterwards pay T. the amount due to him on the then subsisting securities, and this amount was paid.

An execution creditor of H. contended that the bill of sale was invalid.

Held, that the bill of sale was good.—*Thomas* v. *Searles*, C.A. 692—[1891] 2 Q. B. 408.

14. "*True owner*"—*Property previously settled by grantor—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43).—A. made a settlement upon marriage of all the furniture then at his residence, together with all that should be acquired during coverture, upon himself and his wife during their joint lives, and after their death to the survivor absolutely, with a proviso that, if A. became bankrupt, his wife might declare other trusts. A. executed a bill of sale over certain furniture included in the settlement. On motion by the trustee in bankruptcy of A. to set aside the bill of sale, on the ground that the bankrupt was not the true owner within the meaning of the Bills of Sale Act, 1882,

Held (dismissing the motion), that A. was, to the extent of his interest under the settlement, the true owner of the goods.—*In re Field, Ex parte Pratt*, Q.B.D.—63 L. T. 289.

BOILER:—

Boiler explosion—Explosion in coal mine—Meaning of "boiler"—Jurisdiction of Board of Trade to order inquiry—Boiler Explosions Act, 1882 (45 & 46 *Vict. c.* 22), *ss.* 3, 4—*Boiler Explosions Act*, 1890 (53 & 54 *Vict. c.* 35), *s.* 2.—By section 4 of the Boiler Explosions Act, 1882, the Act was not to apply to "any boiler used exclusively for domestic purposes, or to any boiler used in the service of her Majesty, or any boiler on board a steamship having a certificate from the Board of Trade, or to any boiler explosion into which an inquiry may be held under the provisions of the Coal Mines Regulation Act, 1872, and the Metalliferous Mines Regulation Act, 1872."

By section 2 of the Boiler Explosions Act, 1890, "So much of section 4 of the Boiler Explosions Act, 1882, as relates to any boiler other than a boiler used in the service of her Majesty, or used exclusively for domestic purposes, is hereby repealed, and the said Act shall apply in the case of any boiler explosion occurring on board a British ship."

Held, that the provision in section 4 of the Act of 1882 excepting from the operation of that Act any

boiler explosion into which an inquiry may be held under the Mines Regulation Acts, 1872, was repealed by section 2 of the Act of 1890, and therefore the Board of Trade has jurisdiction under the Act of 1882 to order an inquiry into such a boiler explosion.

On the surface of a mine there was a boiler, from which the steam was conveyed by a pipe down the shaft of the mine and along the workings to a receiver, and from the receiver by a pipe to an engine in the mine. Stop-valves were placed upon the pipe at different places, the last valve being close to the engine, the distance from the boiler on the surface to the engine being 1,363 feet. When all the valves were open steam passed from the boiler to the engine. An explosion having occurred at the valve close to the engine,

Held (by Lord Halsbury, L.C., and Lord Esher, M.R.; Fry, L.J., doubting), that the place where the explosion occurred was a part of the "boiler" within the meaning of that word as defined by section 3 of the Boiler Explosions Act, 1882—"a closed vessel used for generating steam."

Decision of the Queen's Bench Division affirmed. —*Reg.* v. *Commissioners under the Boiler Explosions Act*, 1882, C.A. 440—[1891] 1 Q. B. 703; 60 L. J. Q. B. 544; 64 L. T. 674.

BUILDING CONTRACT:—

Time—Implied waiver—Vendor and purchaser—Notice—Covenant for title—Statutory declaration.—A land company were in possession of part of certain settled estates under building agreements providing for leases to be eventually granted, such agreements to expire in case the buildings were not completed in 1881 and 1885 respectively. A railway company projected a scheme which would involve taking part of the premises and interfere with the building operations. The tenant for life, the leasing authority of the estate, under these circumstances, without making any agreement to that effect, did in fact, through his agent's conduct, waive the obligation of the land company to complete within the specified time. In 1883 the railway company, with knowledge of these circumstances, agreed to purchase the fee subject to the building agreements. In 1886 the railway company entered without making a deposit, or giving a bond to the land company under the Lands Clauses Act, though knowing that the land company claimed that their agreements were subsisting in equity. The land company brought an action against the railway company, and established that the railway company had wrongfully entered, the land company being equitably entitled to an extension of time. The railway company took their conveyance of the fee, the tenant for life, who joined as beneficial owner, and his land agent, making statutory declarations that they knew of no negotiation of any kind with the land company having reference to any extension of time under the building agreements. The conveyance was expressed to be subject, so far as the premises were affected thereby, to the building agreements. The land company subsequently obtained compensation from the railway company in respect of their interest in the lands taken.

Held (affirming the decision of Kekewich, J., 62 L. T. Rep. N. S. 393), that in the absence of fraud, neither under the statutory declarations nor under the covenant for title supplied by the Conveyancing Act, 1881, were the railway company entitled to be recouped the compensation they had paid the land company.—*London and North-Western Railway Co.* v. *Boulton*, C.A.—63 L. T. 727.

BUILDING SOCIETY:—

1. *Arbitration—Power to direct arbitrators to state a case—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *s.* 36—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 19, 24.—By section 36 of the Building Societies Act, 1874, the decision of arbitrators appointed under the Act is to be final, but power is given to them, at the request of either party, to state a special case for the opinion of the court on any question of law.

By section 19 of the Arbitration Act, 1889, power is given to the court to direct arbitrators to state a case on any question of law arising in the course of the reference; and, by section 24, the provisions of the Act are made applicable to all arbitrations under any Act passed before the Act, "except in so far as this Act is inconsistent with the Act regulating the arbitration."

Held (reversing the decision of the Queen's Bench Division), that the two Acts are not inconsistent, and that there is, therefore, power under section 19 of the Arbitration Act, 1889, to order arbitrators appointed under the Building Societies Act, 1874, to state a special case for the opinion of the court on a question of law.—*In re Knight and the Tabernacle Permanent Building Society*, C.A. 507 —[1891] 2 Q. B. 63.

2. *Liability of director—Advance of money on security of scrip—Building Societies Acts*, 1836 (6 & 7 *Will.* 4, *c.* 32), *s.* 4, *and* 1874 (37 & 38 *Vict. c.* 42), *ss.* 13, 15.—A., the director of a building society, was party to a resolution that advances should in future be made to members on the deposit of their scrip. In pursuance of this resolution, advances were from time to time made on this security, but A. was not a party to any of the resolutions to make such advances: a loss having been sustained by the society in consequence of these advances,

Held, that, under the Building Societies Acts, the resolution authorizing the advance was invalid, but that, since the real cause of the loss was the advance, and not the resolution authorizing it, A. was not liable to the society for the loss.—*Cullerne* v. *London and Suburban Benefit Building Society*, C.A. 88—25 Q. B. D. 485; 59 L. J. Q. B. 525; 63 L. T. 511.

3. *Winding up—Losses—Liability of past members —Borrowing power—Method of calculation—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *s.* 15, *sub-section* 2.—Advanced or investing members of a building society who have redeemed or withdrawn under the rules are no longer members for any purpose or liable to contribute in the event of a winding up.

In ascertaining the limits of a power of borrowing under a rule similar to section 15, sub-section 2, of the Building Societies Act, 1874, "the total amount borrowed" must be taken to include all moneys borrowed from any source whatsoever, notwithstanding subsequent loans of the same moneys to non-members, and "the amount for the time being secured to the society by mortgages from its members" must extend to and be limited by the amount so secured, whether advanced in respect of shares or not.—*In re West Riding of Yorkshire Permanent Benefit Building Society, Ex parte Pullman, Ex parte Charnock, Ex parte Johnson and Greenwood*, CH.D. CHI., J. 74—45 Ch. D. 463; 59 L. J. Ch. 823; 63 L. T. 483.

4. *Winding up—Unregistered company—Vesting order—Official liquidator—General powers—Motion in name of liquidator—Companies Act*, 1862 (25 & 26

Vict. c. 89), *ss.* 95, 203.—A motion was made in the name of the official liquidator of an unincorporated building society, which was in course of being wound up compulsorily under the Companies Act, 1862, as an "unregistered company," for an order, pursuant to section 203 of that Act, vesting in the liquidator certain property then vested in the sole surviving trustee of the society; and that the liquidator might be at liberty to exercise any of the powers conferred on him by section 95 of the same Act without the sanction or intervention of the court.

Held, that, subject to the notice of motion being amended by making it in the name of the society instead of in that of the official liquidator, the usual vesting order should be granted.

But held, that the right to exercise the powers conferred by section 95 of the Companies Act, 1862, without the sanction or intervention of the court could not be allowed, it being improper to make the order in such general terms, notwithstanding the order made in *In re Ebsworth and Tidy's Contract*, 42 Ch. D. 23, 60 L. T. N. S. 841.—*In re Britannia Permanent Benefit Building Society*, CH.D. KAY, J.—63 L. T. 304.

See also COUNTY COURT, 11.

BURIAL.—See ECCLESIASTICAL LAW, 1, 2.

CANADA, LAW of:—

Quebec—C. C. P. 1034 *and* 1035—31 *Vict. c.* 25—*Letters patent of incorporation—Fraud—Annulment of letters patent—Writ of* scire facias.—Where it appeared that the defendants and others had been incorporated by letters patent issued under the great seal of the province, which letters had been obtained by a fraudulent representation that the defendants and others had petitioned for the same, and a writ of *scire facias* was issued on an information by the Attorney-General against the company, its liquidator, and its judgment creditor, to show cause why the letters patent should not be declared fraudulent, null, and void, "at least in so far as the said defendants were concerned."

Held, under C. C. P. 1034 and 1035, that the code does not authorize a partial annulment of letters patent as had been directed by the Court of Queen's Bench, and they ought to be entirely annulled, and that the terms of the prayer were wide enough to authorize an order to that effect.—*La Banque d'Hochelaga* v. *Murray and Others*, P.C.—15 App. Cas. 414; 59 L. J. P. C. 102; 63 L. T. 63.

CEYLON, LAW of:—

Fiscal sale—Ejectment.—In an action of ejectment it appeared that the plaintiff had derived title by purchase from the mortgage of the estate in question, and had covenanted with his vendor to pay all sums due on the mortgage; while the defendant had derived title and possession by a subsequent purchase at a fiscal sale obtained by the mortgagee in possession in proceedings to which the plaintiff was not a party.

Held, that whether the plaintiff was bound by the fiscal sale or not, he could not in justice or in law eject the defendant without at least paying to him the moneys due on the mortgage, and that, whether he was entitled to redeem or not, there being no prayer for relief of that character, it could not be decreed to him in this action.—*Murugaser Marimuttu* v. *De Soysa*, P.C.—[1891] A. C. 69; 60 L. J. P. C. 26.

CHARGING ORDER.—See LUNATIC, 2; PRACTICE, 13; PRACTICE (IRELAND), 4; SOLICITOR, 1, 2.

CHARITY:—

1. *Charitable bequest—Legacy to Society for Abolition of Vivisection—Legacy to Society for the Protection of Animals—Uncertainty—Perpetuity.*—A testator gave a legacy of £500 to the Society for the Abolition of Vivisection, and he bequeathed the residue of his property to the Society of Carlsruhe for the Protection of Animals, to be paid in each case to the treasurer of the society. The objects of the first-named society was to procure by legislation the entire suppression of vivisection. The rules provided that the secretary should receive all moneys contributed to the society and expend the same on its behalf in his discretion; and that all moneys exceeding the sum required for use by the society should be invested. The objects of the Carlsruhe Society was to prevent the ill-treatment of animals, to protect all useful animals, especially birds, and whenever necessary to provide them with food, and such like objects. Neither of the societies was incorporated.

Held, (1) that the legacies were charitable legacies; (2) that even if not charitable, they were not void for uncertainty or as creating perpetuities.—*Armstrong* v. *Reeves*, V.C. (Ir.)—25 L. R. Ir. 325.

2. *Charitable bequest—Memoranda in favour of—Invalid declaration of trust—Abortive instruments.*—A testator about eight years before his death, which occurred in 1889, called on H., a friend of his, and stated that he was about to dispose of his property in case of his death, and that after making provision for his relations he should give certain bonds to H. and another friend C. to distribute amongst different charitable institutions, and asked H. to assist him in making out a list. The testator and H. and C. subsequently met together, and a memorandum was written by C. at the dictation of the testator, to the effect that the testator had handed over to H. and C. the securities named on the other side of the paper, to be given by them to the various charitable institutions specified. The testator signed this memorandum, and his signature was witnessed by an independent witness, and the securities, which were all payable to bearer, were handed over and placed by C. in a safe. The testator, however, received the interest on the securities, and also withdrew some of the securities, and at various interviews with C. varied the names of the charitable institutions, and the amounts payable to them, and the memorandum was accordingly altered or in part re-written in pencil. Some short time before the testator's death, C., at the testator's instance, wrote another memorandum as a final expression of the testator's wishes concerning the securities which were remaining, but did not ask the testator to sign such memorandum, being of opinion that it was highly probable that after so many changes the testator would withdraw the remaining securities, and the whole thing would end. Neither C. nor H. made any claim to the securities, but the charitable institutions contended that the memoranda operated as a declaration of trust.

Held, that there was unquestionably no valid declaration of trust; and that the memoranda were imperfect testamentary documents of an informal character.

Held, therefore, that the property which the memoranda purported to affect passed to the executors as part of the property belonging to the testator at his death.—*In re Smith, Champ* v. *Marshallsay*, CH.D. CHI., J.—64 L. T. 13.

3. *Charitable bequest—Validity of—"Advancement and propagation of education in economic and sanitary*

science in Great Britain."—A testator by his will gave £200,000 to trustees, to be paid exclusively out of such part of his personal estate as might by law be bequeathed for charitable purposes; and he directed that his trustees should stand possessed of the said legacy upon trust to apply the same "for the advancement and propagation of education in economic and sanitary science in Great Britain."

Held, that this was a perfectly valid charitable bequest.

Decision of Stirling, J. (62 L. T. N. S. 365), affirmed.—*In re Berridge, Berridge* v. *Turner*, C.A.—63 L. T. 470.

4. *Failure of particular charity after testator's death, but before payment of legacy—Lapse*—Cy-près.—A testator bequeathed a legacy to a charitable institution, which was an orphanage voluntarily maintained by a lady at her own expense. The institution was in existence at the date of the testator's death, but it came to an end shortly afterwards, and before the legacy was paid.

Held (reversing Stirling, J., 39 W. R. 284, [1891] 1 Ch. 373), that the legacy had not lapsed, but had become the property of the orphanage; and that, as the ophanage had ceased to exist, the legacy became applicable by the Crown for charitable purposes *cy-près*.

Clark v. *Taylor*, 1 W. R. 476, 1 Drew. 642, and *Hayter* v. *Trego*, 5 Russ. 113, considered.—*In re Slevin, Slevin* v. *Hepburn*, C.A. 578—[1891] 2 Ch. 236; 60 L. J. Ch. 439; 64 L. T. 311.

5. *Lease — Consent of Charity Commissioners — Effect of lease for more than twenty-one years without consent—Charitable Trusts Amendment Act*, 1855 (18 & 19 *Vict. c.* 124), *s.* 29.—A lease of charity property for more than twenty-one years, made without the consent required by section 29 of the Charitable Trusts Amendment Act, 1855, does not enure for any purpose, but is absolutely void.—*Bishop of Bangor* v. *Parry*, Q.B.D. 541—[1891] 2 Q. B. 207.

6. *Mortmain—Bond of municipal corporation—Borough fund—Interest in land—Mortmain Act* (9 *Geo.* 2, *c.* 36)—*Municipal Corporations Act*, 1835 (5 & 6 *Will.* 4, *c.* 76), *s.* 92—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50). *Part VII., ss.* 139-143—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 175.—Section 92 of the Municipal Corporations Act, 1835, provides that (*inter alia*) the rents and profits of all hereditaments belonging to any corporate body shall be carried to an account to be called the "borough fund," and that such fund, saving the rights of all persons in or upon any real or personal estate of any body corporate, by virtue of any mortgage or otherwise, shall be applied to various specified purposes, including the payment of the salaries of the mayor, recorder, and police of the borough; and that, in case the borough fund shall be more than sufficient for such purposes, the surplus thereof shall be applied for the public benefit of the inhabitants of the borough. The Municipal Corporations Act, 1882, contains a similar provision.

Held, that a bond of a municipal corporation creating a mortgage of the "borough fund" as constituted under either of the above Acts does not create an interest in, or a charge upon an interest in, land within the meaning of 9 Geo. 2, c. 36, because such bond can only operate to charge the surplus (if any) of the fund remaining as moneys in the hands of the body corporate after the payments specified in section 92 have been made out of the fund.

The clause in section 92 of the Act of 1835 saving the rights of any person claiming under any mortgage applies only to rights existing at the date of the passing of that Act, and not to prospective rights.

Section 175 of the Public Health Act, 1875, provides that lands acquired by any local authority under that Act, and not required for the purposes for which they were acquired, shall be sold, and the proceeds of sale carried to the account of the "district fund."

Held, that, in the absence of any evidence to show the existence of any such surplus lands, a mortgage of the "district fund" did not create an interest in, or a charge upon an interest in, land within 9 Geo. 2, c. 36.

Decision of Stirling, J. (38 W. R. 249), reversed,—*In re Thompson, Bedford* v. *Teal*, C.A. 50—45 Ch. D. 161; 59 L. J. Ch. 689; 63 L. T. 471.

7. *Mortmain—Manchester Corporation stock—Interest in land—Manchester Waterworks and Improvements Act*, 1872 (35 & 36 *Vict. c. xxxi.*), *s.* 34.—The Corporation of Manchester were empowered by 35 & 36 Vict. c. xxxi., s. 34, to issue stock, "and the stock so created and issued shall be a charge upon the city rate, and all landed and other property vested in or belonging to the corporation, or which may be acquired by them, but shall be distributable, transmissible, and transferable as, and in other respects have the incidents of, personal estate."

Held, that the stock conferred an interest in land within the Mortmain Act (9 Geo. 2, c. 36), s. 3, and could not be bequeathed for charitable purposes.

Bedford v. *Teal*, 39 W. R. 50, 45 Ch. D. 161, distinguished.—*In re Holmes, Holmes* v. *Holmes*, CH.D. KAY, J.—60 L. J. Ch. 267; 63 L. T. 477.

8. *Mortmain — Interest in land — Mortgage of borough "rents, rates, and waterworks"—"Undertaking"—Mortmain Act* (9 *Geo.* 2, *c.* 36).—A corporation, by virtue of their powers under two private Acts, and under the Local Government Supplemental Act, 1861, to secure the sum of £150 paid by the testatrix for the purposes of these Acts, mortgaged to her, "her executors, administrators, and assigns, such proportion of the rents, rates, and waterworks which, by the said Acts, . . . the corporation are authorized to charge, levy, purchase, and make, . . . as the principal sum doth or shall bear to the whole sum which is or shall be borrowed."

Held, that this was a mortgage of the undertaking as a going concern.

Held, also, that the mortgage did not create an interest in land within the Mortmain Acts, and that the mortgage debt was, in consequence, pure personalty.

The principles of *Walker* v. *Milne*, 11 Beav. 507; *Gardner* v. *London, Chatham, and Dover Railway Co.*, 15 W. R. 325, L. R. 2 Ch. App. 201; *Holdsworth* v. *Davenport*, 25 W. R. 20, 3 Ch. D. 185; *Attree* v. *Hawe*, 26 W. R. 871, 9 Ch. D. 337; and *In re Yerbury's Estate, Ker* v. *Dent*, 62 L. T. N. S. 55, 38 W. R. Dig. 217, followed and applied.—*In re Parker, Wignall* v. *Parker*, CH.D. STI., J. 346—[1891] 1 Ch. 682; 60 L. J. Ch. 195; 64 L. T. 257.

See also TRADE UNION; WILL, 26.

CHEQUE:—

Crossing—Negotiability—Words restricting negotiability—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 8, 29, 35, 73, 81.—A cheque payable to order or bearer can only be rendered not negotiable by writing across the face of the cheque a direction, in clear and unambiguous language, that the cheque is not negotiable.

[illegible]

City of London Court.—[illegible] —The City of London Court has jurisdiction to try an action where the defendant has employment within the City of London, although he does not live or carry on business therein, and although the cause of action arose therein, as section 31 of the London City Small Debts Extension Act, 1852, which gave this extended jurisdiction, has not been repealed by any of the subsequent County Court Acts [illegible] 2 Q. B. [illegible] 61 L. J. Q. B. 365; 64 L. T. [illegible].

CLUB.—

[illegible]—Member—Expulsion—Injunction.—In [illegible] where the members of a club have a right of property in the club, any member who is improperly expelled can obtain relief by injunction. In the case of a proprietary club where the members have no right of property in the club, but have merely a licence in consideration of a certain payment to use the club, in accordance with certain rules, the remedy of a member improperly expelled is damages for breach of contract, but he cannot obtain relief by injunction.—*Bond* v. *Hotten*, Ch.D. STIRLING, J. 61—44 Ch. D. 661; 59 L. J. Ch. 676; 63 L. T. 612.

See also NUISANCE, 1.

COKE.—See METROPOLIS MANAGEMENT ACTS, 5.

COLLEGE.—See UNIVERSITY, 1, 2.

COMMONS, RIGHTS of.—See COPYHOLDS.

COMPANY:—

BORROWING POWERS—

1. *Debentures—Receiver—Principal and interest payable—Non-interest unpaid.*—Where debentures include all the property of the company, and the company is insolvent, the debenture-holders are entitled to the appointment of a receiver of the property and assets of the company, although the principal secured by the debentures is not immediately payable, and there is no interest in arrear.—*[illegible] Limited*, CH.D. [illegible] 60 L. J. Ch. 372; [illegible].

[illegible] *receiver.*—In a debenture-holder's action for foreclosure, where the debentures included all the property and uncalled capital of the company and the shares which had been called were fully paid up, and almost all the assets and the whole of the debentures belonged either to the chairman or the proposed manager, the chairman with the assent of the company, appointed the chairman and the company to be receiver and manager of the property and business of the company in the undertaking of the plaintiff to pay the debenture expenses, to be responsible for the receipts of the receiver till he should give notice and realize the property as soon as possible.—[illegible] *Sons (Limited)*, [illegible] 1 Ch. 133; 60 L. J. Ch. [illegible].

[illegible] *Barrett's, & Bonus*, [illegible]—[1891] 1 Ch. 136 n.

See also [illegible] WINDING-UP, 36, 37.

[illegible] *to secure proceedings by directors*—[illegible].—A limited company, incorporated in [illegible] which one object was [illegible] borrow money by mortgage or otherwise, receive money on deposit, and issue [illegible] and other bonds and mortgage debentures, and any other securities founded or based upon all or any of the real and personal assets or upon the credit of the company," was in liquidation under an order of the 16th of February, 1889. In [illegible] the company had obtained an overdraft from a bank on security of two joint promissory notes, payable on demand, given by two directors, M. and G. These notes were renewed at various times down to [illegible]. M. and G. also executed guarantees to two railway companies. In April, 1882, the board resolved that under article 81 of the company's articles, the directors should be indemnified, and in March, [illegible] a similar resolution was passed, and also that they should be secured by means of charge on the uncalled capital. In May, 1886, a mortgage by way of indemnity to M. and G. was executed "of the uncalled-up amounts of £4 per share on 5,000 shares." M. and G. had made payments to the bank and to the railway companies, and now claimed the benefit of their security.

Held, upon the evidence, that it was part of the agreement that M. and G. should be indemnified by a charge upon the uncalled capital, and that the overdraft being a borrowing of money, the transaction was a borrowing on the security of the uncalled capital, and to that extent the mortgage was valid.

Held, also, that clause 3 (L) authorized the issue of securities founded upon uncalled capital.

Held, also, that, under the articles, the indemnifying of a director was a legitimate business purpose of the company.—*In re Pyle Works (Limited)*, CH.D. STIRLING, J. 235—[1891] 1 Ch. 173; 60 L. J. Ch. 114; 63 L. T. 628.

DIRECTORS—

4. *Appointment—Validity of—Practice—Motion to stay action—Costs—Companies Act*, 1862 (25 & 26

Vict. c. 89), *s.* 67; *Table A, arts.* 35, 52, 53, 58, 62, 71.—Article 58 of Table A to the Companies Act, 1862, does not apply to mere *de facto* directors, nor to subscribers to the memorandum of association, who, by article 53, are "deemed to be directors," no directors having been appointed by them under article 52; but only to directors who have been duly appointed under the articles.

Where no directors have been appointed by the subscribers to the memorandum of association, nor have they themselves acted as directors, persons who have constituted themselves directors *de facto* cannot retire from office under article 58, and then continue in office as "vacating directors" under article 62.

The power of appointing directors given to the subscribers of the memorandum of association under article 52 remains in force until an appointment has been made and reasonable notice only is required for calling a meeting of subscribers of the memorandum of association.—*John Morley Building Co.* v. *Barras*, CH.D. STI., J. 619—[1891] 2 Ch. 386; 60 L. J. Ch. 496; 64 L. T. 856.

5. *Remuneration—Net profits for the year—Voluntary winding up—Reconstruction—Profits on sale of undertaking to new company.*—A provision in a company's articles remunerating the directors for their services by a percentage on the net profits of each year applies only to profits made by the company as a going concern, and not to a profit realized on the sale of its undertaking to a new company in a voluntary winding up, with a view to reconstruction.

Rishton v. *Grissell*, L. R. 5 Eq. 326, 16 W. R. Ch. Dig. 86, approved.—*Frames* v. *Bultfontein Mining Co.* (*Limited*), CH.D. CHI., J. 134—[1891] 1 Ch. 140; 60 L. J. Ch. 99; 64 L. T. 12.

6. *Resignation—Regulations of company—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 15; *Table A, art.* 55.—In the absence of a special provision in the articles of association the directors of a company have no power to accept the resignation of a co-director; the resignation must be made to the company.

Article 55 of Table A gives the directors no such power.—*Municipal Freehold Land Co.* v. *Pollington*, CH.D. KEK., J.—59 L. J. Ch. 734; 63 L. T. 238.

MEETING—

7. *Amendment to resolution—Rejection by chairman—Conduct of member—Waiver—Terms of notice convening meeting.*—The rules of a company provided that no shareholder should be qualified to vote unless he had held five shares for six months before the meeting, but the number of the votes of a qualified proprietor depended on the number of his shares, without regard to how long he had held the other shares. Notice was given of an extraordinary meeting for the 4th of April, 1889, with a view "to alter the scale of voting by giving to every qualified proprietor one vote for each share." On the 1st of April the directors circulated the resolution to be proposed, which was to the effect that every proprietor should have one vote for each share, but should have no vote for any share unless he had held it six months. H., a proprietor, attended the meeting and proposed that to qualify a person to be a director he must have held shares for a certain period. The chairman ruled this out of order, upon which H. moved an amendment that the qualification of six months as to shareholders should be expunged. He did not put the amendment in writing, or in very clear terms. The chairman, however, understood the motion in the above sense, and asked whether anyone seconded it, and, it having been seconded, he was about to put it to the meeting; but after consulting the solicitor of the company he said he was advised that no amendment could be put, and that the proposed resolution must either be accepted as it stood or rejected. He therefore refused to put the amendment. The original resolution was then passed, H. moving its rejection and voting against it. It was confirmed at a subsequent meeting at which H. attended, and protested on the grounds that the resolution was not within the notice calling the meeting, and that the chairman had refused to put his amendment. On an action by H. to set aside the resolution on the above grounds,

Held by Chitty, J., that the conduct of the plaintiff at the meeting amounted to a waiver which precluded him from bringing an action against the company of which he was a member, on the ground of any irregularity in the notice; that any member wishing to insist upon his right to move an amendment, or to protest against the ruling of the chairman, ought to formulate and put before the chairman, either orally or in writing, the terms of his amendment, and should also put the chairman on his guard, by cautioning him that his ruling was objected to, so as to give him an opportunity of reconsidering his position; and that on these grounds the plaintiff's action failed, and must be dismissed.

Held, on appeal, that H. had moved an amendment which was sufficiently definite, and that the chairman was wrong in refusing to put it to the meeting; that, as the chairman after consulting the solicitor of the company had deliberately ruled that no amendment could be put, H. was under no obligation to contest that ruling or to leave the meeting, but was justified in voting against the resolution; that his so doing could not be deemed acquiescence in the ruling; and that as the chairman's refusal to put the amendment had withdrawn a material and relevant question from the consideration of the meeting, the resolution must be set aside.

Whether the resolution was within the scope of the notice calling the meeting, *quære*.

Per Cotton and Fry, L.JJ., *semble*, that it was.—*Henderson* v. *Bank of Australasia*, C.A.—45 Ch. D. 330; 59 L. J. Ch. 794; 63 L. T. 597.

MEMORANDUM—

8. *Alteration of memorandum—Business—Objects—Main purpose—Extending range of investments—Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1 (2), (4), (5) (a) (b).—A company formed for the purpose of investing in Government stock or other securities guaranteed by Government cannot alter its memorandum of association under the Companies (Memorandum of Association) Act, 1890, so as to extend its power of investment to non-Government securities, such alteration neither "enabling it to carry on its business more economically or more efficiently," nor "to attain its main purpose by new or improved means" within the meaning of the Act.

Observations on the duty of the court in exercising its discretion under the Act.—*In re Government Stock Investment Co.*, CH.D. CHI., J. 375—[1891] 1 Ch. 649; 60 L. J. Ch. 477; 64 L. T. 339

9. *Alteration of memorandum—New business—Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-sections* 3, 5 (d).—The court has power, under sub-section 5 (*d*) of section 1 of the Companies (Memorandum of Association) Act, 1890, to confirm, either wholly or in part, resolutions of a company extending the powers of investment in its memorandum of association; but, in exercising its discretion, the court, under sub-

section 3 of section 1, may impose such conditions as it may think necessary.

In re Government Stock Investment Co., 39 W. R. 375, [1891] 1 Ch. 649, distinguished.—*In re Foreign and Colonial Government Trust Co. (Limited)*, CH.D. STI., J. 699—[1891] 2 Ch. 395.

10. *Alteration of memorandum — Extension of objects mentioned in memorandum—Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62)—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63).—A petition was presented by a company, under the Companies Acts, 1862 to 1890, asking for the sanction of the court to certain proposed alterations in, and additions to, the memorandum of association of the company resolved on by special resolutions. The company was registered in May, 1888, with a nominal capital of £2,000,000, but it had not been brought out, nor had it carried on business. It had no creditors nor debenture-holders. and only seven shareholders—viz., the seven subscribers to the original memorandum of association—all of whom joined the company as co-petitioners. The company had no articles of association. The objects of the company as contained in its memorandum of association were those of an investment and loan company. It was proposed to add to these the objects of a guarantee and finance company with increased borrowing powers.

The evidence showed that the business of the company could be more conveniently carried on with less restricted borrowing powers; and that the proposal to give to the company the additional powers of a guarantee and finance company would enable the company to carry on business more efficiently, and attain its purpose by improved means, and also conveniently and advantageously combine other business with its original business.

Held, that the court ought to sanction the proposed alterations.

Held also, that, although there had been no advertisements of the petition or application in chambers relating thereto, advertisements would, under the circumstances, be dispensed with.—*In re The Empire Trust (Limited)*, CH.D. CHI., J.—64 L. T. 221.

11. *Certificate of incorporation—Memorandum of association—Number of signatories—Evidence—Winding up—Jurisdiction—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 6, 17, 18, 145.—The registrar's certificate of incorporation of a company is not conclusive evidence that the memorandum of association was in fact signed by at least seven persons; evidence can be adduced to show that in fact the memorandum was signed by less than seven persons, and, if that fact be established, the court has no jurisdiction to make a winding-up order.

In re Northumberland and Durham District Banking Co., 2 De G. & J. 357, approved.

Peel's case, L. R. 2 Ch. App. 674, and *Oakes* v. *Turquand*, L. R. 2 H. L. 325, distinguished.—*In re National Debenture and Assets Corporation*, C.A. 707—[1891] 2 Ch. 505; 60 L. J. Ch. 533; 64 L. T. 512.

PROSPECTUS—

12. *Misrepresentation—Action of deceit—Fraud—Directors—Prospectus.*—An action of deceit will not lie in respect of a negligent, as distinguished from a fraudulent, misrepresentation.

Derry v. *Peek*, 38 W. R. 33, 14 App. Cas. 337, followed.

The directors of a gold mining company issued a prospectus containing a statement that "full reports of the property have been prepared for the directors by eminent engineers" (naming four). None of the reports in question had in fact been prepared on the instructions of the directors or on their behalf, and, although one of the reports was addressed to the directors, it had been in fact prepared, before the formation of the company, on behalf of a vendor of the property.

At the trial of an action for damages for misrepresentation. brought against the directors by a person who had taken shares in the belief, induced by the prospectus, that the reports had been prepared on behalf of the directors, the judge, in effect, found, (1) that the above statement was untrue in any fair sense of the words used, (2) that none of the defendants gave any satisfactory explanation of the meaning they attributed to the statement, and (3) that they were not justified in allowing the statement to be inserted in the prospectus. There was, however, no finding that the defendants, or any of them, had been guilty of fraud.

Held, by the Court of Appeal, on these findings, and on investigation of the evidence with respect to each defendant separately (which the court held to be necessary in an action of deceit), that fraudulent, as distinguished from negligent, misrepresentation had not been proved, and consequently that the action could not be supported against any of the defendants.

Decision of Romer, J. (39 W. R. 252), reversed.

Quære, whether the misstatement in the prospectus could be held material in the absence of proof that the reports themselves were in fact untrue.—*Angus* v. *Clifford*, C.A. 499—[1891] 2 Ch. 449; 60 L. J. Ch. 443.

13. *Misrepresentation — Rescission of contract to take shares—Removal of name from register of shareholders.*—The name of a shareholder ordered to be removed from the register of shareholders on the ground that he had been induced to take shares on the faith of a statement which was untrue in the prospectus that certain persons were members of the council of administration, and that the council consisted of members of the company. — *In re Metropolitan Coal Consumers' Association, Wainwright's case*, C.A.—63 L. T. 429.

14. *Misrepresentation—Rescission of contract—Acquiescence—Attending meeting after repudiation of shares—Inquiring price of shares.*—The prospectus of a company contained a statement that certain persons would form a council of administration from which would be selected an executive and financial committee, which should constitute the board of directors. E. applied for shares in the company, relying upon the representation that those persons were members of the council of administration, and in the belief that they would be responsible for the management of the company. Those persons were not, in fact, members of the company, and, upon discovering this, E. gave notice of motion to remove his name from the register of members. Shortly afterwards E. attended a meeting of the company, but did not vote or take any other part in the meeting. Some months after giving notice of motion E. wrote to the secretary of the company and inquired at what price the shares of the company were then quoted.

Held, that there was a material misrepresentation, on which E. relied, and that he was entitled to have his name removed from the register of members.

Held, that E. had not, by attending the meeting, or inquiring the price of the shares, acted as a shareholder towards the company so as to disentitle him to insist on his repudiation of his shares.—

In re Metropolitan Coal Consumers' Association, Edward's case, CH.D. KEK., J.—64 L. T. 561.

15. *Misrepresentation — Rescission of contract — Winding-up order—Practice—Statement of claim—Amendment after commencement of winding up.*—In an action against a company for rescission of a contract to take shares, the plaintiff cannot, after the commencement of the winding up of the company, raise, by amendment of his statement of claim, a ground for relief distinct from those raised in his original statement of claim.—*Cocksedge v. Metropolitan Coal Consumers' Association*, CH.D. KEK., J. 636—64 L. T. 826.

REDUCTION OF CAPITAL—

16. *Preference and ordinary shares—Resolution for reduction of ordinary shares only—Confirmation by court—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *ss.* 9, 11—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 3.—Under the Companies Acts, 1867 and 1877, the court has power to sanction a special resolution for the reduction of the ordinary capital only of a company, the preference capital remaining unreduced.

In re Union Plate Glass Co., 37 W. R. 792, 42 Ch. D. 513, not followed.

In re Gatling Gun Co., 38 W. R. 317, 43 Ch. D. 628, and *In re Barrow Hæmatite Steel Co.*, 37 W. R. 249, 39 Ch. D. 582, followed.—*In re Agricultural Hotel Co. (Limited)*, CH.D. KEK., J. 218—[1891] 1 Ch. 396; 60 L. J. Ch. 208; 63 L. T. 748.

17. *Preliminary expenses — "Lost capital" or "capital unrepresented by available assets"—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *ss.* 9, 11—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 3.—A company is not entitled to reduce its capital by the amount expended on preliminary expenses, as such expenditure is not "lost capital" or "capital unrepresented by available assets" within section 3 of the Companies Act, 1877.—*In re Abstainers' and General Insurance Co.*, CH.D. NOR., J. 574—[1891] 2 Ch. 124; 60 L. J. Ch. 510; 64 L. T. 256.

18. *Sinking fund—Contract in memorandum—Payment off of preference shares—Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 4—*General Orders, March*, 1868, *rr.* 2—20.—The memorandum and articles of a company contained a contract binding the ordinary shareholders to set apart, and the preference shareholders to accept, a sinking fund for the payment off of their preference shares. The fund having been set apart, and a petition presented for reduction of capital, according to the contract,

Held, that the reduction of capital so to be effected did not involve "the payment to any shareholder of any paid-up capital" within section 4 of the Companies Act, 1877, and, consequently, that creditors (if any) were not entitled to object; and

Order made without the usual inquiries as to creditors. — *In re Dicido Pier Co.*, CH.D. CHI., J. 486—[1891] 2 Ch. 354; 60 L. T. 695.

REGISTER—

19. *Rectification—Motion for rectification of register—Service on solicitors of company—Insufficiency of service—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 35, 62.—A motion was made under section 35 of the Companies Act, 1862, to rectify the register of members of a company by the insertion therein of the name of the applicant as the holder of certain shares. Correspondence had passed between the solicitors of the company and the solicitors of the applicant with reference to the applicant's claim to be a shareholder of the company, and the notice of motion had been served on the company's solicitors, they accepting service on behalf of the company in the usual manner. At the hearing the company did not appear.

Held, that service on the solicitors of the company was not sufficient; and that no order could be made until the company had itself been served at its registered office, or until it appeared.—*In re the Denver United Breweries (Limited)*, CH.D. NOR., J.——63 L. T. 96.

REGISTRATION—

20. *Private partnership—Company formed for mere purpose of registration—Company "otherwise duly constituted by law—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 4-6, 180.—Seven persons, constituting a firm which had for some years carried on a publishing business, executed a deed reciting that the partners had sold their business to a limited company in consideration of certain fully paid-up shares in the company, which formed the only assets of the partnership, and that they were desirous of modifying their partnership with a view to its registration as an unlimited company under Part VII. of the Companies Act, 1862; and containing mutual covenants between the present partners and any future members of the company, that they should be subject to certain provisions therein contained. The sole object of the deed was, in fact, to obtain registration as a company under Part VII. of the Act. The deed was produced to the Registrar of Joint-Stock Companies, and an application made to him to register the company.

Held, reversing the decision of the Divisional Court (Cave and Charles, JJ.), that the application could not succeed.—*Reg.* v. *Registrar of Joint-Stock Companies*, C.A. 708.

SHARES—

21. *Allotment—Allotment before application—Subsequent application by allottee—Withdrawal of application—Removal of name from register.*—A company allotted shares to H., who had not applied for them. Subsequently H., being unaware of the previous allotment, applied for shares. H. having withdrawn his application,

Held, that the allotment prior to the application was invalid, and H. was entitled to have his name removed from the register.—*In re Northern Electric Wire, &c., Co., Ex parte Hall*, CH.D. KAY, J.—63 L. T. 369.

22. *Allotment — Directors — Allotment by unauthorized directors—Ratification by company—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 67.—A. and B. had applied for shares in a mining company, and on October 24, 1888, two of the four directors of the company met and allotted shares to A. and B. and other applicants. The allotments so made were invalid, the two directors not having authority to make allotments. Letters of allotment, were, however, sent out, and were received by A. and B. on October 25. A. returned his allotment letter, but the secretary refused to receive it back, and both A. and B. immediately wrote complaining of the manner in which the allotments had been made, and asking to be relieved from taking the shares, but neither of them expressly repudiated the shares. On October 31 B. paid the allotment money to the company's bankers under protest, as he alleged, but there was no evidence that any protest had been communicated to the company. On December 24 the company brought an action against A. for the allotment money payable by him. On January 7, 1889, at a meeting of directors, at which two were present, it was resolved that certificates be sealed of the shares allotted to A. and B., and this was accordingly done and notice thereof given to A.

and B. There was no evidence that the meeting of January 7 was in any way irregular or invalid. On January 16, at a meeting of all the four directors, the minutes of the prior meeting of January 7 were signed.

A. and B. subsequently applied to have their names removed from the shareholders' register.

Held, (1) that the invalid allotments made to A. and B. on October 24 were capable of being ratified by the company, and had been so ratified as regards A. on December 24, when the action to recover the allotment money was brought against him by the company, and had also been so ratified as regards both A. and B. either on January 7, 1889, or on January 16 at the latest; (2) that, under the circumstances of the case, and in the absence of any prior repudiation of the shares by A. or B., the ratification had been made within a reasonable time; and, consequently, that neither A. nor B. were entitled to have their names removed from the register.

Bolton v. *Lambert*, 37 W. R. 434, 41 Ch. D. 295, followed.

Decision of North, J., affirmed.—*In re Portuguese Consolidated Copper Mines, Badman's and Bosanquet's cases*, C.A. 25—45 Ch. D. 16; 63 L. T. 423.

23. *Transfer—Blank transfer—Executor—Broker—Pledge — Certificates — Estoppel — Domicil — Foreign law.*—The executors of a registered owner of shares in a New York railway company signed blank transfers, which were indorsed on the certificates, and handed them to their brokers, with the intention of having the shares registered in their own names. The brokers deposited the transfers, by way of security, with their bankers, and were afterwards adjudicated bankrupts. The documents themselves were quite consistent with the fact that the executors had signed merely to complete their title.

Held (affirming the Court of Appeal), that the executors were not estopped, as against the banks, from asserting their title to the shares and certificates as part of the testator's estate.

Transactions as to share certificates taking place in England between persons domiciled there are to be decided by English law; but what is effectual to transfer the shares in a foreign country, by the laws of that country.—*Colonial Bank* v. *Cady*; *London Chartered Bank of Australia* v. *Cady*, H.L. (E.) 17—15 App. Cas. 267; 60 L. J. Ch. 131; 63 L. T. 27.

24. *Transfer—Blank transfer—Pledge of certificates—Fraudulent transfer—Stockbroker—Mercantile usage—Estoppel—Proof in bankruptcy.*—A. employed B., a stockbroker in Dublin, to purchase certain shares in the Northern Pacific Railway Co., which B. did through a stockbroker in London. The certificates of these shares had indorsed on them an assignment in blank and a power of attorney; and by the custom of the Stock Exchange they were treated by brokers and bankers as transferable by delivery. No deed of transfer was ever executed. B. deposited the certificates, without the knowledge of A., with the defendants as security for an advance. B. was adjudicated bankrupt, and the plaintiff, as the administrator of A., who had died, proved in the bankruptcy for a sum which included the value of the shares. The plaintiff at this time did not know that the certificates had been pledged to the defendants. In an action to have the defendants declared trustees of the shares for the plaintiff,

Held, (1) that the defendants had no notice, nor any reason to believe, that the shares were not the property of B.; and that as A. was not the registered owner, and as his name did not appear anywhere in connection with the shares, the shares were "in order" in the hands of B., and that consequently the defendants were *bonâ fide* purchasers for value without notice of any defect in the title; (2) that the plaintiff was estopped by the proceedings in the Bankruptcy Court from pursuing his remedy by action.

Goodwin v. *Robarts*, 1 App. Cas. 476, followed.

Sheffield v. *London Joint-Stock Bank*, 13 App. Cas. 333; *Colonial Bank* v. *Cady*, 15 App. Cas. 267; and *Simmons* v. *London Joint-Stock Bank*, [1891] 1 Ch. 270, distinguished.—*Hone* v. *Boyle, Low, Murray, & Co.*, C.A. (Ir.)—27 L. R. Ir. 137.

25. *Transfer—Non-registration of transfer—Pre-existing equitable title to shares.*—As between two persons claiming title to shares registered in the name of a third person in a company formed under the Companies Act, 1862, with articles of association regulating the transfer of its shares, the title prior in date prevails unless the claimant second in point of time can show that, as between himself and the company, he has, before the receipt by the company of notice of the prior title, acquired the full *status* of a shareholder, or, at all events, that all the formalities have been complied with, and that some purely ministerial act alone remains to be done by the company which, as between himself and the company, the company would be bound to do forthwith.—*Moore* v. *North-Western Bank*—[1891] 2 Ch. 599; 64 L. T. 456.

25a. *Transfer—Sale of shares—Certificate issued to transferee—Sale of shares by transferee—Denial by company of transferee's title—Estoppel—Representation contained in certificate—Measure of damages.*—P., being the owner of certain shares in the defendant company, executed a blank transfer thereof, and, having procured a certification from the secretary of the company, deposited the transfer so certified with the plaintiffs as security for an advance of £250. P. then sold the same shares to M. and B., and they were registered as owners. Subsequently the plaintiffs, having executed their transfer, sent it to the company for registration, and received a certificate in the usual form. They then contracted to sell the shares on the Stock Exchange, the market price being £426, and, having repaid themselves the sum owing to them from P., handed over to him the balance of the purchase-money. The company refused to recognize the plaintiffs' purchasers, on the ground that the plaintiffs never had a good title to the shares. The plaintiffs, being bound to carry out their contract with their purchasers, bought other shares, the market price then being £717.

Held, that the company, having given the plaintiffs a certificate, were estopped from denying the plaintiffs' title; and that the plaintiffs were entitled to recover from the company the sum of £717.—*Tomkinson* v. *Balkis Consolidated Co.*, C.A. 693—60 L. J. Q. B. 558; 64 L. T. 816.

26. *Transfer — Sale of shares — Certification of transfer—Want of title of transferor*—Ultra vires *act—Estoppel—Representation as to credit and ability—Lord Tenterden's Act* (9 *Geo.* 4, *c.* 14), *s.* 6.—A., who was a shareholder in the defendant company, sold his shares, and the purchaser was entered on the register as the owner of the shares. Subsequently A. purported to transfer some of these shares to another person, from whom the plaintiffs bought them. Before the transfer was executed by the plaintiffs or the price paid, the transfer form was taken to the defendants' office, and the defendants'

secretary wrote upon it the words "certificate lodged." No certificate had in fact been lodged. The plaintiffs, relying upon this "certification," paid the price of the shares. The defendants subsequently discovered that the transferor had no title to the shares, and refused to recognize the plaintiffs' title. The plaintiffs then brought an action to recover the value of the shares.

Held, that the "certification" amounted to a representation that the transferor had produced to the person certifying such documents as on the face of them showed a *primâ facie* title in the transferor to transfer the shares, but did not amount to a warranty of the title of the transferor to the shares; that the giving of the "certification" by the secretary of the company was not *ultrà vires*, and, though the company were estopped from denying the truth of the facts certified, they were not estopped from denying the title of the transferor to transfer the shares; and that, as the company could not be held liable for a mere careless misrepresentation, the plaintiffs were not entitled to recover.

Held, further, that the "certification" was not a representation as to the credit and ability of the transferor within section 6 of Lord Tenterden's Act.

Judgment of Vaughan Williams, J. (38 W. R. 750, 25 Q. B. D. 77), affirmed, but not for the reasons given in his judgment.—*Bishop* v. *Balkis Consolidated Co.*, C.A. 99—25 Q. B. D. 512; 59 L. J. Q. B. 565; 63 L. T. 601.

WINDING UP—

27. *Arrangement with creditors—Sanction of court—Debenture-holders—Scheme depriving creditors of their security—Joint-Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104), *s.* 2.—The power given by the Joint-Stock Companies Arrangement Act, 1870, s. 2, to sanction a scheme of arrangement between a company in liquidation and its creditors extends to debenture-holders and other secured creditors, and enables the court to sanction a scheme, although it deprives debenture-holders of their security wholly or in part.

In re Empire Mining Co., 44 Ch. D. 402, approved.

In exercising the power of sanctioning a scheme of arrangement conferred on it by the Act, the court will not only ascertain that all the statutory conditions have been complied with, but will also consider whether the class of creditors summoned to the meeting was fairly represented by those who attended, and whether the statutory majority who approved of the scheme were acting *bonâ fide*, or were seeking to promote interests adverse to those of the class whom they professed to represent, and generally whether the arrangement is such as a man of business would reasonably approve.

The decision of North, J., affirmed. — *In re Alabama, New Orleans, Texas, and Pacific Junction Railway Co.*, C.A.—[1891] 1 Ch. 213; 60 L. J. Ch. 221; 64 L. T. 127.

28. *Compulsory order — Right of creditor to — Voluntary winding up—Second petition, with notice of first—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 145—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63).—The fact that, under the Companies (Winding-up) Act, 1890, the court has larger powers than formerly in a compulsory winding up, has not the effect of entitling a creditor to a compulsory order which he would not have been entitled to before the Act, unless he can show that his rights will be prejudiced by a voluntary winding up; but if a case for investigation is made out, it constitutes a stronger reason than existed before the Act for a compulsory order.—*In re Russell, Cordner, & Co.*, CH.D. NOR., J. 635.

29. *Compulsory order—Supervision order—Discretion of the court—Companies Act*, 1862, *s.* 145.—A petition was presented by creditors to wind up the company compulsorily. Previously to the presentation of the petition, an order was made in a debenture-holder's action for the appointment of a receiver and manager of the company's undertaking and property. The debentures comprised the whole of the assets of the company, including the uncalled capital. After the presentation of the petition the company passed resolutions for a voluntary winding up. The company now asked for a supervision order.

Held, that, as the petitioners would not be prejudiced within the meaning of section 145 of the Companies Act, 1862, there must be an order that the voluntary winding up of the company should be continued under the supervision of the court.—*In re The Electrical Engineering Co.* (*Limited*), CH.D. KEK., J.—64 L. T. 658.

30. *Contributory—Certificate—Application to remove name—Time—Companies Act*, 1862, *s.* 124—*R. S. C.*, 1883, *ord.* 55, *r.* 70.—There is no definite limit of time within which an application must be made to remove a name from the list of contributories settled by a certificate in the winding up of a company. Neither section 124 of the Companies Act, 1862, nor ord. 55, r. 70, definitely limit the time in such a case. Therefore, where no injury has been caused by the delay, an application may be made after the expiration of twenty-one days from the making of the certificate.—*In re Liverpool Household Stores Association, Ex parte Weld-Blundell*, CH.D. KEK., J.—63 L. T. 383.

31. *Contributory — Paid-up shares — Payment in cash—Contributory—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.—Shares which have been allotted to, and accepted by, a creditor of a company as fully paid up, in consideration of the extinguishment of the company's debt, cannot, in the liquidation of the company, be treated as having been paid for "in cash" within the meaning of section 25 of the Companies Act, 1867, as expounded by *Spargo's case*, 21 W. R. 306, L. R. 8 Ch. App. 407, because a contract to take fully paid-up shares creates no liability to pay money, and consequently the transaction cannot amount to an extinguishment of existing cross-debts of the company and the allottee. —*In re Johannesburg Hotel Co., Ex parte Zoutpansberg Prospecting Co.*, C.A. 260—[1891] 1 Ch. 119; 60 L. J. Ch. 391; 64 L. T. 61.

32. *Contributory—Allotment of shares made without authority—Sham transaction to deceive the public —Companies Act*, 1862, *s.* 23.—Directors of a company arranged among themselves to enter on the register as allottees of shares the names of persons handed in by the directors, in order to make it appear that a number of shares in fact unallotted had been allotted, so as to induce the public to apply for shares. In pursuance of this arrangement A., a director, sent to the company a form of application for 200 shares, purporting to be an application by A.'s son, and signed in the son's name by A., but in fact without the son's knowledge or authority. The 200 shares were accordingly registered in the son's name, but no certificates were ever issued, and no application or allotment money ever paid, nor any call ever made or dividend paid on the shares. The son never at any time ratified A.'s act, nor in any way held himself out as the holder of the shares.

The company went into liquidation, and then A., and subsequently the son, died. After the son's death the liquidator placed the names of A.'s

executors on the list of contributories in respect of the 200 shares.

Held (reversing the decision of Kay, J.), that, upon the facts as above stated, no contract to take shares, either for himself or his son, had ever been entered into between A. and the company, and, therefore, that A.'s executors could not be placed on the list of contributories.

Pugh's case, L. R. 13 Eq. 566, 20 W. R. Ch. Dig. 45, and *Cox's case*, 12 W. R. 92, 4 De G. J. & S. 53, distinguished.—*In re Britannia Fire Association, Coventry's case*, C.A. 328—[1891] 1 Ch. 202; 60 L. J. Ch. 186; 64 L. T. 185.

33. *Contributory—Calls—Balance order—Action to enforce—Action for debt in respect of calls—Merger of debt in order—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 101, 102, 120.—By a balance order made in the winding up of a company, a contributory was ordered to pay to the liquidator the amount of calls made previous to the winding up. The liquidator was unable to serve the balance order upon the contributory, who was out of the jurisdiction, and brought an action in the name of the company for the amount of the calls.

Held, that the original obligation of the contributory to pay the calls was not merged in the balance order, and that the action was maintainable.

Chalk, Webb, & Co. v. *Tennent*, 36 W. R. 263, discussed.—*Westmoreland Green and Blue Slate Co.* v. *Feilden*, CH.D. KEK., J. 379—60 L. J. Ch. 301; 64 L. T. 286.

34. *Contributory—Calls—Agreement to pay unpaid capital at future dates—Right of liquidator to immediate call of whole sum—"Liability"—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 7, 102.—By an agreement made on the reconstruction of a company it was provided that the new company should allot to the shareholders shares in proportion to their paid-up capital in the old company, and that the sums remaining unpaid on such new shares should be paid to the new company on certain fixed dates, the last two of which had not yet arrived. The agreement was confirmed, and, in response to a circular by the new company inviting applications for shares on the terms of the agreement, the respondents applied for and received allotments of shares. In the memorandum of association of the new company it was stated that one of the objects of the company was to carry out the agreement; it was adopted by and scheduled in full to the articles. The new company was now being wound up compulsorily, and the liquidator applied for an order for the immediate payment of all the unpaid instalments.

Held, that the contract had been superseded by the statutory rights of the liquidator, and that he was entitled to an immediate call.—*In re Cordova Union Gold Co.* (*Limited*), CH.D. KEK., J. 536—[1891] 2 Ch. 580; 64 L. T. 772.

35. *Contributory—Director—Qualification shares—Allotment notice—Agreement to take shares—Acquisition within reasonable time.*—I. became a director, on the 25th of October, 1888, of a company, the articles of association of which provided that a director's qualification should be forty shares. On the same day forty shares were, without his knowledge, allotted to him, and his name placed on the register. He first acted as a director on the 24th of November, 1888, and acted again on the 16th of January and the 18th of January, 1889. On the 19th of January, 1889, he himself acquired forty fully paid-up shares, which were duly registered in his name. I. retired from the directorship on the 28th of January, 1889, and the company was, in the same year, ordered to be wound up, whereupon I. first discovered that the original forty shares had been allotted to him. He took out a summons to have his name removed from the list of contributories, upon which he had been placed in respect of the original forty shares. North, J., refused to order his name to be removed from the list of contributories.

Held, on appeal, without deciding that the mere circumstance that the original forty shares were standing in I.'s name was notice to him of the fact that the shares had been allotted to him, that I. must be taken to have known that it was his duty to qualify by acquiring forty shares, as required by the articles of association, and that he was bound to qualify within a reasonable time; and that, if a reasonable time had not actually elapsed by the 24th of November, 1888, it certainly had before January, 1889; and, consequently, that I. was not entitled to have his name struck off the list.—*In re Portuguese Consolidated Copper Mines* (*Limited*). *Ex parte Lord Inchiquin*, C.A. 610—60 L. J. Ch. 556; 64 L. T. 841.

36. *Debenture-holders—Execution creditor—Sheriff—Mistake in law—Goods seized, but not sold, by sheriff before winding up—Priority of debenture-holders.*—Goods consisting of the theatrical properties of a company carrying on the business of a theatre were seized by the sheriff under writs of *fi. fa.* issued by two judgment creditors of the company. On the day following the seizure a creditor's petition was presented to wind up the company, and a winding up order was subsequently made and a liquidator appointed. Between the date of the presentation of the petition and that of the winding-up order, the sheriff, of his own accord, took the moneys paid by the public at the doors of the theatre, and thereout paid the two execution creditors the amount of their judgment debts. After the winding-up order had been made the sheriff withdrew from possession without selling the goods he had seized, and these goods were taken possession of by the liquidator, and subsequently sold by him. The sheriff, under an order made in the winding up, having been obliged to pay the whole amount of the moneys taken by him at the doors of the theatre to the liquidator, made an application that the liquidator might be ordered to repay the sheriff out of the proceeds of sale of the goods seized by the sheriff, but given up to, and sold by, the liquidator, the sum paid by the sheriff to the two execution creditors. The sheriff's application was opposed by the liquidator, and also by debenture-holders whose debentures constituted a floating charge, payable on demand, on the undertaking and all the property, present and future, of the company.

Held (reversing on this point the decision of Kekewich, J., reported 39 W. R. 398, [1891] 1 Ch. 154), that the goods seized, but not sold, by the sheriff were covered by the debentures, and that the debenture-holders were entitled to be paid out of the moneys in the hands of the liquidator arising from the sale of such goods in priority to the two execution creditors, and therefore in priority to the claim for repayment made by the sheriff.

In re Standard Manufacturing Co., 39 W. R. 368, [1891] 1 Ch. 627, at p. 641, discussed and approved. —*In re Opera* (*Limited*), C.A. 705.

37. *Debenture-holders — Liquidator — Receiver.* — Where a company is being wound up, and an application is made by debenture-holders to appoint a receiver, and another application is made

by the creditors in the winding up to appoint a liquidator, the court, in order to avoid trouble and expense, will usually appoint the same person liquidator and receiver.

But, in a case where the only outstanding property of the company consisted of a sum of £180, and the debenture-holders had obtained an order for the appointment of a receiver in a debenture-holders' action previously to the appointment of a liquidator in the winding up,

The Court of Appeal (Lindley and Kay, L.JJ.) (affirming the decision of Kekewich, J., 39 W. R. 200) refused to appoint the liquidator receiver, in the place of the receiver already appointed in the debenture-holders' action.

In re Henry Pound, Son, & Hutchins, 38 W. R. 18, 42 Ch. D. 402, distinguished.—*In re Stubbs & Co., Barney and Birmingham Banking Co.* v. *Stubbs & Co.*, C.A. 617—[1891] 1 Ch. 475; 60 L. J. Ch. 190; 64 L. T. 306.

See also COMPANY (BORROWING POWERS), 1, 2.

38. *Estate of deceased director—Misfeasance—Payment of dividend out of capital—Delay—Stale demand.*—The articles of association of a limited company provided (1) that interest at the rate of five per cent. per annum should be payable half-yearly on all money paid on the shares until otherwise determined by the directors, and (2) that no dividend or bonus should be payable except out of the profits arising from the business of the company, including the income arising from paid-up capital. No profits were ever earned by the company From 1869 to 1878, when the Board of Trade interfered, the directors made half-yearly payments of interest or dividend at the rate of five per cent. per annum on the amount of shares paid up. These payments, which amounted to £4,500, were made out of capital. The company was ordered to be wound up in 1886. This action was commenced in 1890 against the representatives of two deceased directors. Certain moneys were recovered from the estate of one of the deceased directors under a compromise effected with the sanction of the court. Certain moneys had been also recovered from the surviving directors.

Held, that the payments were made by way of dividend, and that the estate of a deceased director was liable to the liquidator for so much of the £4,500, with interest at four per cent., as had not been already recovered.

Held, that the delay was not such as to disentitle the liquidator to succeed.—*In re Sharpe, In re Bennett, Masonic and General Life Assurance Co. (Limited)* v. *Sharpe and Others*, CH.D. NOR., J. 636.

39. *Liquidator, to what extent trustee—Voluntary winding up—Companies Act*, 1862, *s.* 138.—A liquidator in a voluntary winding up is an agent of the company, but not, strictly speaking, a trustee for, nor liable as such to, the creditors or contributories; and an action for damages will not lie against him for delay in handing over to a contributory his proportion of the surplus assets of the company, unless fraud, *mala fides*, or personal misconduct can be proved against him.

Dicta of Lord Selborne, L.C., in *Black & Co.'s case*, 21 W. R. 249, L. R. 8 Ch. 254; of James and Mellish, L.JJ., in *In re Oriental Inland Steam Co.*, 22 W. R. 810, L. R. 9 Ch. 557; and of James, L.J., in *In re London and Caledonian Marine Insurance Co.*, 27 W. R. 713, 11 Ch. D. 140 explained.—*Knowles* v. *Scott*, CH.D. ROM., J. 523—[1891] 1 Ch. 717; 60 L. J. Ch. 284; 64 L. T. 135.

40. *Liquidator—Voluntary winding up—Committee of inspection—Creditors—Restrictions imposed on voluntary liquidator—Companies Act*, 1862, *ss.* 95, 96, 133 (*sub-section* 7), 149, 151—*Companies (Winding-up) Act*, 1890, *ss.* 6, 9, 12.—The court may impose the same restrictions upon a voluntary liquidator as a liquidator in a compulsory winding up would be subject to, and also dispense with restrictions imposed upon a liquidator in a compulsory winding up.

The Companies (Winding-up) Act, 1890, can be made use of by the court, by way of analogy, for the purpose of placing restrictions upon a voluntary liquidator's powers.

Form of order continuing a voluntary winding up under supervision, subject to the control of a committee of inspection.—*In re Watson & Sons (Limited)*, CH.D. CHI., J. 633—[1891] 2 Ch. 55; 60 L. J. Ch. 473.

41. *Official receiver — Liquidator — Carrying on business—Manager—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict.* c. 63), *ss.* 5, 12.—A petition was presented by a creditor to wind up the company. The objects for which the company was established included the sale of perishable goods. It was asked that the order might contain a direction that the official receiver might be at liberty to carry on the business as a going concern. There appeared to be no provision for carrying on the business of a company pending applications under sections 5 and 12 of the Companies (Winding-up) Act, 1890.

The court made the usual winding-up order, with the addition of a direction that the official receiver should be at liberty, if he thought fit, to carry on the business of the company so far as necessary for the purposes of the winding up.—*In re General Service Co-operative Stores (Limited)*, CH.D. KEK., J.—64 L. T. 228.

42. *Order for dissolution — Action by creditors against late directors—Fraud—Companies Act*, 1862, *s.* 111.—After a company has been completely wound up, and an order for dissolution of the company obtained, a creditor, in the absence of fraud, has no cause of action against the late directors to recover assets alleged not to have been got in pending the winding up.—*Coxon* v. *Gorst*, CH.D. CHI., J. 600—[1891] 2 Ch. 73; 60 L. J. Ch. 502; 64 L. T. 444.

43. *Petition—Voluntary winding up—Petition for supervision order—Amendment of petition by adding prayer for compulsory order—Advertisement—Companies Act*, 1862, *General Order, November*, 1862, *r.* 2, *Schedule* 3, *Form* 1—*Companies (Winding-up) Act*, 1890, *General Rules*, 33, 34.—Resolutions were passed to wind up the company voluntarily, appointing a liquidator, and to apply to the court for a supervision order. A petition was presented by a shareholder and the liquidator asking for an order continuing the voluntary winding up subject to the supervision of the court. The petition was subsequently amended by adding a statement that difficulties had arisen, and a prayer, in the alternative, for a compulsory winding-up order.

Held, that the petition must be readvertised.—*In re National Wholemeal Bread and Biscuit Co.*, CH.D. KEK., J. 380—[1891] 2 Ch. 151; 60 L. J. Ch. 350; 64 L. T. 285.

44. *Proof—Wrongful forfeiture of shares—Claim to prove for damages—Companies Act*, 1862 (25 & 26 *Vict.* c. 89), *s.* 38, *sub-section* 7.—A shareholder, whose shares had been irregularly forfeited, claimed to prove in the winding up of the company for damages for the loss of his rights as a member.

Held, that section 38, sub-section 7, of the Companies Act, 1862, did not apply to preclude the shareholder from proving in competition with the other creditors, as this sum was not due to him "in his character of a member," but rather in his character of a non-member; and his claim must be admitted by the liquidator.

Whether sub-section 7 of section 38 applies to a past member, *quære.*—*In re New Chile Gold Mining Co. (Limited)*, CH.D. STI., J. 59—45 Ch. D. 598; 60 L. J. Ch. 90; 63 L. T. 344.

44a. *Purchase of shares after date of order—Order for compulsory winding up—Right of purchaser to be placed on list of members—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 35, 98, 153.—A person who purchases shares in a company after an order has been made by the court for the compulsory winding up of the company is not entitled, under section 35 of the Companies Act, 1862, to be placed on the register of members of the company, as section 35 is not applicable to transfers after the date of a winding-up order made by the court.—*In re Onward Building Society*, Q.B.D. 718—[1891] 2 Q. B. 463.

45. *Rent—Sequestration for rent by Scotch landlord—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 163.—An English company leased a shop in Scotland from a Scotch landlord, but, before the first quarter's rent was payable, an order to wind up the company was made and a liquidator appointed, who took possession of the shop. The Scotch landlord thereupon, without obtaining the leave of the court under section 87 of the Companies Act, 1862, took proceedings for a sequestration to secure the payment of the rent of the shop.

Held, on the motion of the liquidator, that the sequestration was void by virtue of section 163 of the Companies Act, 1862; but the court gave leave to the landlord, under section 87 of that Act, to enforce his hypothec for the rent by proceeding with the sequestration, unless security was given for payment thereof, on the terms of paying the costs of the motion.—*In re Wanzer (Limited)*, CH.D. NORTH, J. 343—[1891] 1 Ch. 305; 60 L. J. Ch. 492.

46. *Staying actions against company—Companies Act*, 1862, *s.* 85—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-section* 5—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63)—*General Order of the 29th of November*, 1890.—When a petition has been presented in the Chancery Division to wind up a company, an application to stay an action against the company in the Queen's Bench Division must still be made in the division in which the action is pending, the practice in this respect not being altered by the Companies (Winding-up) Act, 1890, and the General Order under it.

Decision of Kekewich, J., affirmed.—*In re General Service Co-operative Stores*, C.A.—[1891] 1 Ch. 496; 60 L. J. Ch. 586; 64 L. T. 272.

47. *Surplus assets—Shares fully paid up—Shares issued at a discount—Mode of distribution of surplus.*—The original shares in a limited company incorporated in 1859 were shares of £10 each, on which the whole amount had been paid up. In 1861 a special resolution was passed by the company, whereby the capital of the company was increased by the issue of a number of additional shares of £10 at a discount of £7 per share. The company continued to carry on business until 1889, when it was wound up voluntarily. After payment of all creditors a large surplus remained for distribution among the contributories.

Held (affirming the decision of North, J., reported 39 W. R. 5), that the holders of the fully paid-up original shares should first receive out of the surplus a sum of £7 per share, and that the balance of the surplus should then be divided equally among the holders of the original shares and the holders of the additional shares alike.

In re Hodge's Distillery Co., Ex parte Maude. 19 W. R. 113, L. R. 6 Ch. App. 51, approved.—*In re Weymouth and Channel Islands Steam Packet Co.*, C.A. 49—[1891] 1 Ch. 66; 60 L. J. Ch. 93; 63 L. T. 686.

48. *Surplus assets—Contributories, rights of, inter se—Ordinary and preference shareholders—Reserve funds—Profits—Undrawn profits—Capitalization—Capital—Income—Valuation.*—The articles of association of a canal company formed under the Companies Acts authorized the company by resolution to increase its capital, but, save as specified in any such resolution, all new capital was to be subject to the same provisions as the original capital; and the articles also provided that the directors might, in priority to any dividend, set aside out of "profits" any sum as a "reserve fund" for certain specified purposes, or "any other contingencies or purposes of the company," and might invest the same; that any interest derived from such investment should be dealt with as profits; and that, subject thereto, "the entire net profits of each year" should belong to the shareholders. Subsequently the company increased its capital by the issue of new shares carrying a preferential dividend. Year by year part of the profits of the company's business was carried to three reserved funds to meet (*a*) depreciation of steamers, (*b*) insurance, and (*c*) canal improvements; and the remaining profits, after providing for the preferential dividend, were distributed among the ordinary shareholders. These reserve funds were not represented by any separate or specific investments, but were merely book-keeping entries represented in the company's balance-sheets by property of various kinds.

The company's undertaking was eventually sold by special Act of Parliament at a price which left a surplus in excess of the liabilities of the company and the capital paid up on the ordinary and preference shares. The sale was completed during the currency of a financial year. On the completion of the sale the company passed resolutions for a voluntary winding up. It had never been found necessary to resort to any of the reserve funds while the company was a going concern, and part of them had been in fact divided among the ordinary shareholders in the form of a bonus; and at the date of the sale three funds representing these reserve funds were still standing in the company's books.

Held (varying order of North J.), that all three reserve funds represented undrawn "profits," uncapitalized, and to be therefore treated as income to which, subject to the preferential dividend for the broken financial year, the ordinary shareholders were exclusively entitled, and not as "capital" or "assets" distributable among both the ordinary and the preference shareholders; also that in taking the accounts for the broken year, the value of the plant and book debts should be taken at the actual ascertained values as stated in the stock books, and not at the lower value at which the company had, according to their regular custom and from motives of prudence, estimated them in a previous annual balance-sheet on which a dividend had been declared; and that the difference between the two values represented undrawn profits to which, subject to preferential dividend, the ordinary shareholders were exclusively entitled.

The question as to when undrawn profits can be treated as capital discussed.

Bouch v. *Sproule*, 12 App. Cas. 385, considered.—*In re Bridgewater Navigation Co.*, C.A.—[1891] 2 Ch. 317; 60 L. J. Ch. 415; 64 L. T. 576.

49. *Transfer to new company—Dissentient shareholder.*—A shareholder in a company which had by special resolution resolved that the company should be wound up and its assets transferred to a new company to be formed, had notice of resolutions which gave her the option of exchanging within a limited time her shares for shares in the new company at a fixed rate. She also had notice of an agreement between the liquidator of the old company and new company, in which no date was fixed for exercising the option, and of a deed-poll by which the new company covenanted to perform the agreement. She did not exercise the option, and protested against the proposed arrangement, and took proceedings unsuccessfully to prevent it from being carried out. Some months afterwards, when the shares in the new company had risen considerably in value, she applied for an allotment of shares, and, on being refused, brought the present action claiming an allotment of shares or damages.

Held (affirming the judgment of the court below) that the action could not be maintained.—*Weston* v. *New Guston Co.*, H.L. (E.)—64 L. T. 815.

See also BILL OF SALE, 4; BUILDING SOCIETY, 4; CONFLICT OF LAWS, 1; COUNTY COURT, 11; TENANT FOR LIFE AND REMAINDERMAN, 1, 2.

CONFIRMATION of SALES ACT.—See TRUSTEE, 5.

CONFLICT of LAWS:—

1. *Company — Winding up — Uncalled capital—Debenture — Scotch arrestment — Priority—Notice.*—The Queensland Mercantile and Agency Co. issued debentures to the Union Bank of Australia charging the uncalled capital in respect of some of its shares. After call, but prior to payment, the Australasian Investment Co. obtained in Scotland an arrestment on the unpaid calls of shareholders resident in Scotland. Such shareholders had no notice of the debentures.

Evidence was given that a Scotch arrestment was equivalent to an assignment with notice, and had priority to an assignment without notice.

The Queensland Co. was being wound up in Queensland and England, the law in both countries being the same.

Held, that the Australasian Investment Co. had priority, as Scotch law regulated priority on the proceeds of Scotch shares.—*In re Queensland Mercantile and Agency Co., Ex parte Australasian Investment Co., Ex parte Union Bank of Australia*, CH.D. NOR., J. 447—[1891] 1 Ch. 536; 60 L. J. Ch. 579.

2. *Foreign bankruptcy—Discharge by—Contract—Stay of proceedings—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-section* 5; *s.* 39.—A party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled.—*Gibbs & Sons* v. *Société des Metaux*, C.A.—25 Q. B. D. 399; 63 L. T. 503.

3. *Power of attorney—Construction.*—Where an authority is given in a foreign country to an agent to transact business for his principal in other countries, it must be construed, in the absence of any evidence of a contrary intention, according to the law of the place where the business is to be transacted.—*Chatenay* v. *Brazilian Submarine Telegraph Co.*, C.A. 65—[1891] 1 Q. B. 79; 60 L. J. Q. B. 295; 63 L. T. 739.

4. *Ship—Port of distress—Sale of cargo—Law of the flag.*—The plaintiffs, who were British subjects, shipped pepper at Singapore on board the German ship *August*, to be carried with other cargo to London. The ship met with bad weather, and was obliged to put into Cape Town, the ship and portions of her cargo having sustained damage. The master, acting on advice of surveyors, sold a portion of the plaintiffs' pepper with other cargo. In an action for breach of contract and for conversion,

Held, that the conduct of the master, in selling the pepper in question, was to be determined by German law, that being the law of the flag.—*The August*, P.D. & A.D.—60 L. J. P. D. & A. 57.

CONSPIRACY and PROTECTION of PROPERTY ACT, 1875.—See MASTER AND SERVANT, 2.

CONTEMPT of COURT:—

Newspaper comments—Pending proceedings—Motion to commit.—A paragraph inserted in a newspaper commenting on a case pending before the court, and foretelling the result of the case, is a contempt of court.—*Ex parte Crown Bank, In re O'Malley*, CH.D. NOR., J. 45—44 Ch. D. 649; 59 L. J. Ch. 767; 63 L. T. 304.

CONTRACT:—

1. *Joint contract—Judgment recovered against one co-contractor—Setting aside judgment and adding co-contractor as defendant*—Res judicata.—The plaintiffs, a firm of printers, sued the defendant for the cost of printing for him a certain newspaper of which they supposed him to be the sole proprietor. There being no defence to the action, the defendant consented to final judgment being signed against him. After judgment had been so signed, the plaintiffs received information that at the time the work was done one T. was a partner of the defendant, and joint proprietor with him of the newspaper. They accordingly, with the consent of the defendant, applied for an order that the judgment should be set aside, and that the writ should be amended by adding T. as a defendant in the action.

Held, that the consent of the defendant to the setting aside of the judgment could not enable the plaintiff to evade the rule that judgment recovered against one of two joint contractors is a bar to an action against the other, and that there was consequently no jurisdiction to make the order.—*Hammond* v. *Schofield*, Q.B.D.—[1891] 1 Q. B. 453; 60 L. J. Q. B. 539.

2. *Joint contract—Separate liability*—Res judicata.—The rule in *Kendall* v. *Hamilton*, 28 W. R. 97, 4 App. Cas. 504, that a judgment (althouh unsatisfied) against one of two joint contractors for breach of the contract is a bar to a subsequent action for the same breach against the other joint contractor, applies where that other is a married woman, and therefore bound only as to her separate estate.—*Hoare* v. *Niblett*, Q.B.D. 491—[1891] 1 Q. B. 781; 60 L. J. Q. B. 565; 64 L. T. 659.

3. *Personal service—No negative covenant—Specific performance—Injunction.*—An agreement entered into by H. to act as manager to the W. Chemical Co. for a term of years provided that he should "give the whole of his time to the company's business," but contained no negative covenant by him.

H. intimated to the company his intention of forming and becoming director of a rival company in the immediate neighbourhood, though still willing to act as manager of the original company, who now applied for an injunction to restrain H. from

committing any breach of his agreement to give the whole of his time to them.

Held (reversing Kekewich, J.), that, the contract being one for personal service, of which specific performance would not have been granted, and there being no express negative covenant by the defendant, no injunction could be granted.—*Whitwood Chemical Co.* v. *Hardman*, C.A. 433—[1891] 2 Ch. 416; 60 L. J. Ch. 428; 64 L. T. 716.

4. *Tramway company—Conductor—Forfeiture of wages—Certificate of company's manager.*—The plaintiff became a conductor of the defendant company under a written agreement on the terms, amongst others, that, for a breach by him of the rules of the company, the company's manager might decide that wages owing to him might be retained by the company as liquidated damages for the breach, and that the manager's certificate in writing to that effect should be binding and conclusive evidence between the company and the conductor in all courts of justice. The plaintiff, having been dismissed by the manager for a breach of the rules, brought an action to recover the wages due to him. After the action was brought the manager, without hearing anything that the plaintiff might wish to say, signed a certificate which declared the wages then due to the plaintiff to be forfeited to the company.

Held, that the certificate was no defence to the action, as the manager had not given the plaintiff an opportunity of being heard on the question of forfeiture.—*Armstrong* v. *The South London Tramways Co.* (*Limited*), C.A.—64 L. T. 96.

5. *Validity — Illegal consideration — Stifling a prosecution.*—The secretary of a building society who had made default and was threatened by the society with a prosecution for embezzlement applied for assistance to the plaintiffs, and they gave a written undertaking to the society to make good the greater part of the debt due from the secretary, the expressed consideration being the forbearance of the society to sue the secretary for the amount, for which the plaintiffs made themselves responsible, and in pursuance of that undertaking they gave two promissory notes to the society. The plaintiffs in giving the undertaking were actuated by the desire to prevent the prosecution, and this was known to the directors of the society.

Held, that it was an implied term of the agreement that there should be no prosecution, that the agreement was founded on an illegal consideration and void, and that the promissory notes ought to be set aside.

Ward v. *Lloyd*, 6 Man. & G. 785, and *Flower* v. *Sadler*, 10 Q. B. D. 572, explained and distinguished. — *Jones* v. *Merionethshire Permanent Benefit Building Society*—[1891] 2 Ch. 587; 60 L. J. Ch. 564.

See PRINCIPAL AND AGENT, 1; RESTRAINT OF TRADE, 1, 2, 3.

CONVERSION:—

Petition by tenant in common for sale—Order for sale—Landed Estates Court (Ireland) Act (21 & 22 *Vict. c.* 72), *s.* 64.—One of several tenants in common of an unincumbered estate, who had presented a petition as owners and obtained an order for sale, died intestate before sale. Part was afterwards sold, and part remained unsold.

Held, that the order for sale operated as a conversion into personalty of the share of the deceased in the estate.—*In re Beamish's Estate*, L.J. (Ir.)—27 L. R. Ir. 326.

See also WILL, 8.

CONVEYANCING ACT, 1881.—See LANDLORD AND TENANT, 2, 8, 9; MARRIED WOMAN, 7.

COPYHOLDS:—

Enfranchisement — Fishing, right of — Common, right of—Right appurtenant—Profit à prendre—*Custom—Prescription—Interruption—Acquiescence—Extinguishment—"Owners and occupiers"—Indefinite class—Right of action—Legal origin—Lost grant—Presumed grant—River—Soil* ad medium filum—*Grant*—2 & 3 *Will.* 4, *c.* 71, *ss.* 1, 4, 6.—The practice in a manor was for the lords to grant copyholds for three lives, and to renew at a fine upon the dropping of any of the lives; but there was no custom binding them to renew. The copyhold grants did not mention a right of fishing; but from time immemorial the copyholders had enjoyed a right of angling in a stream which formed the boundary of the manor, and of passing along the bank over the lands of other tenants of the manor for that purpose. Subject to this the right of fishing was in the lords. In 1845 the lords enfranchised a copyhold belonging to S., which adjoined the river, and released in the most ample terms all rights of fishing and all other rights they had over the enfranchised tenement. After this various other copyholds were enfranchised, and for nearly forty years the copyholders and the enfranchised copyholders exercised the same right as before of angling and going over the land of S. for that purpose. T. was the owner of several tenements formerly copyhold of the manor, which had been enfranchised since 1845. In 1885 S. set up a gate which prevented T. from passing over his land to fish. T. acquiesced in the interruption until 1888, when he commenced an action, on behalf of himself and all other the owners and occupiers of copyholds or enfranchised copyholds, to establish the right of angling and of passing over the land of S. for that purpose.

Held (affirming Kay, J.), that by the enfranchisement deed of 1845 the lords gave up all their rights over the land of S., and that no reservation or exception of a power to make to other tenants grants giving rights over that land could be implied, as there was no obligation on the lords to make such grants; that the rights given up included the reversionary right of the lords to grant rights of fishing on the expiration of the lives for which the copyholds were held; that the lords, therefore, had no power to give to T. by his subsequent enfranchisement deeds any rights over the land of S. and that T. had no title to maintain the action; also that lost grants of the rights to the enfranchised copyholders could not be presumed.

Held, also, per Kay, J., that the interruption of T.'s alleged right, acquiesced in by him, for five years before action brought, was a bar to that right under section 4 of 2 & 3 Will. 4, c. 71; and that such right, being in the nature of a profit à prendre, could not be claimed by prescription on behalf of a large and indefinite class such as "owners and occupiers."

Where a privilege has been exercised as of right for a long series of years, the court will make every presumption in favour of its legal origin, but the circumstances of the enjoyment must be carefully looked to; and as in the present case they were copyholders whose right of way and of fishing was not disputed, the court considered the case not to stand on the same footing as if the persons exercising the privilege formed only one class.

Per Kay, J.: The general law of conveyancing—that, where a riparian owner, who is also owner of the soil under the river *ad medium filum*, makes a grant of his land on the banks of the river, the

soil *ad medium filum* passes by the grant—applies to land of any tenure, whether freehold, copyhold, or leasehold.

Goodman v. *Mayor of Saltash*, 7 App. Cas. 633, as to presuming legal origin for an immemorial usage, distinguished by Kay, J.—*Tilbury* v. *Silva*, C.A.—45 Ch. D. 98; 63 L. T. 141.

COPYRIGHT:—

1. "*Book*" — "*Sheet of letterpress*" — *Painted card — Proprietorship — Registration — Evidence — Certificate of registration — Injunction — Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 11—*Copyright Act*, 1862 (25 & 26 *Vict. c.* 68).—A motion was made by the plaintiffs to restrain the infringement of their copyright in a certain picture or publication which consisted of a gloved hand painted on a card cut to the exact size, and showing the back and palm of the hand. The card opened bookwise, and on the inside was represented on the palm of the hand the lines of life of palmistry, and on the back of the hand some verses. The picture had been painted, and the verses written by different persons. The entire work was published in May, 1889, for circulation as a Christmas card. It was registered in February, 1891, under the Copyright Acts, 1842 (books) and 1862 (works of art). The artist had assigned her interest to the plaintiffs, but it did not appear that there had been any assignment of the copyright in the verses. The certificates of registration were in the prescribed form, and in the one case gave as the title of the book "The Happy Hand," and the plaintiffs as publishers, and in the other, as a description of the work, "painting of the happy hand, hand marked with lines delineating character," stated the assignment, and gave the plaintiffs as proprietors of the copyright. The defendants had issued a similar card with advertisements of their goods printed on it.

Held, that the defendants' card was a copy of the plaintiffs'; that the plaintiffs' work was well registered under the Act of 1842 as a "sheet of letterpress," and under the Act of 1862 as a painting; and that the certificates of registration were *primâ facie* proof that the plaintiffs were proprietors.

Held, therefore, that the plaintiffs were entitled to an *interim* injunction to restrain the defendants from printing, publishing, or distributing imitations or copies of the plaintiffs' "work" until the trial or further order, the word "work" being used to avoid prejudicing the questions at issue.

Semble, that where a person has composed verses or other matter on behalf of another person—that is to say, as his agent or his servant—whether for pay or not, the person on whose behalf such verses or other matter are composed is properly registered under the Copyright Act, 1842, as the proprietor thereof, notwithstanding that there has been no assignment in writing, or indeed any assignment at all.—*Hildesheimer & Faulkner* v. *Dunn & Co.*, CH.D. KEK., J.—64 L. T. 452.

2. *Dramatic piece—Dramatizing a novel—Representation without consent of proprietor*—3 & 4 *Will.* 4, *c.* 15, *ss.* 1, 2—5 & 6 *Vict. c.* 45, *ss.* 20, 21, 24.—An action was brought by the executors of A. to restrain the defendant from representing a certain drama in infringement of the plaintiff's stage copyright. A. had first published a novel and afterwards had published a dramatized version of his own novel. The defendant's drama was dramatized directly from the novel, after the publication of the dramatized version by A., but not with the help of it.

Held, that A. having published the novel before the drama, any person had a right to dramatize the novel and represent the drama; and that therefore the action failed.

Toole v. *Young*, 30 L. T. N. S. 599, L. R. 9 Q. B. 523, followed.—*Schlesinger* v. *Bedford*, CH.D. KEK., J.—63 L. T. 762.

3. *Dramatic piece—Dramatizing a novel—Representation without consent of proprietor*—3 & 4 *Will.* 4, *c.* 15, *ss.* 1, 2—5 & 6 *Vict. c.* 45, *ss.* 20, 21, 24.—An action was brought by the executors of A. to restrain the defendant from representing a certain drama in infringement of the plaintiffs' stage copyright. A. had first published a drama and afterwards a novel founded on it. The defendant's drama was dramatized directly from the novel, and not with the help of A.'s drama.

Held, that, A. having published the drama before the novel, no person had a right to infringe the stage copyright in the drama, even though the passages complained of were taken from the novel, and not from the drama of the author.

Held, therefore, that the plaintiffs were entitled to a perpetual injunction as claimed.

Reade v. *Conquest*, 11 C. B. N. S. 479, followed.

Toole v. *Young*, 30 L. T. N. S. 599, L. R. 9 Q. B. 523, distinguished.—*Schlesinger* v. *Turner*, CH.D. KEK., J.—63 L. T. 764.

4. *International copyright—Musical composition—Foreign copyright—Protection in United Kingdom—"Subsisting and valuable rights or interests arising from or in connection with" the prior "lawful production" of foreign compositions in the United Kingdom—International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33), *ss.* 6, 11—*Order in Council of the 6th of December*, 1887.—A bandmaster who has purchased and lawfully produced in England, by means of his band, a piece of music by a foreign composer, before the date of the Order in Council making the International Copyright Act, 1886, applicable to England, has acquired a subsisting and valuable right or interest in the production within the meaning of the proviso in section 6 of that Act, and cannot be restrained by the proprietors of the foreign composition from the further production of it.—*Moul and Another* v. *Groenings*, C.A. 691—[1891] 2 Q. B. 443.

5. *International copyright—Foreign painting—English copyright—Registration—Right to sue for infringement—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45)—*International Copyright Act*, 1844 (7 & 8 *Vict. c.* 12)—*Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68)—*International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33)—*Berne Convention—Order in Council, Nov.* 28, 1887.—In order to entitle the owner of the English copyright in a foreign painting to sue in this country in respect of an infringement of such copyright, it is not necessary for him to have registered his ownership under the International Copyright Acts, but he must have previously registered himself as proprietor of the copyright under section 4 of the Copyright Act, 1862.—*Fishburn* v. *Hollingshead*, CH.D. STI., J.—[1891] 2 Ch. 371; 64 L. T. 647.

6. *Report of mining engineer—Publication—Injunction—Damages.*—A mining engineer, K., made a report upon a mining property and handed it to a person engaged with a syndicate in bringing out a company. It was agreed between them that the report might be printed and shown to the syndicate, and, if they determined to proceed with the formation of the company and published the report, K. was to be paid £1,000 for it, but if the company was not proceeded with, the report was to

be returned to him. Some 100 copies of the report were printed and shown to the syndicate. Copies were given to some of the members of the syndicate and to one or two other persons. The proposed company having been abandoned, the defendant company took up the property, and, having obtained a copy of the report, made use of it in the prospectus issued by them.

Held, that K. was entitled to an injunction against the company to restrain them from publishing the report, which remained his property, and also to an inquiry as to damages.—*Kenrick* v. *Danube Collieries and Minerals Co.*, CH.D. ROM., J. 473.

See PRACTICE, 15, 16.

CORONER:—

Salary—Quinquennial period for which salary is fixed—Date from which period runs on appointment of coroner—Division of district—Effect of such division on salary—Appropriate remedy of coroner—Declaration of rights—Statutory mandamus—*Prerogative writ of* mandamus—*The County Coroners Act*, 1860 (23 & 24 *Vict.* c. 116), *s.* 4.—The quinquennial period of five years, for which a county coroner's salary is fixed under section 4 of the County Coroners Act, 1860 (23 & 24 Vict. c. 116), ends with the coroner's death, and his successor on his election is entitled to have a new settlement or fixing of his salary, and such salary so fixed continues for a period of five years from the time it is so fixed, without reference to the time when it was last fixed for his predecessor, and the coroner is entitled to the salary so fixed for the whole of the term of five years, even although in the meantime the district, to which the coroner was assigned has been, by order of the Privy Council, subdivided, and a new coroner appointed and assigned to a part of that district.

The coroner, however, cannot bring an action against the justices of the county, *quâ* justices, or any number of them acting for the whole, claiming a declaration of rights that he is entitled to the full salary fixed, or a *mandamus* to enforce those rights; the action is not such an action wherein, under the Judicature Act or otherwise, a declaration of rights may be made, or a *mandamus* granted, as a declaration of rights is only made, or a *mandamus* granted, where the action is such that relief can be given, and the rights claimed enforced, in that action, whereas in a case like the present the only appropriate remedy is the prerogative writ of *mandamus* to the justices.—*Baxter* v. *London County Council*, Q.B.D.—63 L. T. 767.

CORPORATION.—See APPRENTICE, 1; DEFAMATION, 1.

COSTS.—See PRACTICE, 15—22.

See also ADMINISTATION, 1, 2, 6; ADMIRALTY, 2, 3, 4; ARBITRATION, 1, 2; BANKRUPTCY, 14, 15; COUNTY COURT, 5—8; DIVORCE, 15, 16; HIGHWAY, 3; PARTITION ACTION, 1, 2; PRACTICE (IRELAND), 7; PROBATE, 21; SHIP, 36; SOLICITOR, 1—12.

COUNSEL, AUTHORITY of.—See PRACTICE (COMPROMISE), 14.

COUNTY COUNCIL.—See LOCAL GOVERNMENT, 2—6.

COUNTY COURT:—

1. *Admiralty jurisdiction—County court having admiralty jurisdiction—District in which to commence action—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict.* c. 71), *s.* 21—*County Courts Admiralty Jurisdiction Act*, 1869 (32 & 33 *Vict.* c. 51), *s.* 2.—A claim by a shipowner under the 2nd section of the County Courts Admiralty Jurisdiction Act. 1869, arising out of an agreement in relation to the use or hire of a ship belonging to him, is properly brought in the county court having admiralty jurisdiction within the district of which such ship happens to be at the date of the commencement of the suit.—*The County of Durham*, P.D. & A.D. 303—[1891] P. 1; 60 L. J. P. D. & A. 5; 64 L. T. 146.

2. *Admiralty jurisdiction—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict.* c. 71), *s.* 21, *sub-sections* (1) (2)—*County Courts Act*, 1888 (51 & 52 *Vict.* c. 43), *s.* 74.—By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 21:—"Proceedings in an admiralty cause shall be commenced (1) In the county court having admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings; (2) If the foregoing rule be not applicable then in the county court having admiralty jurisdiction in the district of which the owner of the vessel or property to which the cause relates . . . resides."

By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 74, "Except where by this Act it is otherwise provided, every action or matter may be commenced in the court within the district of which the defendant . . . shall dwell or carry on his business at the time of commencing the action or matter."

The plaintiffs, owners of a steamship, brought an action *in personam* on the admiralty side of the county court within the district of which the defendants, charterers of the vessel, and consignees of the cargo, carried on their business, for damage for the detention of the vessel in unloading. The county court judge dismissed the action for want of jurisdiction, on the ground that, as the ship was not at the time of the commencement of the proceedings within the district, nor did the plaintiffs reside there, neither sub-section (1) nor sub-section (2) of section 21 of the County Courts Admiralty Jurisdiction Act, 1868, had been complied with. On appeal,

Held, that the county court had jurisdiction, as the language of section 74 of the County Courts Act, 1888, was general in its terms, and therefore included defendants in an admiralty action who at the time of commencing the action carried on their business within the district.—*The Hero*, P.D. & A.D.—[1891] P. 294.

3. *Appeal—Notice of motion—Service of—R. S. C.*, 1883, *ord.* 59, *rr.* 10, 12.—Service of notice of motion upon the London agent of a country solicitor, on appeal from a county court, is not sufficient to satisfy ord. 59, r. 12.—*Powell* v. *Thomas*, Q.B.D. 224—[1891] 1 Q. B. 97; 63 L. T. 812.

4. *Appeal—Extension of time for appealing—Discretion of court—Ord.* 59, *rr.* 12, 16.—Under ord. 59, r. 16, the court has a discretion, which it will exercise on the particular circumstances of each case, to extend the time for appealing from the judgment of a county court.

Collins v. Paddington Vestry, 28 W. R. 588, 5 Q. B. D. 368, explained.—*Cusack* v. *London and North-Western Railway Co.*, C.A. 244—[1891] 1 Q. B. 347; 60 L. J. Q. B. 208; 64 L. T. 45.

5. *Costs—Action in High Court for more than £50—Recovery of less than £20 under order 14—Case remitted—Recovery of less than £50 altogether—*

County Courts Act, 1888 (51 & 52 *Vict.* c. 43), *ss.* 65, 116.—In an action of contract brought in the High Court for more than £50, where less than £20 was recovered in proceedings under order 14, and, on the case being remitted to the county court, less than £50 was recovered altogether,

Held, that the plaintiffs were not entitled to costs on the High Court scale in respect of any of the proceedings that had taken place in the High Court.—*Wilson* v. *Statham*, Q.B.D. 686—[1891] 2 Q. B. 261.

6. *Costs—Particulars of claim—Signature of particulars by solicitor's clerk—Sufficiency of signature—Ord.* 6, *r.* 10; *ord.* 27, *r.* 4 (*County Court Rules*, 1889)—*Scales of Costs, Appendix.*—In an interpleader action in a county court the particulars of claim were signed with the name of the claimant's solicitor by the solicitor's clerk, who had general authority to conduct his master's business. Upon an objection taken on the taxation of costs that the particulars ought to have been signed by the solicitor himself, to entitle him to costs under the rules,

Held (distinguishing *Reg.* v. *Cowper*, 38 W. R. 408, 24 Q. B. D. 533), that the signature of the solicitor's name by the clerk was a sufficient signature by the solicitor, and that the solicitor was entitled to his costs.—*France* v. *Dutton*, Q.B.D. 716—[1891] 2 Q. B. 208; 60 L. J. Q. B. 488; 64 L. T. 793.

7. *Costs—Refresher—Adjournment for want of time—Continuous sittings—County Court Rules*, 1889, *Costs, item* 78.—Where a county court is held from day to day, it rests with the judge to say whether the sittings shall be one continuous sitting or a succession of several sittings, so that, when a case which appears in the list is not reached on one day, but is heard in its turn upon another day, a refresher may be allowed by order of the judge as upon an adjournment for want of time under item 78 in the scale of costs of the County Court Rules, 1889.—*Heap* v. *Peart*, Q.B.D. 95—[1891] 1 Q. B. 110.

8. *Costs—Solicitor and client—Amount claimed over* £10—*Amount recovered under* £10—*County Courts Act*, 1888 (51 & 52 *Vict.* c. 43), *ss.* 118, 119—*County Court Rules*, 1889, *Appendix.*—Where, in an action in a county court, the amount claimed is over £10, but less than £10 is recovered, there is a discretion to allow the taxation of costs, as between solicitor and client, on the higher scale.

Decision of the Queen's Bench Division (39 W. R. 110) reversed.—*In re Langlois & Biden*, C.A. 181—[1891] 1 Q. B. 349; 60 L. J. Q. B. 123; 63 L. T. 816.

9. *Jurisdiction—Validity of patent—Patents Act*, 1883 (46 & 47 *Vict.* c. 57), *s.* 117—*County Courts Act*, 1888 (51 & 52 *Vict.* c. 43), *s.* 56.—A county court has no jurisdiction to entertain an action in which the validity of a patent is in question.

Decision of the Queen's Bench Division (39 W. R. 492, [1891] 1 Q. B. 793) affirmed.

The effect of the Patents Act, 1883, is to confine the jurisdiction in patent actions to the High Court.—*Reg.* v. *Judge of Halifax County Court and Bairstowe*, C.A. 545—[1891] 2 Q. B. 263; 60 L. J. Q. B. 550.

10. *Remittal of counter-claim for trial—Discontinuance of action—Power to order trial of counter-claim in county court after discontinuance of action—County Courts Act*, 1888 (51 & 52 *Vict.* c. 43), *s.* 65.—A counter-claim in an action cannot, after the action has been discontinued, be remitted for trial to a county court under section 65 of the County Courts Act, 1888.—*The Queen* v. *The Judge of the City of London Court*, Q.B.D.—[1891] 2 Q. B. 71; 60 L. J. Q. B. 575; 64 L. T. 869.

11. *Winding-up petition—Transfer from county court to High Court—County Courts Act*, 1888 (51 & 52 *Vict.* c. 43), *s.* 126.—The High Court has jurisdiction to order the transfer of a winding-up petition from the county court to itself, notwithstanding that the petition has been opened in the county court.—*In re East Dulwich No.* 295 *Starr-Bowkett Building Society*, CH.D. NOR., J. 32.

See also BANKRUPTCY, 8, 9; CITY OF LONDON COURT; PRACTICE (COSTS), 15, 18; PRACTICE (IRELAND), 14, 15, 16; SOLICITOR, 3.

COUNTY COURT (IRELAND):—

Equity civil bill—Annual value—Want of jurisdiction appearing during "progress" of suit—Transfer of action—40 & 41 *Vict.* c. 56, *s.* 37.—If the want of jurisdiction appears on the face of an equity civil bill, the only order that can be made is one of dismissal.

If want of jurisdiction does not appear on the face of the equity civil bill, but is made to appear afterwards, it is made to appear "during the progress of the suit," although objection be at once taken by the defendant by a notice challenging the jurisdiction.

If the plaintiff issues a civil bill with knowledge that the subject-matter exceeds the limits of the chairman's jurisdiction, but avers that it is within it, the suit should be dismissed, and not transferred; the *onus* of proving plaintiff's knowledge being on the defendant.—*Morris* v. *Flynn*, L.J. (Ir.)—27 L. R. Ir. 37.

COVENANT.—See LANDLORD AND TENANT, 2—6; RESTRAINT OF TRADE, 1, 2, 3.

CRIMINAL LAW:—

1. *Attempt to pervert the course of justice—Manufacturing false evidence—No litigation* in esse—*Legal tribunal — Body of arbitrators for settlement of disputes.*—A person may be convicted of a misdemeanour for manufacturing false evidence for the purpose of perverting the course of justice, although the evidence be never used in any legal proceedings, and no litigation be *in esse* at the date of the offence.

It is sufficient if the prisoner has done what was in his power to place the false evidence before a judicial tribunal. A body of arbitrators, provided for by a contract for the settlement of disputes arising out of it, is a judicial tribunal for this purpose.—*Reg.* v. *Vreones*, C.C.R. 365—[1891] 1 Q. B. 360; 60 L. J. M. C. 62; 64 L. T. 389.

2. *Bankrupt—Petition presented by bankrupt himself—Act creating criminal offence—Prospective effect—Debtors Act*, 1869 (32 & 33 *Vict* c. 62), *s.* 11, *sub-sections* 14, 15—*Bankruptcy Act*, 1890 (53 & 54 *Vict.* c. 71), *s.* 26.—The Debtors Act, 1869, s. 11, sub-sections 14, 15, makes certain acts misdemeanours if committed by a bankrupt "within four months next before the presentation of a bankruptcy petition against him." The Bankruptcy Act, 1890 (which received the Royal assent on the 18th of August, 1890, and came into operation on the 1st of January, 1891), by section 26 substitutes for the above words in section 11 of the Debtors Act, 1869, the words "within four months next before the presentation of a bankruptcy petition by or against him."

The defendant committed certain of the acts specified in sub-sections 14 and 15 in the year 1890; and within four months, but after the 1st of

January, 1891, presented his petition and was adjudged bankrupt.

Held, that he could not be convicted of offences under the above sections, for that section 26 of the Bankruptcy Act, 1890, was not retrospective, and that, to constitute an offence under that section, the acts must have been committed after the 1st of January, 1891.—*Reg.* v. *Griffiths*, C.C.R. 719—[1891] 2 Q. B. 145; 60 L. J. M. C. 93.

3. *Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *s.* 4—*Carnal knowledge of girl under the age of thirteen years—Evidence.*—In order to prove the offence of carnally knowing a girl under the age of thirteen years, under section 4 of the Criminal Law Amendment Act, 1885, it is not necessary to prove emission.—*Reg.* v. *Marsden*, C.C.R. 703—[1891] 2 Q. B. 149.

4. *Larceny — Fraudulent misappropriation — "Broker, attorney, or other agent"—"Security for the payment of money"—Bill of exchange without drawer's name—Larceny Act* (24 & 25 *Vict. c.* 96), *s.* 75—*Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 18.—A document which is complete as a bill of exchange, except that it is not signed by the drawer, is "a security for the payment of money" within section 75 of 24 & 25 Vict. c. 96. It is a question for the jury whether a person who had some interest in a bill-discounting transaction, beyond that of a broker or agent only, was intrusted with the bill "as a broker or agent."—*Reg.* v. *Bowerman*, C.C.R. 207—[1891] 1 Q. B. 112; 60 L. J. M. C. 13; 63 L. T. 532.

5. *Offence against Parliamentary Registration Act*, 1843 (6 & 7 *Vict. c.* 18), *s.* 51—*Indictment—Parliament—Registration—Duties of overseer—Misconduct—Indictable misdemeanour.*—An offence by an overseer within the meaning of section 51 of the Parliamentary Registration Act, 1843 (6 & 7 Vict. c. 18), is not an indictable misdemeanour.—*Reg.* v. *Hall*, C.C.C.—[1891] 1 Q. B. 747; 60 L. J. M. C. 124; 64 L. T. 394.

See also CRUELTY TO ANIMALS; EXTRADITION; SCHOOL BOARD.

CRIMINAL LAW (IRELAND):—

1. *Error in law apparent upon record—Form of record—Appeal*—Habeas corpus—*Practice—Criminal Law and Procedure (Ireland) Act*, 1887 (50 & 51 *Vict. c.* 20)—*Winter Assizes Act* (39 & 40 *Vict. c.* 57); *Order in Council.*—The trial of a prisoner was transferred, under the Criminal Law and Procedure (Ireland) Act, 1887, from the county where the offence was committed to another county before a special jury. The jury having disagreed the case was adjourned to the next assizes. By an Order in Council under the Winter Assizes Act the case was transferred to the county of Tipperary, where the prisoner was convicted. The three counties were all in the Munster Circuit.

Held, that the trial legally took place in Tipperary before a special jury.

It is not necessary that the record should state the names of the jurors, or that the number of the jury amounted to twelve, if it appears, either expressly or by manifest implication, that the jury consisted of twelve.

Where there is an averment on the record of a proper and legal adjournment of the sessions from day to day, it is not necessary that the record should state the day or days upon which the trial took place.

An appeal lies to the Court of Appeal from the judgment of the Crown side of the Queen's Bench Division upon a writ of error; and the proceeding is by way of appeal, and not by writ of error.

When it becomes necessary to bring up a prisoner to be present at the argument of an appeal from the decision of the Queen's Bench Division on a writ of error, application for a writ of *habeas corpus* should be made to the Divisional Court.—*O'Brien* v. *The Queen*, C.A. (Ir.)—26 L. R. Ir. 451.

2. *Unlawful conspiracy—Absence of some of several defendants during part of proceedings—Overt act—Criminal Law and Procedure (Ireland) Act*, 1887—*Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 99), *s.* 10, *sub-section* 4.—D. with others was prosecuted before a court of summary jurisdiction, constituted under the Criminal Law and Procedure (Ireland) Act, 1887, for having taken part in an unlawful conspiracy to induce certain tenants not to pay their rents. During the trial two of the accused, who had been admitted to bail, left the country.

Held, that, notwithstanding their absence, it was competent for the court to proceed with the trial of D. and others.

Held, also, that there being evidence of the continuance of the alleged conspiracy within six months of the conviction was sufficient to satisfy section 10, sub-section 4, of the Petty Sessions (Ireland) Act, 1851, although no overt act of D. within six months was proved.

A combination of several individuals to induce persons not to pay rent to a landlord constitutes a criminal conspiracy, it being a combination to effect a private wrong, though the inducement be not effected by compulsion or undue influence.—*Ex parte Dalton*, EX.D. (Ir.)—28 L. R. Ir. 36.

CROWN:—

Recognizance—Estreatment—Crown debt—Reduction or remission of amount—57 Geo. 3, c. 56.—The Exchequer Division has no jurisdiction to reduce or remit the amount payable at foot of recognizances ordered by justices to be estreated.—*Reg.* v. *Dillon and O'Brien*, EX.D. (Ir.)—28 L. R. Ir. 276.

See LIGHT, 1; MINE, 1.

CRUELTY to ANIMALS:—

Dishorning cattle—12 & 13 *Vict. c.* 92, *s.* 2.—Dishorning cattle, if performed with care and skill, and for the purpose of rendering the animals more profitable to farmers and exporters, is not cruelty to animals within 12 & 13 Vict. c. 92, s. 2.

Ford v. *Wiley*, 23 Q. B. D. 203, and *Brady* v. *M'Argle*, 14 L. R. Ir. 174, not followed.

Callaghan's case, 16 L. R. Ir. 325, and *Renton* v. *Wilson*, 15 Court of Justiciary Cases, 4th Series, 84, followed.—*Reg.* v. *M'Donagh*, Q.B.D. (Ir.)—28 L. R. Ir. 204.

DAMAGES:—

Lord Campbell's Act (9 & 10 *Vict. c.* 93)—*Pecuniary loss by death of deceased—Evidence*—Onus *of proof.*—In an action under Lord Campbell's Act by a father to recover damages for the death of his daughter, aged ten, who was killed by the negligence of the defendants, it was proved that the deceased, who lived with her parents and was maintained by them, rendered services to her parents which enabled them to dispense with a servant, whom they had previously employed; and that in consequence of the girl's death the parent's had been obliged to employ a servant again. No evidence was given as to the exact value of her services or as to the cost of her maintenance.

Held, that there was evidence to justify the jury in finding that the services of the deceased were of a pecuniary value exceeding the cost of her main-

tenance and education.—*Wolfe* v. *Great Northern Railway Co.*, C.A. (Ir.)—26 L. R. Ir. 548.

See also DEFAMATION, 10; LANDLORD AND TENANT, 6; NEGLIGENCE, 1, 7; SHIP, 16.

DEBTORS ACT:—

1. *Judgment debt—Order for payment by instalments—Receiving order previously made against debtor—Jurisdiction—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.—An order for payment by instalments, under section 5 of the Debtors Act, 1869, cannot be made in the High Court upon a judgment summons after a receiving order has been made against the judgment debtor.—*In re Nuthall, Ford* v. *Nuthall*, C.A.—64 L. T. 241.

2. *Solicitor — Attachment — Non-compliance with order to pay a sum of money in his character of an officer of the court—Bankruptcy of solicitor—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4 (4)—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 9.—The court has jurisdiction to attach a solicitor for default in payment of a sum of money which he has been ordered to pay in his character of an officer of the court, although he has subsequently become a bankrupt.

In re Wray, 36 W. R. 67, followed.

In re Simes, 38 W. R. 570, not followed.—*In re Edye*, CH.D. CHI., J. 198—63 L. T. 762.

See also CRIMINAL LAW, 2.

DECEIT, ACTION of.—See COMPANY, 12—15.

DEED:—

Setting aside—Mortgage—Transfer—Execution of deed—Fraud—Negligence—Validity of deed.—The mortgagee in possession of certain copyhold property was, by the fraud of her solicitor, induced to sign, without knowing the contents thereof, a deed which, after falsely reciting that the solicitor had agreed to pay to the mortgagee the amount due to her upon the mortgage, purported to transfer the mortgage debt, and the securities for the same to the solicitor. The solicitor then deposited the deeds of the property with the plaintiff as security for money lent to him. The solicitor absconded, and the trustee of his estate executed a deed mortgaging the property to the plaintiff.

The original mortgagee thought when she signed the deed that she was only signing a lease of the property, and she did not intend to deal with her mortgage or with her possession thereunder.

Held, that the mind of the mortgagee did not go with the deed which she signed, and as she had not been guilty of any negligence the deed was void.—*Favell* v. *Wright*, Q.B.D.—64 L. T. 85.

DEFAMATION:—

LIBEL—

1. *Corporation—Personal charges made against a corporation—Right of action.*—A corporation, as distinguished from its individual members or officials, cannot sue for a libel merely affecting personal reputation.—*Mayor, &c., of Manchester* v. *Williams*, Q.B.D. 302—[1891] 1 Q. B. 94; 60 L. J. Q. B. 23; 63 L. T. 805.

2. *Innuendo—Reasonable meaning of words used—Question for jury.*—The respondent, a member of Parliament, asked a question in the House of Commons implying that one C. had been guilty of improper conduct. C. wrote to the respondent to complain of the imputation on his character, and subsequently published his letters in a newspaper of which the appellants were proprietors. One letter contained the following passage: "Supposing, for example, I sent a question . . . based on hearsay evidence to the effect that I heard, from a gentleman whom I would not think of doubting, that 'you' were in a state of delirium tremens. . . . Or suppose I had added to that further stories I had heard that" you were "utterly intoxicated" in the streets. The respondent brought an action for libel against the proprietors of the newspaper.

Held (affirming the judgment of the court below), that the words were capable of being reasonably understood in a libellous sense, and that therefore there was a question to go to the jury.—*Ritchie & Co.* v. *Sexton*, H.L. (Sc.)—64 L. T. 210.

3. *Privileged occasion—Misdirection*—Onus probandi.—Wherever a communication is privileged, it is not necessary for the defendant in an action for libel to prove *bona fides*; the *onus* is on the other side to show malice.

There is no distinction in this respect between different classes of privileged communications.

Where a jury was told that the existence of privilege depended on their finding that the defendant honestly believed his statement to be true,

Held, a misdirection.—*Jenoure* v. *Delmege*, P.C. 388—[1891] A. C. 73; 60 L. J. P. C. 11; 63 L. T. 814.

4. *Privileged occasion—Railway company—Publication to company's servants of offences committed by other servants, with names of offenders and punishments inflicted.*—The plaintiff was a guard in the service of the defendants, a railway company. The defendants dismissed him, on the ground that he had been guilty of gross neglect of duty, and published his name in a printed monthly circular addressed to their servants, stating in it that he had been dismissed, and the ground of his dismissal. The plaintiff brought an action for libel against the defendants.

Held, affirming the decision of Stephen, J., that the statement was made on a privileged occasion, and that the defendants were not liable.—*Hunt* v. *Great Northern Railway Co.*, C.A.—[1891] 2 Q. B. 189; 60 L. J. Q. B. 498.

5. *Publication—Letter applying to plaintiff derogatory remarks made by third person on privileged occasion.*—The defendant published in a newspaper, under the heading "Parochial Matters at Eversley," a letter containing the words, "I refer all readers of the letters on this subject to the Primate's speech on the Clergy Discipline Act." The Primate's speech contained serious allegations against an unnamed clergyman. Three paragraphs of the statement of claim in an action for libel brought by the rector of Eversley against the defendant set out the defendant's letter and the portion of the Primate's speech which contained the allegations, and alleged that the defendant intended by his letter that the plaintiff was the object of the Primate's allegations.

Held, upon an application to strike out the three paragraphs, that the matters therein alleged amounted to a publication of a libel by the defendant upon the plaintiff, and disclosed a cause of action.—*Lawrence* v. *Newberry*, Q.B.D. 605—64 L. T. 797.

6. *Publication—Privileged occasion—Letter dictated by manager of company to clerk—Type-writer—Press copy—Letter sent to plaintiff's place of business.*—The manager of a company, in the course of business, dictated to a type-writer employed in the office of the company a letter to be sent from the company to the plaintiffs. The letter having been written in type, a press copy was made by an

office boy. It was then directed to the office of the plaintiffs' firm, where it was opened and seen by three clerks.

Held, in an action of libel against the company, that, assuming the letter to be libellous, there was a publication both at the defendants' office and at the plaintiffs' office, and that neither publication took place on a privileged occasion.—*Pullman* v. *Hill & Co.*, C.A. 263—[1891] 1 Q. B. 524; 60 L. J. Q. B. 299; 64 L. T. 691.

7. *Words not libellous* per se—Onus *of proof—Postcard.*—A dispute having arisen between the defendants and the plaintiff, their Dublin agent, as to an item in the accounts, the defendants sent the plaintiff a postcard as follows:—"Settlement. If you do not remit by return, the matter will be handed to our Dublin solicitors." In an action of libel the plaintiff was nonsuited.

Held (affirming the judgment of the Exchequer Division), that the nonsuit was right.—*McCann* v. *Edinburgh Roperie Co.*, C.A. (Ir.)—28 L. R. Ir. 24.

SLANDER—

8. *Privileged occasion—Evidence of malice.*—The defendant, who was Mayor of Newcastle-on-Tyne, was entertaining at the Mansion House the African explorer Stanley, who was accompanied by the plaintiff, his valet. The defendant received from the Chief Constable of Newcastle a letter, which had been sent to the latter by the Chief Constable of Edinburgh, stating that suspicion had fallen on the plaintiff of having stolen a watch in an Edinburgh hotel. The defendant told Stanley privately of this just before he was leaving Newcastle, and Stanley discharged the plaintiff a few days later.

In an action for slander,

Held, by the Court of Appeal (Lindley and Kay, L.JJ.; Lopes, L.J., dissenting), that the occasion was privileged, and, there being no evidence of malice in fact to be left to the jury, that judgment ought to be entered for the defendant.

Decision of Wills, J., reversed.—*Stuart* v. *Bell*, C.A. 612—[1891] 2 Q. B. 341; 64 L. T. 633.

9. *Privileged occasion—Meeting of board of guardians—Presence of reporters—Words spoken in* bonâ fide *belief of their truth.*—The defendant, a member of a board of guardians, made a speech which would have been privileged if the meeting of the board at which it was made had been a private one.

Held, that the presence of reporters at the meeting, who were not in any way brought there by the defendant, did not destroy the privilege.—*Pittard* v. *Oliver*, C.A. 311—[1891] 1 Q. B. 474; 60 L. J. Q. B. 219; 64 L. T. 758.

10. *Special damage—Unauthorized repetition—Imputation of unchastity—Remoteness of damage.*—The defendant uttered an imputation upon the chastity of the plaintiff, an unmarried woman, to the plaintiff's mother. The mother repeated the slander to the plaintiff, and the plaintiff repeated it to the man to whom she was engaged to be married. In consequence thereof the man refused to marry the plaintiff.

In an action of slander,

Held, that in the absence of evidence that the defendant authorized or intended the slander to be repeated, or that the repetition was the natural consequence of the defendant's act, the action could not be maintained.—*Speight* v. *Gosnay*, C.A. —60 L. J. Q. B. 231.

See also PRACTICE (INJUNCTION), 38, 39.

DISCOVERY.—See PRACTICE, 26—33.

See also DIVORCE, 17; PRACTICE (IRELAND), 5, 6.

DISTRICT REGISTRY.—See PRACTICE, 34; SOLICITOR, 4.

DIVORCE:—

1. *Access to children—Guilty wife—Discretion of judge—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 35—*Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 4.—There is no general rule of practice to compel a judge of the Divorce Division to refuse a mother, who has been divorced on account of her adultery, access to the children of the marriage. The judge of that division is, by section 35 of 20 & 21 Vict. c. 85, given the fullest discretion in the matter.

In January, 1886, a decree for dissolution of marriage on account of the wife's adultery was made absolute, and the custody of the children—two boys, now aged respectively eleven and thirteen years—was given to the father, but the decree contained no declaration as to access by the mother.

The mother (who in February, 1886, married the co-respondent) did, in fact, however, from time to time visit the children, with the permission of the father, until June, 1890, when the father, who had then recently married again, withdrew such permission.

An application to the court by the mother for an order for access was refused by Hannen, P., and the Court of Appeal now affirmed this decision.

Symington v. *Symington*, L. R. 2 H. L. (Sc.) 415, followed.—*Handley* v. *Handley and Wroughton*, C.A. 97—[1891] P. 124; 63 L. T. 535.

2. *Alimony — Permanent maintenance to wife — —Dum sola et casta clause.*—Where the amount allowed for maintenance of a wife guilty of adultery is not a large income, but only a bare allowance, the court will not necessarily insert a *dum sola et casta* clause in the order.—*Lander* v. *Lander*, P.D. & A.D. 416—[1891] P. 161; 60 L. J. P. D. & A. 65; 64 L. T. 120.

3. *Alimony—Permanent maintenance to wife—Counter-charges—Conditional decree—Motion to make decree absolute—Allowance to be made to respondent* dum casta et sola vixerit—*Order.*—The petitioner obtained a decree *nisi* on the ground of his wife's adultery, but, at the time of pronouncing that decree, the learned judge intimated that an allowance must be made by the petitioner to his wife. The solicitors for the petitioner and respondent settled an agreement, which was signed by both the parties. One of the terms in the agreement was that the allowance should continue so long as the respondent should remain chaste and unmarried.

The court (Butt, J.), while expressing disfavour with the *dum casta* clause, made the decree absolute. —*Weller* v. *Weller, Funnell, and Cass*, P.D. & AD—63 L. T. 263.

4. *Alimony—Permanent maintenance to wife—Clause* dum sola et casta—29 & 30 *Vict. c.* 32, *s.* 1.—There is no rule that, in an order granting permanent maintenance to a divorced wife, the *dum sola et casta* clause ought to be inserted, unless there is some reason to the contrary, nor that it ought to be omitted unless there is some reason for inserting it. The court must in each case determine what is reasonable, having regard to (1) the conduct of the parties; (2) their position in life, and their ages and their respective means; (3) the amount of the provision made; (4) the existence or non-existence of children, and who is to have the custody of them;

and (5) any other circumstances which may be important in any particular case. The wife of an officer in the army obtained a decree for dissolution of marriage on the ground of adultery and cruelty. There was no child, and neither party had any property, the husband having only his pay. An order was made for permanent maintenance at the rate of £60 a year, and Jeune, J., directed the insertion of the *dum sola et casta* clause, considering that there was a general rule for inserting it, unless there was some reason for omitting it.

Held, by the Court of Appeal, that there was no such general rule, and that, in the present case, having regard to the innocence of the wife, the misconduct of the husband, the fact that the wife had no property, and the smallness of the allowance, the clause ought not to be inserted.—*Wood* v. *Wood*, C.A.—[1891] P. 272; 60 L. J. P. D. & A. 66; 64 L. T. 586.

5. *Collusion—Cruelty and adultery of husband—Judicial separation*—The husband having been found guilty upon the wife's petition for divorce of cruelty and adultery, the court pronounced a decree *nisi*. Subsequently, upon the intervention of the Queen's Proctor, the wife was found guilty of collusion.

The court refused to pronounce a decree for judicial separation upon the application of the wife. —*Butler* v. *Butler and Burnham*, P.D. & A.D.—63 L. T. 256.

5a. *Condonation—Wife's adultery—Direction to jury—Plea not established.*—A husband who had received from his wife a confession of adultery, thereupon went home with her and they slept together upon that and the following night. He then sent her away to her relations, and they parted upon affectionate terms. The same day as he saw her off at the railway station he signed a petition praying for a divorce.

Upon the plea of condonation put forward by the wife, the learned judge directed the jury that the fact of the parties sleeping together was not conclusive, but that they must take that fact in conjunction with the other facts of the case in forming a conclusion as to whether the adultery had been condoned.—*Hall* v. *Hall and Kay*, P.D. & A.D. —64 L. T. 837.

6. *Connivance—Wilful neglect—Conduct conducing to adultery—Desertion—Unreasonable delay—Conditional decree.*—The petitioner married the respondent in 1873, and they lived together very happily till the birth of the only child, early in 1874, shortly after which event the respondent's mind became temporarily unhinged, and she was removed to an asylum, from which, towards the end of the same year, she was discharged as cured. The petitioner was, however, advised by his wife's medical attendant that further cohabitation, if it resulted in pregnancy, would probably prove dangerous to the respondent and any future offspring. By the consent of the families of both parties, it was arranged that they should live apart, the wife having the child with her, and the husband making her an allowance. The petitioner corresponded with his wife until 1880, when he refused all further direct communication, but continued the allowance through his solicitor; and throughout the separation he declined all private interviews with his wife, although urgently and repeatedly requested and begged for by her. In 1879 he wrote that she was not to inquire into his mode of life, and he would not interfere with hers.

Held, that he was not disentitled to a divorce, on the ground of his wife's subsequent adultery.—*Lander* v. *Lander, Temple, Fox, and Fox*, P.D. & A.D. —63 L. T. 257.

7. *Cruelty—Husband's petition—Wife addicted to drink—Adultery—Counter-charge of cruelty—Degree of cruelty necessary to bar husband's right to relief—Decree* nisi.—Upon a husband's petition for divorce on the ground of his wife's adultery, where the adultery is fully established against her, but where she countercharges cruelty as having been committed by her husband towards her, and where it appears that the wife is a woman of drunken habits, and that what she alleges as violence has been used upon her in consequence of her drunkenness,

The court requires a very strong case to be made out against the husband in order to bar his right to relief from the marriage tie. Unless it is proved that he has been guilty of such gross violence towards her as the court cannot allow to be excused on the ground that he was provoked to it by her intemperance, the decree in his favour should not be withheld.—*Forsyth* v. *Forsyth, Eccles, and Foster*, P.D. & A.D.—63 L. T. 263.

8. *Cruelty—Wife's petition—Absence of physical violence.*—The respondent, who had not been guilty of any physical violence to his wife, had habitually insulted her, and behaved towards her with neglect and studied unkindness, whereby her health had been impaired.

Held, that this amounted to cruelty, which, coupled with adultery, entitled the petitioner to a decree for dissolution.

Kelly v. *Kelly*, L. R. 2 P. & M. 59, followed.—*Bethune* v. *Bethune*, P.D. & A.D.—[1891] P. 205; 60 L. J. P. D. & A. 18; 63 L. T. 259.

9. *Custody of children—Innocent wife—Order for custody—Subsequent misconduct—Husband leading moral life—Order for change of custody—General principles.*—No hard and fast rule can be laid down as to custody of children, but in every case the court is bound to do what it conceives to be best for their interests.

A wife, on a decree absolute for dissolution of the marriage with her husband for his adultery being made, obtained an order for the custody of the children, including a daughter aged eleven, who was the only child given up to her under the order. Subsequently she lived in the same house with a young man on such intimate terms that the registrar inferred immorality. She gave way to drink and neglected her daughter. The husband meanwhile had married again, and ample proof was given of his present fitness.

The court ordered the custody of the daughter to be taken from the wife and given to the husband.—*Witt* v. *Witt*, P.D. & A.D. 432—[1891] P. 163; 60 L. J. P. D. & A. 63; 64 L. T. 121.

10. *Custody of children—Judicial separation—Cruelty to wife and child—Guardianship of Infants Act*, 1886 (49 & 50 *Vict. c.* 27), *s.* 7—*Declaration annexed to decree.*—The court, while declining to lay down any general principles which should guide the court in making, or refusing to make, at the suit of a successful petitioner, a declaration under section 7 of the Guardianship of Infants Act, 1886, to the effect that the respondent is a person unfit to have the custody of the child or children of the marriage, made such a declaration in a suit by the wife for judicial separation on the ground of cruelty, where the misconduct proved included the taking of the only child of the marriage, an infant at the time under a year old, out of the house in its nightdress, and of threats culminating in a murderous assault upon the petitioner and her mother, for

which the respondent was sentenced to a term of penal servitude.—*Handford* v. *Handford*, P.D. & A.D. —63 L. T. 256.

10a. *Custody of children—Judicial separation—Guardianship of Infants Act*, 1886 (49 & 50 *Vict. c.* 27), *s.* 7—*Order—Effect.*—The wife petitioned for a judicial separation on the ground of her husband's cruelty, and she also prayed that the court would append to the decree a declaration, in terms of section 7 of the Guardianship of Infants Act, 1886, that the respondent was a person unfit to have the custody of the children of the marriage. The cruelty proved was, substantially, that the respondent pinched and kicked the petitioner, and threw cold water over her, and told her that he did so in order to make her miscarry. One of the children was in bed with her at that time. The respondent put the petitioner out of the house at night in her nightdress, it was then raining; the children were very frightened and screamed, and a policeman afterwards went to the house and fetched them away, and took them to a neighbour's house, in which the petitioner had sought refuge. The respondent on many occasions ill-used the children and made them cry, he made use of filthy language in their presence, and used epithets to one of the children about the petitioner, or to the petitioner in presence of that child, and the boy himself afterwards used those epithets to the petitioner.

Held, that the respondent was a person unfit to have the custody of the children; and that the effect of declaring him so to be, under section 7 of the Act of 1886, was merely to put upon him the *onus* of affirmatively proving himself to be a reformed character, and fit to be intrusted with the children's custody, in case of any application which might be made in respect of their custody after the petitioner's death.—*Webley* v. *Webley*, P.D. & A.D.—64 L. T. 839.

11. *Custody of children—Judicial separation*—Ex parte *application as to custody of only child*—Interim *order.*—The court, upon affidavit that the petitioner believed her husband intended to remove the only child out of the jurisdiction of the court, made an order, *ad interim*, upon the petitioner's *ex parte* application, restraining the respondent from removing the child.—*Harris* v. *Harris*, P.D. & A.D.—63 L. T. 262.

12. *Desertion — Husband's adultery coupled with desertion—Husband willing to return to cohabitation—Decree of judicial separation.*—In a wife's suit for dissolution on the ground of adultery coupled with desertion the adultery was proved; and with regard to the desertion it appeared that after twenty-one years' cohabitation it was, in August, 1886, agreed between the parties, who were then resident abroad, that the wife and the children of the marriage should come to live in England. They accordingly took lodgings at Bournemouth, and the wife pressed her husband to return with them, but he refused. She continued willing to receive him and renew cohabitation until February, 1887, when she was shown a letter which convinced her that her husband had been carrying on an adulterous intercourse. Upon this she resolved that she never would live with him again. He wrote several to her offering to return to cohabitation, to which she did not reply; but her solicitors, by her direction, informed him that she would never live with him again.

Held, that there being no proof that the husband's offers to live again with his wife were not *bonâ fide*, she could not treat the separation on which she insisted as desertion by him, and that she was only entitled, therefore, to a judicial separation on the ground of adultery.—*Lodge* v *Lodge*, P.D. & A.D.—15 P. D. 159; 59 L. J. P. D. & A. 84; 63 L. T. 467.

12a. *Excuse for leaving wife—Wife's confession—Husband's separation thereupon—Subsequent adultery —Decree.*—A *bonâ fide* confession of adultery by a wife to her husband, believed in by him, is sufficient excuse for his leaving her.

The husband, in 1881, found a letter in his wife's possession, and taxed her with adultery with a certain man. She admitted it, and he (the husband) left her.

He was a journeyman jeweller, and had no means at that time to commence proceedings. He, about 1890, found that she was living with another man as his wife, by whom she had four children.

The court, finding that he was justified in leaving his wife upon her confession of adultery in 1881, and that his explanation of want of means was sufficient to explain the delay in taking proceedings to have his marriage dissolved, granted him a decree *nisi.*—*Faulkes* v. *Faulkes and Stainton*, P.D. & A.D. —64 L. T. 834.

13. *Husband formerly convicted of aggravated assault—Husband's petition—Separation and allowance granted thereon to wife — Wife's subsequent adultery—Discretional bar—Decree for dissolution.*—Decree dissolving the marriage pronounced in favour of a husband who had been convicted by justices of an aggravated assault upon his wife, and against whom a separation order and an order for an allowance had been thereupon made.—*Sergent* v. *Sergent and Weaver*, P.D. & A.D.—64 L. T. 236.

14. *Judicial separation—Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 4—24 & 25 *Vict. c.* 100, *s.* 43—*Aggravated assault—Order—Wife not bound to cohabit with husband—Appeal.*—A husband was convicted before justices of an aggravated assault on his wife under section 43 of 24 & 25 Vict. c. 100, and they inflicted a fine of forty shillings. They also made an order under section 4 of the Matrimonial Causes Act, 1878, that the wife should be no longer bound to cohabit with her husband, and for maintenance. The husband appealed to this court.

Held, that section 4 of the Matrimonial Causes Act, 1878, gave no appeal from the conviction for the aggravated assault, but only from the order made under that section for separation and maintenance.—*Lewin* v. *Lewin*, P.D. & A.D. 575—[1891] P. 254; 64 L. T. 834.

15. *Practice—Costs—Collusion—Decree* nisi *granted to wife—Queen's Proctor intervening—Collusion by both parties—Decree rescinded—Money paid into court for wife's costs to be paid out to Queen's Proctor.*—At the trial of two cross-petitions for dissolution by husband and wife, the wife by arrangement obtained a decree *nisi*, and the husband was condemned in costs. The Queen's Proctor intervened, charging collusion. At the trial of the issue the jury found that the parties had been guilty of collusion. The husband had paid £140 into court to meet the wife's costs. The court had refused to allow any part of this sum to be paid out to the wife or her solicitors. The Queen's Proctor having applied for payment out of this sum to him to meet his costs,

The court made the order as prayed.—*Butler* v. *Butler; Butler* v. *Butler and Burnham*, P.D. & A.D.—15 P. D. 161; 59 L. J. P. D. & A. 86; 63 L. T. 260.

16. *Practice—Costs—Collusion—Queen's Proctor, in-*

tervention by—Decree nisi rescinded—Costs against co-respondent—23 & 24 *Vict. c.* 144, *s.* 7; 41 & 42 *Vict. c.* 19, *s.* 2.—A husband having obtained a decree *nisi* in a petition for divorce on the ground of his wife's adultery, the Queen's Proctor intervened, and charged that the decree had been procured by the collusion of the respondent and co-respondent. The co-respondent was cited, but did not appear. At the hearing, the court having found the issues in favour of the Queen's Proctor, condemned the co-respondent in costs.—*Taplen* v. *Taplen and Cowen*, P.D. & A.D.—[1891] P. 283; 64 L. T. 870.

17. *Practice—Discovery—Affidavit of documents—Doctrine that "no one is bound to criminate himself," whether applicable where adultery is the charge—Jurisdiction—Infant—Evidence Further Amendment Act*, 1869 (32 & 33 *Vict. c.* 68), *s.* 3—*R. S. C.*, 1883, *ord.* 68, *r.* 1 (d).—Although section 3 of the Evidence Further Amendment Act, 1869, does not relate to discovery at all, but merely to evidence given at the trial of divorce suits, yet it recognizes and is based on the existence of the doctrine that a person questioned as to the fact of his or her adultery is not bound to answer. A party cannot be compelled to discover that which, if discovered, may tend to subject him to any punishment, penalty, forfeiture, or ecclesiastical censure, and, though the fear of ecclesiastical censure is now practically obsolete, it is only natural that the doctrine that no one is bound to criminate himself should be applicable to a charge of such gravity as adultery, notwithstanding that it is not a criminal, but only an ecclesiastical offence.

Although, as a general rule, it is not a sufficient ground for refusing an order for discovery, or for an affidavit of documents, that it may tend to criminate the party against whom it is sought, or that he may thereby be rendered liable to a penalty or ecclesiastical censure, the proper course being to raise that objection, not on the summons for discovery, but in the affidavit made in answer thereto, and with respect to the particular interrogatories or documents as to which the objection applies; yet, if it is evident that the discovery or affidavit of documents is wanted solely for the purpose of proving adultery against the party against whom it is sought, the order ought not to be made.

The court, however, has power to order discovery or an affidavit of documents, even in divorce suits, upon issues other than adultery, subject to the doctrine that no one is bound to criminate himself and to the ordinary rules as to privilege.

Semble (per Lindley, L.J.), that the rule prevailing in the Chancery and Queen's Bench Divisions, not to grant discovery against an infant, never extended to the ecclesiastical courts, and does not now extend to proceedings in divorce, the invariable practice in which is inconsistent with that rule.

Mayor v. *Collins*, 38 W. R. 349, 24 Q. B. D. 361, distinguished.

Decision of Butt, J., affirmed, but on different grounds.—*Redfern* v. *Redfern*, C.A. 212—[1891] P. 139; 60 L. J. P. D. & A. 9; 64 L. T. 68.

18. *Practice—Petition by husband—No appearance by respondent—Verdict of jury against co-respondent—Examination of respondent by the court—Dismissal of petition against her—Co-respondent condemned in damages and costs.*—In a petition by the husband for dissolution of the marriage on the ground of adultery, the respondent filed no answer and did not appear. The jury found a verdict against the co-respondent, and assessed the damages against him at £50. The court, not being satisfied with the evidence against the respondent, directed her to be summoned, and having heard her evidence, on which she was cross-examined, to the effect that she had been forced, came to the conclusion that the charge of adultery had not been established against her, and dismissed the petition as against her, but gave judgment against the co-respondent for the damages with costs.—*Long* v. *Long and Johnson*, P.D. & A.D.—15 P. D. 218; 60 L. J. P. D. & A. 27.

19. *Practice—Security for co-respondent's costs—Husband's petition.*—The court, being satisfied that the petitioner had, as a fact, assets in this country upon which, if defeated in his suit, execution for any costs ordered to be paid by him could be levied, refused the application of one of the co-respondents that the petitioner be ordered to give security for his costs.

Semble, the court, if well assured that there is real necessity for it, will make an order, upon a co-respondent's *bonâ fide* application, that the petitioner give security for the costs of such co-respondent.—*Redfern* v. *Redfern, Herbert, and Others*, P.D. & A.D.—63 L. T. 780.

20. *Practice—Security for wife's costs—Husband's petition—Non-compliance with order for security for costs—Attachment refused.*—In a petition by the husband for dissolution of marriage, the petitioner had been ordered to pay or secure a certain sum for the respondent's costs of the hearing of the cause. The petitioner failed to comply with the order, alleging want of means on his part.

The court, under the circumstances, refused to enforce the order by the issue of writ of attachment.—*Clarke* v. *Clarke*, P.D. & A.D.—[1891] P. 278.

21. *Restitution of conjugal rights — Husband petitioner—Wife entitled to separate estate—Application by husband for settlement out of separate estate—Evidence as to conduct of petitioner to respondent during cohabitation—Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 3.—On an application for a settlement or allowance by virtue of section 3 of the Matrimonial Causes Act, 1884, out of the estate of the husband or wife against whom a decree of restitution of conjugal rights has been pronounced in an undefended suit, it is competent for the party making the application to tender evidence as to the conduct of the other party during cohabitation.

The husband's power of earning money must also be taken into account.—*Swift* v. *Swift*, P.D. & A.D.—[1891] P. 129; 60 L. J. P. D. & A. 14; 63 L. T. 711.

22. *Restitution of conjugal rights—Refusal of wife to comply with decree—Restraint on anticipation—Settlement of wife's property for husband's benefit—Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 3.—The court has no jurisdiction under section 3 of the Matrimonial Causes Act, 1884, to order a settlement to be made on the husband of property of the wife which is subject to a restraint against anticipation.

Swift v. *Swift*, 15 P. D. 118, [1891] P. 129, explained.

Norris v. *Norris*, 6 W. R. 640, 27 L. J. P. & M. 72, approved. — *Michell* v. *Michell*, C.A. 680—[1891] P. 208; 60 L. J. P. D. & A. 46; 64 L. T. 607.

22a. *Settlement—Husband's petition for settlement—Divorce Act*, 1858 (20 & 21 *Vict. c.* 85), *s.* 45—*Refusal.*—The husband obtained a divorce on the ground of his wife's adultery with the co-respondent. He petitioned that certain jewellery belonging to his wife should be sold, and a settlement made of the proceeds, giving her a life interest in

the income arising from the investment of those proceeds, with remainder to himself. His income was substantial, his wife's only £72 a year. The registrar reported against the petitioner.

The court confirmed the registrar's report, and refused to order any settlement. The petition was thereupon dismissed with costs. — *Schofield* v. *Schofield and Cowper*, P.D. & A.D. — 64 L. T. 839.

23. *Settlement—Petition for variation—Respondent and surviving trustee bankrupt—Notice served upon official receiver—Dispensing with service of petition on bankrupts.*—Where a decree absolute for dissolution of marriage was pronounced upon the petition of the wife, and the wife petitioned for a variation of the marriage settlement, the court dispensed with service of the petition to vary upon the husband and the trustee of the settlement, who were both bankrupts, notice of the application to dispense with such service having been given to the official receiver in bankruptcy.—*Snelling* v. *Snelling*, P.D. & A.D.—63 L. T. 263.

24. *Settlement—Variation—Scottish settlement—22 & 23 Vict. c. 61, s. 5.*—The court has power, under 22 & 23 Vict. c. 61, s. 5, after a dissolution of marriage, to vary a settlement made according to the Scottish law, in contemplation of the marriage of a Scottish woman to a domiciled Englishman.—*Nunneley* v. *Nunneley and Marrian*, P.D. & A.D. 190—15 P. D. 186; 63 L. T. 113.

25. *Settlement—Variation—Reversionary interests—Permanent maintenance in excess of one-third of joint income secured to wife* in præsenti.—The wife obtained a decree absolute on the grounds of adultery and cruelty, and presented a petition for variation of the marriage settlements and for permanent maintenance. The present joint income of the husband and wife amounted to nearly £1,500 a year. Both were entitled to considerable property in reversion. The registrar recommended either that a present income of £700 a year should be secured to the wife for her life, or, in the alternative, that she should have secured to her an annual sum equal to one-third of the present joint income, such annual sum to be increased upon the falling in of the husband's reversionary interest.

On behalf of the husband it was stated that, if one of these two courses were to be adopted, he should, of the two, prefer the former.

The court therenpon ordered that the husband secure to the petitioner, by way of permanent maintenance, the sum of £700 a year for her life.—*Warren* v. *Warren*, P.D. & A.D.—63 L. T. 264.

26. *Settlement—Variation—Nullity of marriage—Colonial decree—Variation of settlements—Jurisdiction of the court—20 & 21 Vict. c. 85, s. 45—22 & 23 Vict. c. 61, s. 5.*—A decree of nullity of marriage having been made by a colonial court, a petition was presented to the High Court for variation of settlements, the parties having returned to this country.

Held, that there was no jurisdiction to entertain the application.—*Moore* (*falsely called Bull*) v. *Bull*, P.D. & A.D.—[1891] P. 279.

See INFANT, 1; PROBATE, 27.

DOWER.—See ADMINISTRATION, 3.

EASEMENT:—

1. *Air—Prescription—Right of passage of air through defined channel.*—The cellar of the plaintiffs' public-house was ventilated by means of a shaft cut therefrom through the rock into a disused well situated in an adjoining yard owned and occupied by the defendant, the air from the cellar passing through the shaft and out at the top of the well. The cellar had been so ventilated for more than forty years without interruption, and with the knowledge of the occupiers of the yard.

Held, that the plaintiffs could legally claim, as against the defendant, the easement of the free passage of air from the cellar, and that a lost grant of the right ought to be presumed.—*Bass* v. *Gregory*, Q.B.D.—25 Q. B. D. 481; 59 L. J. Q. B. 574.

2. *Grant of adjoining tenements—Right of way—Unity of possession—Mortgage of servient tenement without reservation of right of way—Implied reservation—Reconveyance—Determination of right of way.*—The owner of two adjoining tenements possessed a right of way from one tenement through the other. The right of way was not a way of necessity. Previous to the grant of these tenements to two respective grantees, the grantor had conveyed the servient tenement by way of mortgage without any reservation of the right of way. Subsequently, by will, the grantor devised the two tenements to the predecessors in title of the respective plaintiff and defendant. The defendant's predecessor paid off the mortgage, and took a reconveyance of all the interest of the mortgagee, and blocked up the passage creating the right of way.

Held, in an action to secure the original right of way, that, the plaintiff and defendant being both volunteers under the will, the plaintiff had no equity to deprive the defendant of what the defendant's predecessor had obtained by the reconveyance, which was not a mere release of a charge, but an estate larger than what the defendant's predecessor had acquired under the will of the testatrix.

Decision of the Queen's Bench Division (39 W.R. 512) affirmed.—*Tawes* v. *Knowles*, C.A. 675.

See also LIGHT; WATERCOURSE.

ECCLESIASTICAL LAW:—

1. *Burial—Faculty for—Reserved grave space—Order in Council closing churchyard except to members of families of parishioners.*—By an Order in Council a churchyard was closed except as to burials in reserved grave spaces allotted to members of the families of parishioners.

Held, that a faculty for a reservation of a space in the churchyard for exclusive burial could be granted to a living non-parishioner, the member of the family of a parishioner.—*In re Sargent*, ARCHES COURT—15 P. D. 168.

2. *Burial ground — Maintenance and repair — Churchwardens—Right to be repaid costs and expenses —Certificate—Burial Act*, 1855 (18 & 19 *Vict. c.* 128), *s.* 18.—By section 18 of the Burial Act, 1855, which provides for the maintenance and repair of disused burial grounds by the burial board or churchwardens, it is enacted that "the costs and expenses shall be repaid by the overseers upon the certificate of the burial board or churchwardens, as the case may be, out of the rate made for the relief of the poor of the parish." A churchwarden had, with the authority of the vestry, received tenders for repairs to the wall of a burial ground, but had not actually paid any sum of money in respect thereof.

Held, that his written request for payment was a sufficient certificate within the section, and that he was entitled to a *mandamus* ordering the vestry to pay him on account a sum which was within the estimated cost of the repairs.—*Reg.* v. *Vestry of St. Mary, Islington*, Q.B.D. 10—25 Q. B. D. 523; 59 L. J. Q. B. 462; 63 L. T. 226.

3. *Parish clerk — Sequestration — Bankruptcy of incumbent—Appointment by stipendiary curate—Injunction*—34 & 35 *Vict. c.* 45, *ss.* 1, 5, 6.—The rights belonging to an incumbent by virtue of his benefice are not taken away or interfered with by the issue of a sequestration, except in so far as they are taken away or interfered with by the express terms of the Sequestration Act, 1871.

The office of parish clerk is a temporal office.—*Lawrence* v. *Edwards*, CH.D. CHI., J. 411—[1891] 1 Ch. 144; 2 Ch. 72; 60 L. J. Ch. 336; 64 L. T. 77, 343.

4. *Pew—Right appurtenant to house—Evidence—Long user and acts of ownership—Presumption of legal origin—Prescription—Faculty.*—A pew may be annexed to a dwelling-house in the parish by a faculty, and a faculty may be presumed upon evidence of exclusive possession and repair for a long period.

The owner of a freehold dwelling-house brought an action in respect of the disturbance of his possession of a pew in the parish church. There was evidence that for more than seventy years he and his predecessors in title had occupied the pew, kept it locked, and repaired it.

Held, upon the principle that a legal origin ought to be presumed if a legal origin be possible, that the grant of a faculty ought to be presumed, and that the action was maintainable, and that this was so though it appeared that 200 years ago the then lessee of the house (before he became the freeholder) first acquired possession of the pew in a manner which gave no legal title, the subsequent enjoyment not being more consistent with the illegal origin than with the presumption of a later faculty.

The decision of the Court of Appeal (37 W. R. 776, 23 Q. B. D. 48) affirmed.—*Philipps* v. *Halliday*, H.L. (E.)—[1891] A. C. 228; 64 L. T. 745.

5. *Public worship—Bishop—Illegal practices in the celebration of Divine service—Rubrics—Communion service—Lighted candles—Mixing and administering water and wine — Eastward position — Performing manual acts before the people—Singing of hymn Agnus Dei—Making sign of the cross—Absolution.*—A bishop of the Church of England was charged with having committed offences against the law ecclesiastical while officiating as principal celebrant at the service of Holy Communion.

As to the first charge, that the respondent permitted lighted candles to be used on the communion table when not required for the purpose of giving light,

Held, that the mere fact that two lighted candles, not required for the purpose of giving light, were kept standing on the table continuously through the service did not constitute a breach of the law.

As to the charge of allowing water to be mixed with the sacramental wine, and administering the wine and water so mixed to the communicants,

Held, that mixing water and wine in and as part of the service was unlawful, but that the use of a cup containing water and wine mixed beforehand was not an ecclesiastical offence.

As to the charge of standing during the Communion service down to the ordering of the bread and wine on the west side of the table, and not on the north side thereof,

Held, that the act above described was not illegal.

As to the charge of performing the manual acts whilst standing in such a position that they could not be seen by the communicants,

Held, that the manual acts must be performed so as to be visible to the communicants.

As to the charge of permitting the hymn Agnus Dei to be said or sung immediately after the prayer of consecration,

Held, that this was not an illegal addition to the service.

As to the charge of making the sign of the cross during the absolution and the benediction,

Held, that this action was a ceremony additional to the ceremonies of the Church, and was unlawful.

As to the charge of pouring the water and wine into the paten and chalice and drinking the said water and wine as part of the service,

Held, that the doing of the acts complained of by themselves was not a ceremony, and that, having been done after the benediction, and not as part of the service, they were not unlawful.—*Read* v. *Bishop of Lincoln*, C. OF A. OF C.—[1891] P. 9; 64 L. T. 149.

6. *Reredos—"Representation" under Public Worship Regulation Act*, 1874 (37 & 38 *Vict. c.* 85), *ss.* 8, 9 — *Second representation — Alleged similarity — Bishop's discretion*—Mandamus.—In May, 1888, a "representation" had been made to the Bishop of London under sections 8 and 9 of the Public Worship Regulation Act, 1874, that the Dean and Chapter had set up in St. Paul's Cathedral Church images or sculptured subjects which tended to encourage ideas and devotions which were alleged to be of superstitious kind and to be unlawful. The bishop refused to transmit this "representation" on the ground that the case was the same as the Exeter case: *Phillpotts* v. *Boyd*, 23 W. R. 491, L. R. 6 P. C. 435. A *mandamus* was granted by a divisional court directing the bishop to transmit the representation; but this decision was reversed by the Court of Appeal, and the matter is now pending before the House of Lords.

A second representation was presented to the bishop stating that the images had in fact encouraged ideas and devotions of an idolatrous kind, and that idolatrous regard had been in fact paid to them. The bishop refused to transmit this second representation, on the ground that it was in substance the same as the former.

On a rule for a *mandamus* to the bishop to transmit the representation,

Held, by Stephen J., that the *mandamus* ought to go as the second representation differed materially from the former, inasmuch as it asserted that the images had, in fact, led to idolatry, whereas the former representation only asserted that they tended to idolatry.

Held, by Hawkins, J., that the *mandamus* ought not to go, on the ground that if the new matter disclosed a new offence it was not within the Act at all; if it did not then it was substantially the same as the former. Further, that, as the bishop had stated in his answer that he "had considered the whole circumstances of the case," his opinion formed thereon was not open to appeal.

The court being divided in opinion, the rule for a *mandamus* was discharged.—*Reg.* v. *Bishop of London* (*No.* 2), Q.B.D. 141—[1891] 2 Q. B. 48; 63 L. T. 819.

EJECTMENT.—See LAND, ACTION TO RECOVER POSSESSION; LANDLORD AND TENANT, 7; PRACTICE (EJECTMENT), 35.

ELECTION LAW.—See LOCAL GOVERNMENT, 5; MUNICIPAL CORPORATION, 1, 2; PARLIAMENT, 1—13.

EMPLOYERS and WORKMEN ACT, 1875.—See MASTER AND SERVANT, 3, 6, 7,

EMPLOYERS' LIABILITY ACT, 1880. — See MASTER AND SERVANT, 4.

ENDOWED SCHOOL:—

Dismissal of schoolmaster—Injunction—Right to sue—Consent of Charity Commissioners—Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *s.* 17.—The deed of trust establishing an endowed school provided that the master of the school should be appointed by the vicars of three specified parishes, and power was given to the three vicars to remove the master for certain specified causes. The plaintiff was appointed master of the school in April, 1890, and in December, 1890, two of the vicars served on him a notice of dismissal signed by themselves, which stated certain reasons for his dismissal. No meeting of the vicars had been summoned to consider the question of the plaintiff's dismissal, and he had not had any opportunity of being heard in defence. There was no evidence that the third vicar had been consulted. The plaintiff commenced an action against the two vicars who had signed the notice, and moved for an interlocutory injunction to restrain them from removing, or purporting to remove, him from his office until after the holding of a meeting of the vicars, and until he should have had an opportunity of being heard at such a meeting in reply to any charge made against him.

Held, that the defendants could not remove the plaintiff without first affording him an opportunity of being heard in his own defence at a properly constituted meeting of the vicars, and that he was entitled to the injunction.

Held, also, that for the purpose of obtaining this relief it was not necessary, under section 17 of the Charitable Trusts Act, 1853, to obtain the consent of the Charity Commissioners to the bringing of the action.—*Fisher* v. *Jackson*, CH.D. NOR., J.—[1891] 2 Ch. 84; 60 L. J. Ch. 482; 64 L. T. 782.

ESTOPPEL.—See COMPANY (SHARES), 23, 24, 25a, 26; MARRIED WOMAN, 1.

EVIDENCE:—

1. *Documents — Proof of — Attesting witness — Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 26.—In a case where all the parties are represented before the court it is not necessary to prove by the attesting witness a deed for the validity of which attestation is not necessary within the meaning of section 26 of the Common Law Procedure Act, 1854.—*Worthington* v. *Moore*, CH.D. CHI., J.—64 L. T. 338.

2. *Marriage—Parochial register—Memorial of deed—Pedigree—Family reputation.*—As evidence of the marriage of R. and M., an entry of the marriage of two persons of the same name (but not otherwise identified) in the parochial register of a Protestant parish, in which M. appeared to have resided, bearing date 1816, was produced by the existing incumbent of the parish, who also proved that the register had been retained in the church by permission of the Master of the Rolls. The entry purported to be signed by the then vicar, and entries in similar handwriting in the register appeared from 1791. The incumbent stated that as far as he knew it was the duty of the clergyman to make the entry, but he was not aware of any canon in force at the time requiring such entries to be made.

Held (by Harrison and Johnson, JJ., *dissentiente* O'Brien, J.), that the entry was not admissible.

A suit to establish a will and administer the estate, in which the executors and trustees were defendants, was compromised by a deed to which the executors and trustees were parties.

Held, that the production of this deed by the solicitors for the executors and trustees was production from the proper custody.

In an action for declaration of title where the plaintiff has to prove matters of pedigree, evidence of family reputation is admissible, including evidence of time.—*Miller* v. *Wheatley*, Q.B.D. (Ir.)—28 L. R. Ir. 144.

3. *Unstamped document—Promissory note—Insufficient stamp—Evidence for collateral purpose—Stamp Act*, 1870 (33 & 34 *Vict. c.* 97), *s.* 54, *sub-section* 1.—The defendant tendered as evidence of a loan an insufficiently-stamped promissory note.

Held, that the receipt of the money was of the essence of the promissory note and inseparable from it; that to admit the note as evidence of the loan would not be to admit it for collateral purposes; and that it must be rejected.—*Ashling* v. *Boon*, CH.D. KEK., J. 298—[1891] 1 Ch. 568; 60 L. J. Ch. 306; 64 L. T. 193.

See also ADMIRALTY, 6, 7; LANDLORD AND TENANT (IRELAND), 7.

EXCISE.—See REVENUE, 2.

EXECUTION.—See BANKRUPTCY, 25, 26; COMPANY, 36; SHERIFF.

EXECUTOR:—

1. *Carrying on testator's business—Indemnity—Rights of creditors of testator and subsequent creditors of executors.*—A testator's business was carried on for about three years by his executors after his death in accordance with the provisions of the will, and with the assent of the testator's creditors as well as of the beneficiaries, and was properly carried on.

Held, that the executors were entitled (in priority to claims by the testator's creditors) to be indemnified out of the testator's estate against the liabilities which they had properly incurred, and that the indemnity was not limited to that portion of the assets which had come into existence or changed its form since the testator's death.

The decision of the Court of Appeal (40 Ch. D. 536) varied accordingly.—*Dowse* v. *Gorton*, H.L. (E.)—[1891] A. C. 190; 64 L. T. 809.

2. *Renunciation of probate by one executor—Power of selection of beneficiaries.*—A testator by his will appointed three executors, and gave the residue of his estate to certain named charitable institutions, "or such others or additional as my executors herein named may select, to be divided in such proportions as they may approve of." One of the executors renounced probate.

Held (reversing the decision of Kekewich, J., 39 W. R. 412, 43 Ch. D. 643), that the executor who had renounced probate was not entitled to exercise the power, but that the power belonged to the two executors who had proved the will, in their official capacity, and was exercisable by them.

Keates v. *Burton*, 14 Ves. 434, approved.—*In re Mainwaring, Crawford* v. *Forshaw*, C.A. 684—[1891] 2 Ch. 261; 65 L. T. 32.

3. *Residuary legatee—Distribution of residue—Shares in company—Liability for future calls—Indemnity—Executor's right to repayment—Married woman—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* (2)—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 16, 75.—Residue consisting of shares in a company, on which there was a liability for future calls, was handed over by the executor, with notice of such liability, to the residuary legatee, a married woman. Before a transfer of the shares was registered, a call was

made, and the executor was compelled by the company to pay the call.

Held, that a liability for future calls was not a debt, and that, as no debt existed at the time the residue had been handed over, the executor was entitled to compel the residuary legatee to repay to the executor the amount of the calls.

Jervis v. *Wolferstan*, L. R. 18 Eq. 18, 22 W. R. Dig. 251, approved.

Held, also, that, although the residuary legatee was a married woman, and although her liability did not depend on any express or implied contract on her part, yet that she was liable to be sued as a *feme sole* by the executor, having regard to the words "or otherwise" in section 1, sub-section (2), of the Married Women's Property Act, 1882, which enacts that "a married woman shall be capable of being sued either in contract or in tort, or otherwise."—*In re Kershaw, Whitaker* v. *Kershaw*, C.A. 22—45 Ch. D. 320; 60 L. J. Ch. 9; 63 L. T. 203.

4. *Retainer—Receiver—Administration action by creditor.*—The executor's right of retainer is not to be interfered with by the appointment of a receiver on the motion of creditors in an administration action, because the executor may and will probably exercise such right to the prejudice of the general body of creditors. To establish a case for the appointment of a receiver it must be shown that the assets are being wasted.

European Assurance Society v. *Radcliffe*, 26 W. R. 417, 7 Ch. D. 733, and *Harris* v. *Harris*, 35 W. R. 710, commented on and explained.—*In re Wells, Molony* v. *Brooke*, CH.D. STI., J. 139—45 Ch. D. 569; 59 L. J. Ch. 810; 63 L. T. 521.

5. *Tenure of lands—Lease, whether chattel or freehold.*—A demise of land for three lives named, "and afterwards with renewals of lives to subsist for and during the term of 150 years, and no longer, to be computed from 25th day of March, or 29th day of September, which would first or next happen after the death of the survivor or longest liver of the said *cestuis que vies*."

Held, after the death of the survivor to constitute a chattel interest.—*In re O'Brien*, V.C. (Ir.)—27 L. R. Ir. 372.

See also LANDLORD AND TENANT, 1; PROBATE, 15, 16; WILL, 22.

EXTRADITION:—

1. *Description of offence—Foreign and English warrant—Embezzlement—Fraud by a bailee or agent—Money intrusted for safe custody—Extradition Act*, 1870 (33 & 34 *Vict. c.* 52), *Schedule—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *ss.* 75, 76.—In proceedings under the Extradition Acts it is not necessary that the description of the offence in the English warrant should correspond in terms with the description in the foreign warrant. It is sufficient for the purposes of extradition if evidence has been brought against the prisoner in the foreign country establishing a crime by the law of that country, and the same facts establish a crime by English law.

An attorney or agent who has received money from a client on the understanding that he is to invest it when a suitable investment has been found, both attorney and client in the meantime seeking for such investment, has received the money "for safe custody," and, if he misappropriates it, is guilty of an offence under section 76 of the Larceny Act, 1861.

Remarks on the English and French criminal law.—*In re Bellencontre*, Q.B.D. 381—[1891] 2 Q. B. 122; 60 L. J. M. C. 83; 64 L. T. 461.

2. "*Offence of a political character*"—Habeas corpus—*Jurisdiction of magistrate—Extradition Act*, 1870 (33 & 34 *Vict. c.* 52), *s.* 3.—An offence of "a political character," for which a fugitive criminal is not to be surrendered under any treaty incorporating the provisions of the Extradition Act, 1870, s. 3 (1), is any criminal act, as specified within the section "incidental to and forming part of a political disturbance."

Upon an application for a writ of *habeas corpus*, the court before whom the application is made has power to review the whole evidence brought before it, whether such evidence was brought before the magistrate who committed the fugitive criminal or not.—*Ex parte Castioni*, Q.B.D. 202—[1891] 1 Q. B. 149; 60 L. J. M. C. 22; 64 L. T. 344.

FALSE IMPRISONMENT:—

Arrest by a servant—Manager of public-house bar—Liability of master.—The plaintiff, with a friend, went into a public-house, in which N., a servant of the defendant's, was barman and acted as manager of the bar. The plaintiff's friend gave to N., in payment of liquor supplied to him and the plaintiff, a German ten-mark piece in lieu of a half-sovereign. N. went for change, but, on discovering that the coin was a foreign one, brought it back and got an English half-sovereign in return. On the plaintiff and his friend leaving the public-house, N. followed them out and gave them both into custody for attempting to pass false coin. The charge was dismissed. Upon an action by the plaintiff against the defendant, as master of N., for false imprisonment, the only evidence of any authority in N. to give suspected persons into custody was the fact that he was manager of the bar.

Held, that there was no evidence of any liability in the defendant for the action of his servant.

Owston v. *Bank of New South Wales* (decided by the Privy Council), 4 App. Cas. 270, 27 W. R. Dig. 156, approved and adopted.—*Abrahams* v. *Deakin*, C.A. 183—[1891] 1 Q. B. 516; 60 L. J. Q. B. 238; 63 L. T. 690.

FEE FARM GRANT:—

Reservation of mines and minerals—Limestone—Compensation for damage.—By an indenture lands were granted in fee farm with the appurtenances, reserving to the grantor all mines and minerals.

Held, affirming the judgment of the Vice-Chancellor, that beds of limestone were included in the words "mines and minerals," whether got by quarrying or surface working; and that, though the deed did not contain any provision for compensation, that defect was supplied by the Irish Act 10 Geo. 1, c. 5.—*Fishbourne* v. *Hamilton*, C.A. (Ir.)—25 L. R. Ir. 483.

FERRY.—See FRANCHISE.

FISHERY ACTS:—

Fixed nets—Certificate—32 & 33 *Vict. c.* 92—*Justices—Jurisdiction.*—In the year 1870 the inspectors of Irish fisheries certified that certain fixed engines were legal, that they consisted of six draft nets of from 150 to 250 yards in length, situate in the tideway of the river M., as enumerated on the schedule thereunto annexed, and that A. and B. had the right to erect same in pursuance of the provisions of the 5 & 6 Vict. c. 105. The schedule specified fixed draft nets used opposite twenty-eight named townlands in the counties of Mayo and Sligo, of the length opposite one townland of 150 yards, and opposite the remaining townland of 250 yards.

In 1890 the defendants, who were the successors in title to A. and B., fished at the places opposite

the townlands included in the schedule with nets of the description specified, not using more than six nets at the same time, but shifting the nets to various fishing-stations in the tideway of the river M., according as the tide served from time to time. The defendants having been prosecuted at petty sessions by one of the public for such fishing, which the complainant alleged was illegal on the grounds (*a*) that the certificate was defective in form; (*b*) that even if valid it would not justify the shifting of the nets, the magistrate dismissed the complaint, but stated a case for the opinion of the Divisional Court.

Held, that it was not open to the magistrate to entertain any question as to the validity of the certificate; that defendants' mode of fishing was authorized by the certificate; and that the case had been properly dismissed by the magistrate.—*Wilson* v. *Moy Fishery Co.*, Q.B.D. (Ir.)—28 L. R. Ir. 320.

FRANCHISE:—

Ferry — Charter. — A charter from the Crown granting "all our ferriages and passages" over certain rivers conveys only ferries existing at the date of the grant, and does not confer on the grantees a right to create new ferries over those rivers.

Hemphill v. *M'Kenna*, 8 Ir. L. R. 43, distinguished. — *Londonderry Bridge Commissioners* v. *M'Keever*, M.R. (Ir.)—27 L. R. Ir. 86.

See COUNTY COURT, 9.

FRANCHISE (ELECTORS).—See PARLIAMENT, 1—13.

FRAUDS, STATUTE of. — See PRINCIPAL AND AGENT, 2.

FRAUDULENT CONVEYANCE:—

Purchaser for value without notice—Interest under the deed—13 Eliz. c. 5, s. 6.—Section 6 of 13 Eliz. c. 5 includes a purchaser for value without notice of any interest under a fraudulent deed, whether that interest be legal or equitable, and prevents the deed from being void as against him. — *Halifax Joint-Stock Banking Co.* v. *Gledhill*, CH.D. KAY, J. 104—[1891] 1 Ch. 31; 60 L. J. Ch. 181; 63 L. T. 623.

FRIENDLY SOCIETY:—

1. *Arbitration under rules of Friendly Societies Act*, 1875 (38 & 39 *Vict.* c. 60), *s.* 22—*Motion to High Court to set aside award—Jurisdiction of the High Court—Arbitration Act*, 1889 (52 & 53 *Vict.* c. 49), *s.* 11, *sub-section* 2.—The appellant, a member of a friendly society, having met with an accident, applied to his society for relief. His claim was refused, and under the rules of the society the dispute was referred to arbitrators, who decided against him.

Held, on appeal, that the High Court had no jurisdiction to interfere in the matter.—*In re Gollings and the Tradesmen's Friendly Society*, Q.B.D. —64 L. T. 775.

2. *Misappropriation by officer — Conviction and order for repayment—Imprisonment for default—Remedy by action—Friendly Societies Act*, 1875 (38 & 39 *Vict.* c. 60), *s.* 16, *sub-section* 9.—The defendant, an officer of a friendly society, was charged under section 16, sub-section 9, of the Friendly Societies Act, 1875, with misappropriation of certain money. He was convicted and ordered to pay a penalty and to repay the money, and, in default of compliance with this order, he was imprisoned for two months, with hard labour. An action having afterwards been instituted against him to recover the misappropriated money,

Held, that his conviction and punishment under the statute were a bar to the remedy by action.—*Vernon and Others* v. *Watson*, C.A. 519—[1891] 2 Q. B. 288; 60 L. J. Q. B. 472; 64 L. T. 728.

GAMING:—

Betting—Bet—Lottery—Prize for naming winners of horse races—Betting Act, 1853 (16 & 17 *Vict.* c. 119), *ss.* 1, 3, 4—*Betting Act*, 1874 (37 & 38 *Vict.* c. 15), *s.* 3, *sub-section* (3)—42 *Geo.* 3, *c.* 119, *s.* 2—4 *Geo.* 4, c. 60, *s.* 41.—A newspaper proprietor published weekly a book of racing intelligence, which contained a coupon announcing that sums of money would be given to persons who correctly inserted the names of the winning horses in certain races (named on the coupon) which were to take place in the ensuing week. The book, with the coupon, was sold at the price of one penny.

Held, that the transaction was not a bet or a lottery within the Betting Acts, 1853 and 1874, or the Acts 42 Geo. 3, c. 119, and 4 Geo. 4, c. 60.—*Reg.* v. *Hulton*, Q.B.D. 540—64 L. T. 572.

See also BANKRUPTCY, 32.

GIFT:—

1. *Assignment of chattels—Subsequent voluntary assignment of same chattels—Covenant for title—Known defect—Remedy on covenant.*—By a deed of gift dated in 1886 A. B. assigned certain chattels to X. absolutely. By a subsequent voluntary deed dated in 1888 A. B. assigned the same chattels to Y. absolutely, and covenanted with Y. that he had good title to assign the same free from incumbrances, and that he would warrant and defend the same unto Y. against all persons whomsoever. At the time of the execution of the deed of 1888 Y. was aware of the existence of the prior deed of 1886. On the death of A. B., X. asserted her title to the chattels, and brought an action against the executors of A. B. for the recovery thereof, which was compromised on the terms of the executors giving up the chattels to X. To assist the executors in carrying out this compromise Y. surrendered to them the chattels comprised in her deed.

In an action to administer the testator's estate Y. claimed a sum of £686 as compensation for the loss of the chattels so surrendered by her.

Held, that, inasmuch as the deed of 1888 constituted an assignment of the chattels themselves, and not merely of A. B.'s estate and interest in them, there had been a breach of the covenants, and that Y. was entitled to damages in respect of such breach.

Held, also, that, as the covenants extended to the particular defect of title, they extended to it none the less because the defect was known to Y. at the time of the execution of the deed of 1888.

Held, therefore, that there must be a reference to chambers to assess the damages.—*In re Ford, Gilbert* v. *Gilbert*, CH.D. STI., J.—63 L. T. 557.

2. *Delivery—Chattel capable of delivery—Passing of property to donee—Delivery first and gift afterwards.*—Delivery first and gift afterwards of a chattel capable of delivery is as effectual as gift first and delivery afterwards.—*In re Alderson, Alderson* v. *Peel*, CH.D. CHI., J.—64 L. T. 645.

"GOLD MINE."—See MINE, 1.

GRAND JURY CESS:—

Distress between sunset and sunrise—Legality.—It is legal to distrain for grand jury cess between sunset and sunrise.

M'Namara v. *Apjohn* (13 Ir. L. R. 394) distinguished.—*Moynihan* v. *Denny*, Q.B.D. (Ir.)—28 L. R Ir. 272.

HABEAS CORPUS.—See CRIMINAL LAW (IRELAND), 1; EXTRADITION, 2; MARRIED WOMAN, 5; PRACTICE (APPEAL), 8, 9.

HARBOUR DUES.—See BANKRUPTCY (IRELAND), 5.

HEIRLOOMS.—See SETTLED LAND ACT, 4.

HIGHWAY:—

1. *Justices — Appeal — Dismissal of complaint by magistrate—Right of appeal by complainant against acquittal—Party "aggrieved"—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 105.—There is no right of appeal against the dismissal of a complaint under the Highway Act, 1835, for obstructing a highway, as the words of section 105 of that Act, which give a right of appeal to the quarter sessions to any person who shall think himself aggrieved by any order, conviction, or judgment, or determination made, or by any matter or thing done by a justice of the peace in pursuance of the Act, apply only to the case of a conviction, and do not give any right of appeal in case of an acquittal.—*Reg.* v. *Justices of London, Ex parte Fulham Vestry*, Q.B.D. 11—25 Q. B. D. 357; 59 L. J. M. C. 146; 63 L. T. 243.

2. *Main road — Highway authority — Highway district or area—District commissioners incorporated under a local Act—Application to county authority—Highway and Locomotive Act*, 1878 (41 & 42 *Vict. c.* 77), *ss.* 13, 14, 15. — The commissioners of a district in the Fens of Norfolk appointed and incorporated under various local Acts for draining and enclosing lands and providing roads, applied to the county council, as the county authority, for an order, under section 15 of the Act of 1878, declaring a certain road in their district to be a main road.

Held, that the Act was so framed as to include only the three highway areas mentioned in section 14 and the highway authority within those areas, and did not extend to include an exceptional area and an exceptional authority. Both the commissioners and their district fell within this category, and the county authority was not bound to make the order sought.—*Reg.* v. *The County Council of Norfolk*, Q.B.D.—60 L. J. Q. B. 379.

3. *Obstruction—Highway Act* (5 & 6 *Will.* 4, *c.* 50), *s.* 109—*Costs.*—A public bridle road and footway, fifteen feet wide, had been set out by an award which provided that the same should also be used as a private carriage and drift way by the owners of certain adjoining allotments. The plaintiffs, owners of these allotments, placed a bar across eleven and a half feet of the width of the way in order to preserve their exclusive right to the use of the way as a carriage and drift way, and brought an action for injunction against the surveyor of highways who had removed the barrier for the purpose of repairing the way.

Held, that the public had the right to the use of the whole length and breath of the way as a bridle road and footway.

Held, further, that section 109 of the Highway Act (5 & 6 Will. 4, c. 50) did not apply to such an action as this so as to entitle the defendant to costs as between attorney and client.—*Pullin* v. *Deffel*, CH.D. ROM., J.—64 L. T. 134.

4. *Trees overhanging—Right of surveyor to lop, but not to top, trees—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 65.—By section 65 of the Highway Act, 1835, power is given to the surveyor, under certain conditions, "to prune and lop" trees adjoining the highway.

Held, that this gave him no right to "top" the trees by cutting off their tops, but only allowed him to cut off lateral branches.—*Unwin* v. *Hanson*, C.A. 587—[1891] 2 Q. B. 115; 60 L. J. Q. B. 571.

See also LOCAL GOVERNMENT, 3, 4.

HOUSE DUTY.—See REVENUE (INCOME TAX), 7.

HUSBAND and WIFE.—See MARRIED WOMAN.

See also ADMINISTRATION, 5; DIVORCE; EXECUTOR, 3; INNKEEPER, 1; PROBATE, 17; SETTLEMENT, 3; WILL, 33.

INCOME TAX.—See REVENUE, 3-8.

INDEMNITY:—

Separate estate — Judgment in foreign country—Contract to indemnify against. — The defendants agreed to indemnify a firm carrying on business in the Argentine Republic against all claims against them by B., the defendants being at liberty to use the firm's name in defending any action. An action was brought in England against the firm by B., and was defended by the defendants in the name of the firm. Judgment was given against the firm, of which the plaintiff, a married woman, was the sole surviving partner. The plaintiff resided in the Argentine Republic, and had no property in this country. In an action to enforce the contract of indemnity,

Held, that as the plaintiff was carrying on a trade it must be assumed, until the contrary was shown, that she had separate estate, and would, therefore, be liable to B.; but that, as the plaintiff had no property in this country, and as no steps had been taken to enforce the judgment in the Argentine Republic, she was not damnified, and there had been no breach of the contract of indemnity.—*Eddowes* v. *Argentine Loan and Mercantile Agency Co.*, C.A.—63 L. T. 364.

INDUSTRIAL SCHOOL.—See POOR RATE, 6.

INFANT:—

1. *Access to children—Divorce—Guilty wife—Guardianship of Infants Act*, 1886 (49 & 50 *Vict. c.* 27).—A divorce decree was made upon the petition of the husband on the ground of the wife's adultery; and by the decree *nisi* it was ordered that the infant child should remain in the custody of the petitioner until further order.

A summons was taken out by the mother in the Chancery Division asking for an order under the Guardianship of Infants Act, 1886, that she might be allowed access to the child.

Held, that the Divorce Court had full power to make orders as to access, and that, whether there was also a discretionary power in the Chancery Division or not, it would not be exercised in a case in which an order dealing with the matter had already been made by the Divorce Court.—*Manders* v. *Manders*, CH.D. STI., J.—63 L. T. 627.

2. *Guardian—Religious education—Abandonment of father's right—Ante-nuptial agreement as to religion of the children—Wishes of deceased parents—Costs.*—Before the marriage of a Protestant with a Roman Catholic wife the husband and wife signed an undertaking that all the children of the marriage should be brought up Roman Catholics. There was only one child of the marriage, a girl, who, with the father's consent, was baptized as a Roman Catholic. When the child was about three years old the father, who was in destitution, died at the house of Miss M., a Protestant cousin of the wife,

who was in good circumstances, and had been kind to the family. The father on his deathbed had commended his wife and child to her, and appointed no guardian. Soon after his death the child, with the consent of the mother, who was statutory guardian, went to live with and was maintained by Miss M., with whom she remained till she was seven years old, and there was a strong attachment between them. The mother then died without appointing a guardian. After her death her brother, who was a Roman Catholic, insisted that the child should be brought up a Roman Catholic, took her away from Miss M. by force, and sent her to America, whence she was brought back under *habeas corpus* proceedings instituted by N., a Protestant brother of the father. Nothing had been said to Miss M. by either father or mother as to the religious education of the child.

Held, by the Court of Appeal (affirming the decision of Chitty, J.), that as the child had no parent or guardian the court had only to consider what was for her welfare, having due regard to the wishes of the father as to religious education; that the ante-nuptial agreement was not binding on the father, and that, though he acted during his life on the view that the child was to be brought up as a Roman Catholic, he was at liberty to change his mind, and that it could not be inferred that, in the events which had happened, he would have wished the child to be taken from Miss M. in order that she might be brought up a Roman Catholic—a course which, in the opinion of the court, would not be for her benefit. Miss M. and N. were, therefore, appointed guardians, and the child was delivered to Miss M., with liberty to bring her up as a Protestant.—*In re Violet Nevin (An Infant)*, C.A.—[1891] 2 Ch. 299; 60 L. J. Ch. 542; 65 L. T. 35.

3. *Maintenance—Contingent legacy—Income—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.—A testator gave his residuary estate to trustees in trust for sale, conversion, and investment, and out of the income of the investments to pay certain life annuities, and subject thereto the fund was to be held upon trust for all and every the present and future-born children of his two daughters respectively (except a specified son of one of them) who, whether in the testator's lifetime or after his death, being a son or sons, should have attained or should attain the age of twenty-one years, or, being a daughter or daughters, should have attained or should attain that age or should have married or should marry.

Held, that the whole surplus income belonged to those grandchildren who had attained twenty-one at the time it accrued, and that section 43 of the Conveyancing and Law of Property Act, 1881, empowering trustees to apply for the maintenance of an infant the income of property held in trust for him contingently on attaining twenty-one, was not applicable to the case.—*In re Jeffery, Burt* v. *Arnold*, CH.D. NOR., J. 234—[1891] 1 Ch. 671; 60 L. J. Ch. 470; 64 L. T. 622.

4. *Settlement—Confirmation or repudiation—Election—Compensation—Forfeiture—Infants' Relief Act*, 1874 (37 & 38 *Vict. c.* 62), *s.* 2—*Infants' Marriage Settlements Act*, 1855 (18 & 19 *Vict. c.* 43).—A marriage settlement, dated the 16th of October, 1883, was made on the occasion of the marriage of two infants. The settlement was confirmed by the court on behalf of the wife, but not on behalf of the husband. By the settlement the husband's father covenanted with the trustees to pay £1,500 a year during the life of the wife and such further period as there should be any child or grandchild of the intended marriage, to be payable by equal quarterly instalments, such sum to be paid by them to the husband until he should assign, charge, or affect so to do, in which event there was a discretionary trust over. The settlement also contained a covenant by the husband that if, during the continuance of the annuity, he became entitled, under certain other settlements executed by his father, or under the will of either his father or his mother, to any property, he would assign the same to the trustees of his marriage settlement, in reduction of the amount of capital necessary to be set apart to meet the annuity.

The father, by his will dated the 22nd of November, 1878, gave the residue of his property equally between his two sons, one of whom was the husband in question. The testator died on the 14th of May, 1887. The husband attained his majority on the 19th of November, 1883, and received three instalments of the annuity, and paid over to the trustees of the settlement a sum received by him under one of the earlier settlements made by his father, but without prejudice to his right to repudiate the settlement. On the 31st of July, 1888, formal notice of repudiation by the husband, of the settlement of the 16th of October, 1883, was given to the trustees.

The trustees brought an action to have it declared that the husband could not repudiate, and that, if he could repudiate, compensation ought to be made by him out of any moneys payable to him under the settlement and out of the property which would have been comprised in his covenant if he had not repudiated.

Held, that the husband was entitled to repudiate the settlement, and had done so within a reasonable time of coming of age and acquiring a knowledge of his rights.

Held, that, as he had repudiated, he must make compensation out of his interests under the settlement and out of the property coming to him under his father's will.

Held, also, that such compensation, coming out of moneys payable to the husband under the settlement, operated as a forfeiture of his right to the annuity thereunder, and that the discretionary trust over took effect.

Codrington v. *Codrington*, 24 W. R. 648, L. R. 7 H. L. 854, followed.—*Carter* v. *Silber, Carter* v. *Hasluck*, CH.D. ROM., J. 552—65 L. T. 51.

5. *Settlement—Covenant to settle after-acquired property—Infants' Settlement Act*, 1855—*Property in expectancy—Husband's covenant—Married Women's Property Act*, 1882, *ss.* 2, 19.—By a marriage settlement made in 1883 the intending husband and wife each covenanted to bring into the settlement all the wife's after-acquired property. At the time of the marriage the wife was an infant, and the settlement was executed under the provisions of the Infants' Settlement Act, 1855. The wife, under her mother's will, became entitled in 1888 to the sum of £3,900.

Held, that the £3,900 was bound by the wife's covenant to settle her after-acquired property, under the Infants' Settlement Act, 1855.—*In re Johnson, Moore* v. *Johnson*, CH.D. NOR., J. 509—60 L. J. Ch. 499; 64 L. T. 696.

6. *Settlement — Power of appointment — Absolute appointment—Failure of limitations of settlement—Resulting trust—Death of appointor under twenty-one—Infants' Settlement Act*, 1855 (18 & 19 *Vict. c.* 43), *ss.* 1, 2.—A testatrix gave property to trustees upon trust to pay the income to her illegitimate daughter for life for her separate use, without power of anti-

cipation, and after the daughter's decease upon trust for such persons as the daughter should appoint, and, on default of appointment, in trust for the daughter's children.

After the death of the testatrix, the daughter, while still an infant, upon her marriage, made, with the sanction of the court under the Infants' Settlement Act, a settlement, by which, in exercise of the power of appointment given her by the testatrix, she appointed the property to trustees, who were not the same persons as the trustees of the testatrix's will, upon trust to pay the income to herself during the joint lives of her husband and herself, and to the survivor of them for his or her life, and after the death of the survivor upon trust for the children of the marriage as the husband and wife should jointly appoint, and, in default, as the survivor should appoint, and, in default of children, for such persons as the wife should appoint, and, in default of such appointment, if the wife should survive the husband, in trust for the wife absolutely, and if she should not survive him, in trust for such persons as, under the Statutes of Distribution, would have become entitled thereto upon the death of the wife, had she died possessed thereof intestate and without having been married.

The wife died while still an infant and intestate, without having exercised the general power of appointment reserved to her by the settlement, and the husband took out letters of administration to her estate. There were no children of the marriage.

Held, that the power conferred on an infant by section 1 of the Infants' Marriage Settlement Act enables an infant to make an appointment which, on failure of the limitations of the settlement, will take effect in favour of the infant, and that section 2 of the Act, which invalidates a settlement by an infant on the subsequent death of the infant before attaining twenty-one, only applies to an infant tenant in tail, and, therefore, that the appointment made by the illegitimate daughter by her marriage settlement, being absolute in terms, operated, on failure of the limitations of the settlement because of the fact that the daughter, being illegitimate, could have no next of kin, to make the property her own absolutely; and that, consequently, her husband was entitled to it as her administrator, and not the next of kin of her mother.—*In re Scott, Scott* v. *Hanbury*, CH.D. NOR., J. 264—[1891] 1 Ch. 298; 60 L. J. Ch. 461; 63 L. T. 800.

7. *Ward of court—Entering convent.*—A female ward of court should not become a postulant or novice in a convent without the consent of the Lord Chancellor.—*In re Gills* (*Minors*), L.C. (Ir.)—27 L. R. Ir. 129.

8. *Ward of court—Sergeant-at-arms—Officer attending the Chancery Division of the High Court.*—The sergeant-at-arms attending the court is the proper officer to whom an order for the delivery up of the person of a ward of court should be directed. Such an order should be countersigned by the Lord Chancellor.—*In re An Infant*, CH.D. CHI., J.—64 L. T. 732.

See also APPRENTICE; BANKRUPTCY, 28; DIVORCE, 1, 9—11, 17; MARRIED WOMAN, 11.

INNKEEPER:—

1. *Lien—Husband and wife guests at inn—Credit given to husband—Lien on wife's goods belonging to her as her separate property.*—Where a husband and wife have come to an inn to stay as guests, bringing goods with them, the innkeeper's lien for his charges attaches to the whole of such goods, including any that are the wife's separate property, although the innkeeper may be unable successfully to sue the wife in respect of her separate estate, by reason of his having giving credit to the husband alone.—*Gordon* v. *Silber*, Q.B.D. 111—25 Q. B. D. 491; 59 L. J. Q. B. 507; 63 L. T. 283.

2. *Loss of guests' property—Liability*—Onus *of proof*—26 & 27 *Vict. c.* 41, *s.* 1.—The plaintiff arrived early in the morning at the defendants' hotel (which was entitled to the benefit of 26 & 27 Vict. c. 41) and asked for a bedroom. He was told that the hotel was full, but that there was one room then vacant, which had been engaged by a lady and gentleman who were expected to arrive in the course of the day, and that he could make use of it for the purpose of washing and dressing. He was then shown to the room, and his luggage, including a dressing bag, was taken into it by the hotel porter. After entering the room the plaintiff opened the bag and took out of it a stand which contained brushes and other articles of the toilet. In the drawer of the stand were some valuable trinkets. The plaintiff placed the stand on the dressing table in the room. When he had finished washing and dressing he went downstairs to the coffee-room and had breakfast. He left the door of the bedroom unlocked, and he left the stand of the dressing bag just as it was on the table. He paid for his breakfast, left the hotel, and did not return till about midnight. About nine p.m. the lady and gentleman who had engaged the room arrived, and were shown to it by the page boy of the hotel. By the direction of the head porter the boy moved all the plaintiff's luggage, including the stand, out of the room into the corridor, and left it there. When the plaintiff returned to the hotel another bedroom, which had meanwhile become vacant, was given to him, and his luggage was moved from the corridor into this room. The next morning the plaintiff discovered that his trinkets had been stolen from the drawer of the stand. He brought an action against the defendants for damages for the loss of the trinkets. There was no evidence to show whether the trinkets were stolen while the stand was in the bedroom or after it had been placed in the corridor.

Held (by Lord Esher, M.R., and Bowen, L.J.), that the plaintiff was received as a guest into the hotel, and that the relation of innkeeper and guest continued until a reasonable time after the plaintiff's goods had been placed in the corridor, and that, if the trinkets were stolen while the stand was in the bedroom, there was contributory negligence on the part of the plaintiff; but that if they were stolen while the stand was in the corridor, the loss was due solely to the negligence of the defendants in placing it there.

But, held, that inasmuch as it was not proved whether the trinkets were stolen in the bedroom or in the corridor, the defendants were, under section 1 of the Act, liable up to the amount of £30, because they could not discharge the *onus* which lay on them of showing that the plaintiff's negligence had contributed to the loss.

Held, also, that beyond the amount of the £30 the defendants were not liable, because, for the same reason, the plaintiff could not discharge the *onus* which was cast upon him by section 1 of showing that the loss had occurred "through the wilful act, default, or neglect" of the defendants.

Held, by Fry, L.J., that the plaintiff was not a guest in the hotel at the time when the loss occurred, and that, therefore, the defendants were not liable at all.

enlarged holding has not the effect of destroying the present tenancy or the rights attached thereto.

But as in such a case there are separate and distinct tenancies existing in the newly-acquired parcel of land and in the original holding, they cannot be included in the same originating notice. —*Jackson* v. *Fagan*, LAND COM. (Ir.)—28 L. R. Ir. 326.

8b. "*Present tenancy*"—*Lease made after passing of Act and before January* 1, 1883—*Tenancy existing at passing of Act—Land Law (Ireland) Act*, 1881, *ss.* 8, 57.—A tenant holding under a lease executed between the 22nd of August, 1881, and the 1st of January, 1883, of lands in which a tenancy was subsisting on the 22nd of August, 1881, is a "present tenant," and entitled to apply to have a fair rent fixed.

Ronaldson v. *La Touche*, 24 L. R. Ir. 344, discussed.—*Magner* v. *Hawkes*, LAND COM. (Ir.)—28 L. R. Ir. 365.

9. *Rent—Fair rent fixed after Land Law (Ireland) Act*, 1887—*Originating notice served before Act—Time for commencement of judicial rent.*—A judicial rent, fixed after the passing of the Land Law (Ireland) Act, 1887, upon an originating notice served prior to the passing of the Act, runs from the gale-day next after the service of the originating notice.—*Sutton* v. *Walsh*, Q.B.D. (Ir.)—26 L. R. Ir. 629.

10. *Rent—Fair rent—Letting for agricultural purposes—Power in landlord to resume portion of holding for building purposes—Land Law (Ireland) Act*, 1881, *s.* 58, *sub-section* 7—*Land Law (Ireland) Act*, 1887, *s.* 1.—A lease of sixty-five acres of agricultural lands for thirty-one years contained a proviso for resumption of possession by the landlord during the lease of five acres in any part of the holding for building purposes at a certain reduction of rent per acre. The landlord did not resume possession of any part of the lands.

Held, that the tenant was entitled to serve an originating notice to fix a fair rent.

Butterly v. *Carroll*, 26 L. R. Ir. 93, and *Leonard* v. *Barry*, MacDev. Rep. 240, distinguished.—*Mooney* v. *Willcocks*, C.A. (Ir.)—28 L. R. Ir. 113.

11. *Rent—Fair rent—Tenant* bonâ fide *in occupation of entire holding—Prior sub-letting of part—Subsequent change of tenancy—Proviso permitting subletting—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *ss.* 21, 27.—In 1841 a lease of two-thirds of a farm was executed, which lease expired in 1878. In 1844 a lease to the same tenant of the remaining one-third of the farm was executed, and in 1869 this lease was renewed for sixty years. Both leases contained a provision enabling the lessee to sublet without the consent of the landlord. The interest of the tenant became vested in M., who held the two-thirds as tenant from year to year after the expiration of the lease of 1841 in 1878, and the one-third under the lease of 1869. Prior to 1841 B. was in possession of five acres of the farm as tenant from year to year, and he died before 1866, when his son entered and paid rent, but no personal representative was raised to B. In 1886 M. served notice to fix a fair rent of the two-thirds, and in 1887 he served notice to fix a fair rent of the one-third.

Held, that B. having died more than twenty years before the notice to fix a fair rent, the tenancy from year to year vested in him was extinguished by the Statute of Limitations; that the tenancy from year to year vested in B.'s son must be deemed a new subletting by M. with the consent of the landlord (the consent being given by permission to sublet in the original leases); and that M. was, therefore, *bonâ fide* in occupation of the holding.—*Jackson* v. *M'Master*, C.A. (Ir.)—28 L. R. Ir. 176.

12. *Sale of tenancy—Execution creditor—Purchase-money—Arrears of rent—Land Law (Ireland) Act*, 1881, *s.* 1.—Where a tenant's interest in his holding is sold under section 1 of the Land Law (Ireland) Act, 1881, in pursuance of a writ of *fi. fa.*, the landlord is entitled to be paid out of the proceeds of the sale all arrears of rent due to him in priority to the execution creditor.—*Waldron* v. *Sutcliffe*, C.A. (Ir.) —26 L. R. Ir. 444.

13. *Sale of tenancy—Sale of portion of holding—Landlords' right of pre-emption—Specific performance—Land Law (Ireland) Act*, 1881, *ss.* 1, 2.—The plaintiff agreed to purchase from the defendants a portion of certain lands held by them under a judicial tenancy, together with another portion of the lands, subject to a condition of sale that, under the Land Law (Ireland) Act, 1881, the landlord of the holding for sale had a right of pre-emption, and also a right to object to the purchaser on reasonable grounds; and that if the landlord should claim the right of pre-emption, or make a valid objection to the purchaser, the sale should be of no effect. The landlord having claimed to exercise his right of pre-emption, and having served a notice objecting to the purchaser, the defendants refused to carry out the sale. In an action for specific performance,

Held, that section 1 of the Land Law (Ireland) Act, 1881, applies to the sale of a portion of a holding, and that the landlord may claim a right of pre-emption; that such a sale comes within section 2, and is illegal without the consent of the landlord; and that specific performance must be refused.—*Murtagh* v. *Allen*, V.C. (Ir.)—27 L. R. Ir. 118.

14. *Sale of tenancy — Landlord's right of pre-emption—Notice by tenant to sell—Notice by landlord to purchase—Equities created by tenant—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 1, *sub-sections* 1, 2, 3; *s.* 8, *sub-section* 5.—If a tenant, who has had a fair rent fixed under the Land Law (Ireland) Act, 1881, serves notice on the landlord of his intention to sell his tenancy in the holding, and the landlord serves notice of his intention to exercise his right of pre-emption, the tenant cannot withdraw his notice of intention to sell, or defeat the landlord's right to purchase, and any equities created by the tenant, such as an ante-nuptial agreement made after the order fixing a fair rent to assign the holding to his wife at his death, cannot interfere with the landlord's rights.—*Farrelly* v. *Waller*, C.A. (Ir.)—28 L. R. Ir. 122.

15. *Surrender by middleman—Trustees having no power of sale—Appointment of trustees—Land Law (Ireland) Act*, 1887, *s.* 8—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 (8), 38.—A tenant for life desired to exercise the power of surrender given to a middleman by section 8 (6) of the Land Law (Ireland) Act, 1887, but the trustees of the settlement had no power of sale.

The court appointed new trustees for the purposes of the Settled Land Act, 1882, limiting the appointment to the lands intended to be surrendered. —*In re Mulcahy's Estate*, M.R. (Ir.)—27 L. R. Ir. 78.

LANDS CLAUSES ACT:—

1. *Purchase-money — Minerals — Settled estate — Tenant for life unimpeachable for waste — Remainderman — Apportionment — Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 7, 9, 69, 70.—A tenant for life, though unimpeachable for

waste, is not entitled to any portion of the *corpus* of the compensation-money paid in respect of minerals sold by him to a railway company under the powers conferred by the Lands Clauses Consolidation Act, 1845, s. 7.

In re Barrington, Gamlen v. *Lyon*, 35 W. R. 164, 33 Ch. D. 523, distinguished.—*In re Robinson's Settlement Trusts*, CH.D. CHI., J. 632.

2. *Purchase-money—Payment of purchase-money into court—Payment out to person in possession—Land sold as freehold—Leasehold title adduced—Absence of claim by reversioner—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 79.—G., whose house had been compulsorily taken in 1865 by a public body in pursuance of powers conferred upon them by Acts of Parliament, had claimed to be the owner of the house in fee, but could only adduce a title to the residue of a long term of years expiring in 1878, and the purchasers paid into court a sum representing the value of the reversion in fee. G., after the expiration of twelve years from the end of the term, claimed to be entitled to have the money in court paid to him (he having already received the value of the leasehold interest) as being the person "in possession" of the house within the meaning of section 79 of the Lands Clauses Consolidation Act, 1845, it not being known who the reversioner was.

Held, that G., never having been in possession of the reversion, was not so entitled.

Ex parte Chamberlain, 28 W. R. 565, 14 Ch. D. 323, doubted.

Decision of North, J. (35 S. J. 295), affirmed.—*Gedye* v. *Commissioners of Public Works*, C.A. 598—[1891] 2 Ch. 630; 60 L. J. Ch. 587.

See also POOR RATE, 2, 3; UNIVERSITY, 1, 2.

LEGACY DUTY.—See REVENUE, 9.

LEGITIMACY DECLARATION ACT:—

Legitimacy Declaration Act (20 & 21 *Vict. c.* 93)—*Motion for directions—Practice.*—The court dismissed, with costs, an application, made upon motion, by the petitioner in a legitimacy declaration suit, asking for leave to cite a certain person, other than the Attorney-General, and for directions; such motion being contrary to the practice in such cases, as settled in *Brinckley* v. *Attorney-General*, 14 P. D. 83, 60 L. T. N. S. 935.—*Bain* v. *The Attorney-General*, P.D. & A.D.—64 L. T. 837.

LICENSING ACTS:—

1. *Beerhouse — Indoor beer licence — Renewal — Notice of opposition—Conviction as evidence of bad character—Jurisdiction of justices—Limitation to four grounds*—32 & 33 *Vict. c.* 27, *s.* 8.—O., the holder of an indoor beer licence which existed before 1869, received due notice before the general annual licensing meeting of opposition to the renewal on the ground merely that he had been convicted. The justices having refused the renewal on the first ground set forth in 32 & 33 Vict. c. 27, s. 8, O. appealed to quarter sessions and produced witnesses who gave evidence of his good character. The quarter sessions dismissed the appeal, though they expressed the opinion that O. had proved his good character.

Held, that the notice of opposition was sufficiently definite; that, as the conviction was some evidence on the first of the aforesaid four grounds, there was no sufficient reason for ordering by *mandamus* that the quarter sessions should hear and determine the matter again.—*In re O'Brien, Reg.* v. *Justices of Lancashire*, Q.B.D.—64 L. T. 562.

2. *Licence—Change of occupation—Licence to new tenant under the Licensing Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Application for a second licence under same section—Jurisdiction of justices.*—J., the tenant of a beerhouse licensed previous to 1869, being about to go out of possession, abstained from applying for a renewal at the annual general meeting held on the 30th of August, 1890. R. came into possession of the house as new tenant on the 5th of September, when J. left. Upon the 27th of September R. applied to the justices in special session for a licence to him as "new tenant" under section 14 of the Licensing Act, 1828, up to the ensuing 10th of October, but omitted to apply to the adjourned general brewster sessions, held on the same day, for a renewal to him of J.'s annual licence subsequent to the 10th of October. At the next special session, on the 3rd of January, 1891, R. again applied for a licence under the same section 14.

Held, affirming the Divisional Court (A. L. Smith and Grantham, JJ.), that R. was no longer, on the 3rd of January, 1891, a "new tenant" within section 14 of the Licensing Act, 1828, nor could he claim the benefit of that section on the other ground, that the former tenant had failed to apply, since he himself had neglected to apply, as he might have done, at the adjourned general meeting; and that the justices were right, therefore, in holding that their jurisdiction under that section had already been exhausted in R.'s case.—*Reg.* v. *Justices of Swansea*, C.A. 630.

3. *Licence—Provisional grant — Final order — Variation in approved plans—Substantial variation—"In accordance with the plans"—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 37—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 22.—A provisional licence was granted upon plans which had been approved, and it became necessary, owing to the slope of the ground, to make certain alterations in the plans. The premises, having been completed, the justices refused an application for a final order on the ground that the house was not built "in accordance with the plans" within section 22 of the Licensing Act, 1874, and that they had no jurisdiction to grant the final order.

Held, that "in accordance with the plans" means in substantial accordance, and that the premises, having been completed as nearly as possible under the circumstances in accordance with the plans, the justices had power to grant the final order.—*Reg.* v. *Pownall and Others*, Q.B.D.—63 L. T. 418.

4. *Licence—Renewal—Discretion of justices—Licensing Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 1—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 26.—Licensing justices have an absolute judicial discretion to grant or refuse an application for the renewal of a licence under the Licensing Acts, 1828, 1872, and 1874.—*Sharpe* v. *Wakefield*, H.L. (E.) 561—[1891] A. C. 173; 60 L. J. M. C. 73; 64 L. T. 181.

5. *Offence—Sale of beer in measure not marked as an imperial measure—Conviction—Licensing Act*, 1874 (35 & 36 *Vict. c.* 94), *s.* 8.—A publican supplied to a customer, at the request of the customer, what was known as a "blue" of beer, which was a quantity of beer in a blue jug, more than half a pint and about one-third of a quart. At the time of the sale there were conspicuously posted up in the room notices that the vessel called a "blue" was not represented as containing any amount of

imperial measure, or as being a measure of imperial standard, and in fact the vessel was not an imperial measure or marked as such.

Held, that the publican had, under section 8 of the Licensing Act, 1872, committed the offence of selling intoxicating liquor, not being a quantity less than half a pint, in a measure not marked according to the imperial standards, and that he was properly convicted of the same.—*Payne* v. *Thomas*, Q.B.D. 240—60 L. J. M. C. 3; 63 L. T. 456.

LIEN. — See INNKEEPER, 1; SALE OF GOODS; SOLICITOR, 13, 14, 15.

LIGHT:—

1. *Crown—Crown land — Sale by trustees—Prerogative—Prescription Act* (2 & 3 *Will.* 4, *c.* 71), *ss.* 1-3.—Land was held in trust for the Crown from a period prior to the Prescription Act. The Crown is not named in section 3 of that Act.

Held, that no prescriptive right to the access of light over the land to adjoining buildings had been acquired against the Crown during its beneficial ownership, although the legal estate therein was not vested in the Crown, and that purchasers from the Crown were entitled to build thereon so as to interfere with the access of light.—*Perry* v. *Eames*, *Salaman* v. *Eames*, *Mercers' Co.* v. *Eames*, CH.D. CHI., J. 602—[1891] 1 Ch. 658; 60 L. J. Ch. 345; 64 L. T. 438.

2. *Derogation from grant—Grant of vacant land—Building contemplated by parties to grant—Covenant as to windows looking out on land of grantor—Implied obligation not to obstruct lights.*—In 1875 W. conveyed land to the trustees of a religious body who were desirous of erecting a chapel thereon. The deed of conveyance set forth fully the trusts upon which the grantees were to hold the land, including trusts to erect a chapel in such manner as the grantees should, with the sanction of the religious body, deem necessary or expedient, and trusts in certain events to let, sell, or mortgage the land and buildings; the conveyance also contained a covenant by the grantees with W. that all windows in the chapel looking out on other land of W. should be of fluted or ground glass.

There were no buildings upon the land at the date of the grant, and no plans or specifications of the proposed chapel were submitted to W. for his approval.

In February, 1878, the grantees commenced to build a chapel, having windows looking out upon the land retained by W. In November, 1878, W. entered into an agreement to sell this land; and it was shortly afterwards conveyed by him to the defendants, who in May, 1890, commenced to build thereon in such a manner as to obstruct the light of the chapel.

Held, that W. had, in effect, given permission to the trustees of the chapel to erect such a building as they thought fit; and that, the chapel having been erected in a reasonable manner, neither W. nor his assigns could complain of the position of the chapel or of the way in which it was lighted.

Held, that, it having been within the contemplation of the parties to the conveyance of 1875 that a chapel would be built on the land conveyed, having windows looking out on the land retained by W., W. and his assigns were under an implied obligation not to do anything to obstruct such windows. —*Bailey* v. *Icke*, CH.D. KEK., J.—64 L. T. 789.

3. *Obstruction—Probable future damage—Injunction.*—Where ancient lights are obstructed so as to cause damage, not present, but likely to accrue within a reasonable time, the plaintiff is entitled to an injunction, and not merely to damages; and the possible future use of the house must be taken into consideration in determining the question.—*Dicker* v. *Popham*, *Radford*, & *Co.*, CH.D. KEK., J.—63 L. T. 379.

See also PRACTICE (INJUNCTION), 41.

LIMITATIONS, STATUTE of:—

1. *Conversion—Accrual of cause of action—Title deeds.* — The plaintiff's son, having wrongfully obtained possession of a lease of certain premises of which the plaintiff was in possession, deposited it in 1881 with B. to secure an advance. B. having afterwards become bankrupt, his trustee in 1889 transferred the lease to the defendant. The plaintiff demanded the return of the lease, and the defendant refused to give it up.

Held, that the cause of the action against the defendant did not accrue to the plaintiff until the demand and refusal to give up the lease; and therefore that the Statute of Limitations was no bar to the action.

Wilkinson v. *Verity*, 19 W. R. 604, L. R. 6 C. P. 206, explained.—*Miller* v. *Dell*, C.A. 342—[1891] 1 Q. B. 468; 60 L. J. Q. B. 404; 63 L. T. 693.

2. *Interest on legacies charged on land—Time from which interest is to be computed—Statute of Limitations* (3 & 4 *Will.* 4, *c.* 47), *s.* 42—102*nd General Order in Chancery*, 1843.—In an action to raise the amount due on an equitable mortgage, instituted by the mortgagee, the lands were sold and realized more than sufficient to pay the plaintiff's claim and costs.

An order having been made directing inquiries as to other incumbrances on the lands sold and their priorities, claims were brought in by legatees entitled to legacies charged on the lands. The question being as to the date from which interest on these legacies should be computed,

Held, that under the 102nd General Order in Chancery, 1843, the claim of the legatees was a proceeding by way of suit within section 42 of 3 & 4 Will. 4, c. 47, and that the legatees were only entitled to interest on the legacies for six years prior to the commencement of the action.—*Archdall* v. *Anderson*, V.C. (Ir.)—25 L. R. Ir. 433.

3. *Legacy—Assent of executor—Implied trust—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.—The time for bringing an action or other proceeding to recover any legacy is limited by section 8 of the Real Property Limitation Act, 1874, to a period of twelve years next after the accruer of a present right to receive the same; and neither the fact that the executor has assented to the legacy, or that the legacy is coupled with any implied trust, prevents the operation of the statute.—*In re Davis*, *Evans* v. *Moore*, C.A. 627.

4. *Mortgage of reversionary interests in personal estate—Covenant for payment of mortgage debt—Personal remedy on covenant—Remedy against property forming security—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 2, 8.—In 1870 A., B., and C. mortgaged certain reversionary shares in a fund in court to which B. and C. were entitled under a will to secure the repayment by A. of a sum of £70. The mortgage contained a joint and several covenant by A. and C. for repayment of principal and interest. In 1873 the mortgagee recovered judgment against C. on her covenant. In 1889 the reversionary interests fell into possession. No interest had ever been paid on the mortgage or judgment, nor had any acknowledgment been given.

Held, that although the personal remedy against

C. was barred by the Statute of Limitations, the assignment of the property comprised in the mortgage was nevertheless good.

Held, therefore, that the mortgagee was entitled to C.'s share of the property under the will.—*In re Lake's Trusts*, CH.D. STI., J.—63 L. T. 416.

5. *Petition for sale in Landed Estates Court—Effect of—Dismissal—Extension of receiver.*—The Statute of Limitations ceases to run, pending a petition for sale in the Landed Estates Court, against all claims properly put forward in the petition. It does not cease to run when the claim is made in some other independent suit or action.

When a petition is dismissed the statute must be taken to have been running all the time, as if the petition had not been filed.

The extension to a receiver to an incumbrance, without any payment thereon, has no greater effect than has the order for sale.—*Irish Land Commission* v. *Davies*, L.J. (Ir.)—27 L. R. Ir. 334.

6. *Simple contract debt—Cause of action—Accruer of*—21 *Jac.* 1, *c.* 16, *s.* 3.—By an agreement in writing, dated the 25th of April, 1880, the defendant, in consideration of a sum of money advanced by the plaintiff, stipulated to pay interest thereon by equal quarterly payments, and the plaintiff stipulated not to call in the principal sum for five years if the defendant should so long live and should duly pay the interest. The agreement contained a proviso that, if the defendant died before the expiration of the five years, it should be lawful for the plaintiff to call in the principal upon giving six months' notice to the defendant's executors; and a further proviso that, in case the defendant made default in any payment of interest for twenty-one days after the same became payable, the plaintiff, immediately upon the expiration of the twenty-one days, might call in the principal and all interest owing in respect thereof.

No payment, either of interest or principal, was ever made by the defendant. On the 13th of February, 1891, the plaintiff brought an action to recover the principal sum and also so much of the interest as had accrued thereon since the 13th of February, 1885 (being a period of six years before the issue of the writ). The defendant pleaded the Statute of Limitations (21 Jac. 1, c. 16), s. 3.

Held, that the cause of action arose on the expiration of twenty-one days from the 25th of July, 1880, the date when the first quarterly payment of interest became payable, and that the plaintiff's claim was, therefore, barred by the statute.

Hemp v. *Garland*, 4 Q. B. 519, approved.—*Reeves* v. *Butcher*, C.A. 626—[1891] 2 Q. B. 509.

See also PARTNERSHIP, 3; PRACTICE (WRIT), 63; TRUSTEE, 3.

LOCAL GOVERNMENT:—

1. "*Buildings*" — *New building — Bye-laws by urban authority—Ground enclosed by hoardings erected for advertisements—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 157.—An advertising company surrounded on three of its sides a piece of ground within a borough with boarded walls or hoardings raised to a height of from thirteen to nineteen feet. These hoardings were stayed, fastened, and tied together, and strengthened on the inner side. The space enclosed was used for the preparation of wood for other hoardings.

Held, that this structure was not a new building within a bye-law in force within the borough made in pursuance of section 157 of the Public Health Act, 1875.—*Slaughter* v. *Mayor, &c., of Sunderland*, Q.B.D.—60 L. J. M. C. 91.

2. *County council—Borough rate—County fund—Costs of quarter sessions and petty sessions in boroughs with populations of* 10,000 *or upwards having a separate court of quarter sessions — Costs of quarter sessions and petty sessions in boroughs with populations under* 10,000 *having a separate court of quarter sessions—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 169, 248, *sub-sections* 2, 5—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 35, *sub-sections* 2, 5; *s.* 38, *sub-section* 5; *s.* 100.—Held, that under the Local Government Act, 1888, where the population of a borough having a separate court of quarter sessions is 10,000 or upwards, the expenses of quarter and petty sessions are payable out of the borough rates; where the population is less than 10,000, out of the county rates.—*Ex parte County Council of Kent and Council of Dover; Ex parte County Council of Kent and Council of Sandwich*, Q.B.D.—[1891] 1 Q. B. 389; 60 L. J. Q. B. 314; 64 L. T. 421.

NOTE.—This case went to the Court of Appeal, but the appeal was dismissed on the ground that no appeal lay: see PRACTICE, 10.

3. *County council—Main road—Roadside wastes—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 11, *sub-sections* 1, 6.—Strips of waste land adjoining a main road are "roadside wastes" within the meaning of sub-section 1 of section 11 of the Local Government Act, 1888, and are not, like the main road, vested in the county council by sub-section 6 of that section; and, consequently, the county council have no right to the herbage of such strips of waste land.—*Curtis* v. *Kesteven County Council*, CH.D. NOR., J. 199—45 Ch. D. 504; 60 L. J. Ch. 103; 63 L. T. 543.

4. *County council—Main road—Road authority—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 3—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 11.—A county council continues to be the road authority under the Tramways Act, 1870, over main roads, notwithstanding a contract made by the county council with a highway board for the repair of such roads by the board.—*Stockport and Hyde Highway Board* v. *County Council of Cheshire*, Q.B.D. 606.

5. *County council—Qualification of member—Election of women—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 41, 73—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41).—By section 73 of the Municipal Corporations Act, 1882 (which is made applicable to the elections of county councillors by the Local Government Act, 1888), every election not called in question within twelve months after the election shall be deemed to have been to all intents a good and valid election. By section 41 penalties are imposed on any person acting in a corporate office without due qualification.

The defendant, a woman, was elected a member of a county council, and, twelve months after her election, which had not in the meanwhile been called in question, she took part in the proceedings of the council.

Held, that, even if the effect of section 73 were to render her election valid, she was nevertheless disqualified as a woman from acting, and was therefore liable to the penalties imposed by section 41.—*De Souza* v. *Cobden*, C.A. 454—[1891] 1 Q. B. 687; 60 L. J. Q. B. 533.

6. *County council—Quarter sessions—Standing joint committee—Police districts—Police Act*, 1840 (3 & 4

Vict. c. 88), *ss.* 3, 27—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 3, 9, 28, 30, 81.—The power of altering police districts, which, under the Police Act, 1840, was vested in quarter sessions, is transferred by the Local Government Act, 1888, to the standing joint committee.—*In re Local Government Act*, 1888, *Ex parte Leicestershire County Council*, Q.B.D. 160—[1891] 1 Q. B. 53; 60 L. J. M. C. 45; 64 L. T. 25.

7. *Insanitary dwellings—Demolition of—Compensation—Basis of arbitration—Liverpool Sanitary Amendment Act*, 1864 (27 & 28 *Vict. c. lxxiii.*) *ss.* 5-13—*Local Government Board Provisional Orders Confirmation Act*, 1879 (42 & 43 *Vict. c. cir.*)—By a presentment of the grand jury at the Liverpool City Sessions, under the provisions of the Liverpool Sanitary Amendment Act, 1864, certain houses were condemned as unfit for human habitation. In the proceedings which followed to determine the amount of compensation to be paid to the owner, the arbitrator made his award on the basis of the value of the site and materials of the houses only.

Held, that the houses ought to have been valued as they stood before demolition, and without reference to the fact of their approaching demolition, as premises which might have been let; and that their value was unaffected by the presentment of the grand jury.—*Gough* v. *The Corporation of Liverpool*, Q.B.D.—64 L. T. 596.

8. *Line of buildings—Buildings in streets—House in course of erection—"Front main wall of building"—"On either side thereof"—"In the same street"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 156—*Public Health (Buildings in Streets) Act*, 1888 (51 & 52 *Vict. c.* 52), *s.* 3.—In considering which is the "front main wall" of a house or building for the purpose of section 3 of the Public Health (Building in Streets) Act, 1888, and whether such house or building is "on either side of" or "in the same street" as a house or building in course of erection, for the purpose of the same section, all the circumstances of the case must be taken into consideration. The building must be looked at as a whole; its character, its position, its distance from the house or building which is being erected or brought forward in alleged contravention of section 3, must be considered; a particular wing or other projection must not be selected, the front of which is to be treated as the "front main wall" which is to give the governing line; nor are two buildings necessarily "in the same street" for the purpose of the section because one faces on the same road or street, or a continuation of the same road or street, as the other.—*Attorney-General* v. *Edwards*, CH.D. ROM., J.—[1891] 1 Ch. 194; 63 L. T. 639.

8a. *Demolition of unhealthy dwelling-house—Notice to owner—Definition of "owner"—The Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70), *s.* 29, *Form C., schedule* 4.—The definition of "owner" in Part II. of the Housing of the Working Classes Act, 1890, is that given by section 2 of the Lands Clauses Act, 1845 (8 Vict. c. 18), as "the person or corporation entitled to sell or convey" the property in question, and notice to such person or corporation of proceedings for demolition under the above Act of 1890 is sufficient, notwithstanding that the Form C. in schedule 4 is drawn as applicable to an owner under the Public Health Act, 1875, s. 4—namely, a person in receipt of the rack-rent.—*Osborne* v. *Skinners' Co.*, Q.B.D. 715.

9. *Nuisance—Smelting works—Right of local board to sue as owners of property affected—Right of local board to act as relators in respect of public nuisance—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 334.—A local authority may act as relators in an action brought by the Attorney-General for the purpose of abating a public nuisance, and may themselves maintain an action for damages for a nuisance affecting property of which they are the actual owners.

The provision in section 334 of the Public Health Act, 1875, that nothing in that Act shall extend to certain businesses therein specified, exempts their proprietors only from the liabilities created and penalties imposed by that Act, and does not relieve them from liability for a public nuisance in a suit brought by the Attorney-General for its abatement, nor from their ordinary common law liability to an owner whose property is injuriously affected by it.—*Attorney-General* v. *Logan*, Q.B.D.—[1891] 2 Q. B. 100.

10. *Paving expenses—Street—Building used partly as a chapel and partly for secular purposes—Liability of trustees as "owners"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150, 151, 257.—The defendants were the trustees of a chapel consisting of two floors. The upper floor was exclusively appropriated to public religious service, and the building as a whole was registered as a place of religious worship. Upon the lower floor were a lecture-hall and other rooms. The lecture-hall was used as a Sunday-school, and as an institute, and for lectures and concerts in connection with the institute, and for other purposes. The defendants had no beneficial interest in the building. The justices having made an order for the repayment of the expense of paving the portion of the street upon which the building abutted under section 150 of the Public Health Act, 1875,

Held, that the defendants were the "owners" of the building within the meaning of section 257, and that they were not exempt by section 151 as "the incumbent or minister of any church, chapel, or place appropriated to public religious worship"; and that, therefore, the order was rightly made.—*Hornsea Local Board* v. *Brewis*, Q.B.D.—60 L. J. M. C. 48; 64 L. T. 288.

11. *Paving expenses—Street—Recovery of expenses—Public highway—Liability of frontager—Order of Local Government Board declaring road to be a street—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150, 276.—The appellant was summoned under section 150 of the Public Health Act, 1875, for non-payment of expenses incurred by the rural authority in sewering, paving, &c., a road on which his premises abutted. An order of the Local Government Board, under section 276, had declared section 150 to be in force as to the road in question, which the order also declared to be a street. The road ran from a turnpike road to a bridge, where it passed into another parish, and was from that point repaired by the local board of that parish as a highway. It was about 900 feet long. It had on the south side several houses, including the appellant's house, abutting on it; on the north there were none for 785 feet from the turnpike road. For the rest of its course it was bounded on that side by a sewage farm belonging to the rural authority, on which were two buildings. It was a public highway. There was no evidence of formal dedication of the road, but there was evidence of its use as a public highway since 1835, and some evidence before 1835, but none inconsistent with its having been then an occupation road or footpath.

The justices held the order of the Local Government Board conclusive that the road was a street, and further held that, although in their opinion it

was not a street in the popular acceptation of the word, it was a street within the meaning of section 4 of the Public Health Act, 1875.

On a case stated,

Held, that the justices were wrong in holding that the order of the Local Government Board was conclusive that the road was a street, but that by the definition in section 4 it was a "street" within the meaning of section 150, and the appellant was liable.

Judgment of the Court of Appeal in *Corporation of Portsmouth* v. *Smith*, 13 Q. B. D. 184, and in *Jowett* v. *Local Board of Idle*, W. N., 1888, p. 187, followed.

Reg. v. *Burnup*, 50 J. P. 598, not followed.—*Fenwick* v. *Rural Sanitary Authority of Croydon Union*, Q.B.D.—[1891] 2 Q. B. 216.

12. *Rates—Rural authority—Powers for lighting district—Order of Local Government Board—Assessment of railway company—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 161, 211, 229, 276.—The first paragraph of section 161 of the Public Health Act, 1875, empowers an urban sanitary authority to contract with any person for the supply of gas or other means of lighting the streets, markets, and public buildings in their district, and to provide the necessary materials. The Local Government Board declared, by an order under section 276 of that Act, that the provisions of the first paragraph of section 161 should be in force within certain portions of a rural sanitary district, and invested the rural sanitary authority with all the powers, rights, capacities, &c., of an urban sanitary authority "under those provisions" within such portions of the district. The rural authority incurred lighting expenses under this order, and treated them as general expenses under section 229 of the Act. A poor rate having been made to defray the expenses, a railway company was assessed in respect of the full rateable value of its property, which consisted of land occupied and used as a railway.

Held, that upon the true construction of the order the rural authority was invested only with the power of an urban authority to incur lighting expenses under the provisions of the first paragraph of section 161, and not with the rating powers applicable to an urban authority under the Act; that the expenses were rightly treated as general and not as special expenses under section 229, and that the company was not entitled to be rated under section 211 of the Act, and in the proportion of one-fourth part only of the rateable value.

The decision of the Court of Appeal (23 Q. B. D. 555) affirmed.—*The Lancashire and Yorkshire Railway Co.* v. *Assessment Committee of the Bolton Union*, H.L. (E.)—15 App. Cas. 323; 60 L. J. Q. B. 118; 63 L. T. 358.

13. "*Street*"—*Passage at back of houses—New street—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 157, *sub-section* 1.—A passage planned to run along the backs of a row of new houses upon land laid out for building, and intended for access to privies and ashpits belonging to the several houses, is a new "street" within the definition clause, section 4, of the Public Health Act, 1875, and is subject to regulation by the local sanitary authority of the district under the power given by section 157, sub-section 1, of the said Act, "with respect to the level, width, and construction of new streets."—*Reg.* v. *Goole Local Board*, Q.B.D. 608—[1891] 2 Q. B. 212; 64 L. T. 595.

14. *Unsound meat—Possession of unsound meat for preparation for sale for food of man—Liability of person in possession of same to a penalty—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117—The respondent, a butcher, had purchased and had in his possession meat for the purpose of preparation for sale, and intended for the food of man. The meat was unsound and unfit for the food of man, and the respondent was so told at the time of the purchase. The respondent had not exposed the meat for sale.

Held (distinguishing the case of *Vinter* v. *Hind*, 31 W. R. 198, 10 Q. B. D. 63), that the respondent, in having the unsound meat in his possession for the purpose of preparation for sale for the food of man, was guilty of an offence under the 117th section of the Public Health Act, 1875, although he had not exposed the unsound meat for sale.—*Mallinson* v. *Carr*, Q.B.D. 270—[1891] 1 Q. B. 48; 60 L. J. M. C. 34; 63 L. T. 459.

15. *Unsound meat—Order for destruction—Penalty on person to whom such meat belongs—Exposure for sale—Nuisances Removal Act*, 1863 (26 & 27 *Vict. c.* 117), *s.* 2.—The appellant, a farmer in the country, sent meat which he knew to be unsound to a salesman in London for the purpose of being sold. The salesman never exposed the meat for sale, but showed it to the inspector of nuisances, who took it away and obtained a justice's order for its destruction.

Held, that, there having been no sale or exposure for sale, the appellant could not be convicted under section 2 of the Nuisances Removal Act, 1863.—*Barlow* v. *Terrett*, Q.B.D. 640—[1891] 2 Q. B. 107; 60 L. J. M. C. 104.

See also POOR RATE, 6; PRACTICE (APPEAL), 10.

LOCAL GOVERNMENT (IRELAND):—

1. *Election of town commissioners—Candidate acting as returning officer—Disqualification—Towns Improvement (Ireland) Act*, 1854 (17 & 18 *Vict.* c. 103).—At an election of town commissioners a candidate acted as returning officer, and gave his casting vote between two candidates who had an equal number of votes. He was himself one of the successful candidates, and declared himself duly elected.

Held, that the returning officer was disqualified as a candidate, and a new election must be held for his place, the election of the remaining commissioners standing good.—*Ex parte Mahony*, Q.B.D. (Ir.)—28 L. R. Ir. 10.

2. *Municipal franchise, Dublin—Power of Collector-General to make rate payable in instalments, and to declare the whole rate payable on default in payment of first instalment—Claims by weekly and monthly tenants to be placed on burgess roll.*—Where the Collector-General of Dublin made and published the rates for the borough of Dublin for the year 1890, and, under section 51 of the Collection of Rates (Dublin) Act, 1849 (12 & 13 Vict. c. 91), declared the same payable by two instalments, upon the 1st of January and the 1st of June in that year, and declared that upon default in payment of the first, the second or both should forthwith become payable; and weekly or monthly tenants, whose first instalments of rates had been paid after the 1st of January but previous to the 1st of June lodged claims, upon the 31st of May, to be placed on the burgess roll as rated occupiers who had complied with the requirements of the 5th section of the 12 & 13 Vict. c. 85 (requiring all rates to be paid or tendered which had accrued previous to the claim to rate being made).

Held, that the payment of the first (or January) instalment was sufficient, and that the Collector-General's declaration that default in payment of the first instalment made the whole rate payable forth-

death of the husband did not make such property liable.

Beckett v. *Tasker*, 19 Q. B. D. 7, 35 W. R. Dig. 96, affirmed.—*Pelton Brothers* v. *Harrison*, C.A. 689—[1891] 2 Q. B. 422.

10. *Separate property—Tort—Joint action for tort to wife—Damages—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* (2); *s.* 5.—A husband and wife brought an action for personal injuries sustained by the wife. The jury awarded £25 damages to the wife, and a sum to the husband for his expenses.

Held, that the £25 was the wife's separate property within the meaning of section 5 of the Married Women's Property Act, 1882, and that a garnishee order attaching the whole sum recovered in the hands of the plaintiff's solicitor, to answer a judgment debt of the husband, was bad.—*Beasley* v. *Roney*, Q.B.D. 415—[1891] 1 Q. B. 509; 60 L. J. Q. B. 408.

11. *Settlement—Infant—Voidable settlement—Confirmation by appointment of new trustee—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 4.—By an ante-nuptial settlement the wife, being then a minor, with the sanction of her guardian, purported to agree, and the husband covenanted with the trustees, that as soon as she was twenty-one she and her husband would assign a legacy to which she would then be entitled to the trustees upon the trusts of the settlement, and the husband and wife covenanted to settle the wife's after-acquired property. The legacy was not assigned to the trustees after the wife came of age, but she and her husband by deed appointed a new trustee of the settlement under the power therein contained.

Held, that the mere appointment of a new trustee by the wife could not be treated as expressing an intention by her to confirm the settlement, and that the wife was therefore entitled to repudiate the settlement.—*Haywood* v. *Tidy*, CH.D. KEK., J.—63 L. T. 679.

12. *Tenant in tail—Acknowledgment by—Base fee—Concurrence of husband—Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *ss.* 1, 15, 19, 40, 77—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 1; *s.* 2.—By an indenture dated in 1884, duly enrolled, two ladies, then spinsters and tenants in tail in remainder, barred their estates tail and conveyed certain lands to S. for the base fee thereby created. The two ladies afterwards married after the commencement of the Married Women's Property Act, 1882. Subsequently to their marriages the protector of the settlement died, and the base fee fell into possession. The two ladies then executed a deed, unacknowledged and without the concurrence of their husbands, for the purpose of enlarging the base fee into a fee simple absolute.

Held, that the deed was effectual to pass the fee simple absolute.—*In re Drummond and Davies' Contract*, CH.D. CHI., J. 445—[1891] 1 Ch. 524; 60 L. J. Ch. 258; 64 L. T. 246.

See also ADMINISTRATION, 5; CONTRACT, 2; EXECUTOR, 3; INDEMNITY; INNKEEPER, 1; PROBATE, 17; UNDUE INFLUENCE; WILL, 33.

MASTER and SERVANT:—

1. *Action for continuing to employ servant after notice of prior contract.*—An action will lie against a person who continues to employ the servant of another after notice of a prior contract of service, and this doctrine applies where the relation is that of employer and employed, and not that of master and servant.—*De Francesco* v. *Barnum* (2), CH.D. FRY, L.J.—63 L. T. 514.

2. *Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *s.* 16—*Exemption of seamen from application of Act—Offences committed upon seamen not exempt.*—The delegate of a Firemen and Seamen's Union, upon being summoned under the Conspiracy Act, 1875, s. 7, for intimidating a seaman from joining a ship, objected that, the prosecutor being a seaman, the provisions of the Act were, by section 16, not to apply to seamen.

Held, on case stated by the justices, that section 16 did not apply to cases where offences dealt with by the Act of 1875 were committed on seamen, and that the objection could not be upheld.—*Kennedy* v. *Cowie*, Q.B.D. 686—[1891] 1 Q. B. 771; 64 L. T. 598.

3. "*Dispute*"—*Justices—Jurisdiction—Six months' limitation under Jervis's Act* (11 & 12 *Vict. c.* 43) *not applicable—Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 4.—By the Employers and Workmen Act, 1875, s. 4, "A dispute under this Act between an employer and a workman may be heard and determined by a court of summary jurisdiction, and such court, for the purpose of this Act, shall be deemed to be a court of civil jurisdiction."

Held, that the word "dispute" is not limited to strictly legal causes of action; following *Clemson* v. *Hubbard*, 24 W. R. 312, 1 Ex. D. 179.

Held, further, that the time for bringing a complaint under the above Act before the court was not limited to six months from the time when such complaint arose within the terms of section 11 of the Summary Jurisdiction Act, 1848, nor did that Act apply to a court of summary jurisdiction sitting under the Employers and Workmen Act, 1875, as a court of civil jurisdiction.—*Charles* v. *Mortgagees of Plymouth Waterworks*, Q.B.D. 122—60 L. J. M. C. 22; 64 L. T. 466.

4. *Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42)—*Negligence—Machinery—Defect in condition of—Workman's knowledge of defect*—Volenti non fit injuria—*Nonsuit.*—B., a workman, whose duty it was to attend to and work at a machine which was defective, and of which defect he had knowledge, continued to work at the machine, notwithstanding the master's refusal to repair it when the defect was brought to his notice by the workman.

In consequence of the defect B. was obliged to step upon the "bed" or plate of the machine to adjust part of it, and, whilst doing so, received injuries.

In an action to recover compensation for such injuries the county court judge nonsuited the plaintiff because he continued to work a machine which he knew to be in a defective condition.

Held, that the plaintiff's knowledge of the defect did not amount to that thorough comprehension of the risk incurred which alone would have justified the withdrawal of the case from the jury.—*Brooke* v. *Ramsden*, Q.B.D.—63 L. T. 287.

5. *Wages paid to railway porter—Deduction for sick fund—Truck Act*, 1831 (1 & 2 *Will.* 4, *c.* 37), *ss.* 1-3, 23—*Truck Act*, 1887 (50 & 51 *Vict. c.* 46).—The plaintiff, a railway porter, sued his employers, a railway company, for deductions made from his wages applied as contributions to a sick fund under the terms of a written agreement signed by him, the amount of such deductions being shown by the defendants to have been, in fact, expended in medical relief to the plaintiff and his wife.

Held, that a contract for deductions to be applied

for medical relief was not in contravention of the Truck Act, 1831, and the amending Act of 1887, but came within the contracts legalized for exceptional purposes under section 23 of the Truck Act, 1831, and that the permissory provisions of section 23 must be read on to the prohibitory provisions of the amending Act of 1887.

Quære, whether a railway porter came within the term "a person engaged in manual labour."—*Lamb* v. *Great Northern Railway Co.*, Q.B.D. 475—[1891] 2 Q. B. 281; 60 L. J. Q. B. 489.

6. "*Workman*" — "*Manual labour*" — *Grocer's assistant* — *Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10.—A person was employed as an assistant in a grocer's shop, his duties being to serve customers, to make up parcels of goods, and to carry them to a cart at the shop door, and occasionally to assist in bringing up heavier goods from the cellar to the shop.

Held, by Grantham, J. (A. L. Smith, J., dissenting), that he was a workman within the definition in section 10 of the Employers and Workmen Act, 1875.—*Bound* v. *Lawrence*, Q.B.D. 457—60 L. J. M. C. 137; 64 L. T. 470.

7. "*Workman*"—"*Otherwise engaged in manual labour*"—*Guard of a goods train*—*Truck Amendment Act*, 1887 (50 & 51 *Vict. c.* 46)—*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10.—The plaintiff was in the employment of a railway company as guard of a goods train. His main duty was to guard and conduct the train and to marshall the trucks; but it was also part of his duty at times to assist in coupling and uncoupling the trucks, and in unloading them.

Held, that he was not a "workman" as defined by section 10 of the Employers and Workmen Act, 1875, and was not, therefore, a person to whom the provisions of the Truck Acts (1 & 2 Will. 4, c. 37 and 50 & 51 Vict. c. 46) applied.—*Hunt* v. *Great Northern Railway Co.*, Q.B.D.—[1891] 1 Q. B. 601; 60 L. J. Q. B. 216; 64 L. T. 418.

See also FALSE IMPRISONMENT; POOR LAW (IRELAND), 2; SEDUCTION.

MERCHANDISE MARKS ACT. — See TRADE-MARK, 2.

MERSEY NAVIGATION.—See SHIP, 21.

METROPOLIS MANAGEMENT ACTS:—

1. *Building*—"*Adjoining owner*" — *Tenement*—*Notice by building owner* — *Injunction* — *Separate tenements*—*Metropolitan Building Act*, 1855 (18 & 19 *Vict. c.* 122), *ss.* 3, 82, 85, *sub-section* 1.—A tenant in possession of part of a house under an agreement for a greater interest than an interest from year to year is an "adjoining owner" within section 82 of the Metropolitan Building Act, 1855, and is, therefore, entitled, under section 85, sub-section (1), to three months' notice from the building owner of any intended alteration to a party structure.

Cowen v. *Phillips*, 11 W. R. 706, 33 Beav. 18, followed.—*Fillingham* v. *Wood*, CH.D. CHI., J. 282—[1891] 1 Ch. 51; 60 L. J. Ch. 232; 64 L. T. 46.

2. *Line of buildings*—*Metropolitan Building Acts*—*Metropolitan Building Act*, 1855 (18 & 19 *Vict. c.* 122), *s.* 26—*General Paving* (*Metropolis*) *Act*, 1817 (57 *Geo.* 3, *c. xxix.*), *s.* 72—*Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 119—*Street*—*Projections*—*Pilaster encroaching on public footway.*—By 57 Geo. 3, c. xxix. (Michael Angelo Taylor's Act), s. 72, power is given to the persons having the control of the pavements of streets in the metropolis to regulate or remove all projections from the fronts of the houses which in their judgment are inconvenient or incommodious to passengers along the footway, and a penalty of not less than forty shillings nor exceeding five pounds is imposed upon any owner or occupier who does not immediately remove any such projection after notice to do so.

By section 119 of the Metropolis Management Act, 1855 (19 & 19 Vict. c. 120), it is enacted that if any projections placed in front of any house after the commencement of the Act shall be an annoyance in consequence of the same rendering less commodious the passage along any street, the vestry may give notice to the owner or occupier to remove such projection, and that if he shall neglect within fourteen days after the service of such notice upon him to remove such projection he shall forfeit a sum not exceeding five pounds, and a further sum not exceeding forty shillings for every day during which the projection continues after the date of his conviction.

By section 26 of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), "the following rules shall be observed as to projections . . . (2) In any street or alley of a width greater than thirty feet any shop front may project ten inches and no more. (5) Except in so far as is permitted by this section in the case of shop fronts, and with the exception of . . . cornices . . . and other like architectural decorations, no projection from any building shall extend beyond the general line of fronts in any street except with the permission of the Metropolitan Board of Works."

The appellant built upon the side of a public street, which was of a width greater than thirty feet, certain shops upon ground of which he was lessee, and erected against the fronts of the shops certain pilasters which projected into the street beyond the general building line to the extent of nine inches of the footway. The respondents passed a resolution declaring the pilasters to be inconvenient and incommodious to passengers along the footway, and served the appellant with a notice to remove them forthwith, and upon his neglecting to comply with the notice took out a summons against him under section 72 of Michael Angelo Taylor's Act. The magistrates convicted the appellant.

Held, that the conviction must be quashed on the grounds:—

(1) That section 119 of the Metropolis Management Act, 1855, was inconsistent with and impliedly repealed section 72 of Michael Angelo Taylor's Act, and that consequently, assuming the projections in question were unlawful, the proceedings had been taken under the wrong Act.

(2) That the projections in question were not unlawful, for that section 26 of the Metropolitan Building Act, 1855, authorized projections beyond the general building line (to the limited extent therein specified) whatever the position of the building line might be, and not only where, the building line being set back from the street, the projections were capable of being made on private land.

Vestry of St. Mary, Islington v. *Goodman*, 23 Q. B. D. 154, overruled.—*Fortescue* v. *Vestry of St. Matthew, Bethnal Green*, Q.B.D.—[1891] 2 Q. B. 170.

3. *Paving expenses*—*New street*—*Liability for expense of paving*—"*Owner*" *of land*—*Land vested in Ecclesiastical Commissioners for purposes of Church Building Acts*—*Site of a church*—*Part left unconsecrated*—*Divesting*—*Church Building Acts*—58 *Geo.* 3, *c.* 45, *s.* 33—59 *Geo.* 3, *c.* 134, *s.* 34—3 *Geo.* 4, *c.* 72, *s.* 34—8 & 9 *Vict. c.* 70, *s.* 13—*Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolis Local Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77.——Where land has been con-

veyed to the Ecclesiastical Commissioners for the purposes of the Church Building Acts as a site for a new church, and a church has been built on part of such land, the effect of the consecration of the church and part of such land is to vest the whole of the land conveyed in the incumbent for the time being of such church, under 8 & 9 Vict. c. 70, s. 13. The commissioners, therefore, are not liable to contribute to the expenses of paving a new street upon which the unconsecrated part of such land abuts, as "owners" of such unconsecrated land within the meaning of the Metropolis Local Management Acts, 1855 and 1862.—*Plumstead District Board of Works* v. *Ecclesiastical Commissioners for England*, Q.B.D. 700—[1891] 2 Q. B. 361; 64 L. T. 830.

4. "*Refuse of trade, manufacture, or business*"—*Removal of ashes—Vestry—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 125, 128.—Clinkers produced in the furnaces of certain boilers in an hotel, and used to generate steam for supplying power for the electric lighting of the hotel, for the heating of the public rooms, and for other purposes, are not "refuse of a trade, manufacture, or business" within section 128 of the Metropolis Local Management Act, 1855, so as to entitle the vestry to demand payment for their removal.

Per Lord Esher, M.R., and Lopes, L.J.—*Gay* v. *Cadby*, 2 C. P. D. 391, 25 W. R. Dig. 156, dissented from.—*St. Martin's Vestry* v. *Gordon*, C.A. 295—[1891] 1 Q. B. 61; 60 L. J. M. C. 37; 64 L. T. 243.

5. *Street traffic—Unloading coke during prohibited hours—Traffic Regulation (Metropolis) Act*, 1867 (30 & 31 *Vict. c.* 134), *s.* 15.—Section 15 of the Traffic Regulation (Metropolis) Act, 1867, prohibits the loading or unloading of coal on or across any footway during certain hours.

Held, that a person who had unloaded coke on a footway during the prohibited hours was not guilty of an offence under this section.—*Fletcher* v. *Fields*, Q.B.D. 655—[1891] 1 Q. B. 790; 60 L. J. M. C. 102; 64 L. T. 472.

6. *Streets—Closing of passage by justices—Interpretation of statute*—57 *Geo.* 3, *c. xxix.*, *s.* 79 (*local and personal*) (*Michael Angelo Taylor's Act*).—At a special session of justices held under section 79 of 57 Geo. 3, c. xxix. (local and personal), an application for an order to close a certain passage was refused solely on the ground that there was no jurisdiction to make the order, because it did not appear that the passage was in fact "a harbour or receptacle for filth and rubbish" within the meaning of the preamble to the said section.

Held, that the construction put upon the section by the justices was erroneous, for its meaning was to give them jurisdiction if the passage was likely to, or might possibly become, a harbour or receptacle for filth and rubbish.—*Reg.* v. *Cloete*, Q.B.D.—64 L. T. 90.

7. *Vestry—Election of vestryman—Qualification—Occupation of club premises as secretary—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 6.—The qualification of a candidate for the office of a vestryman was that he was rated in respect of the house in which he resided at £19 per annum, and that he was rated jointly with another person in respect of the premises of a certain club, of which he was secretary, at £55 per annum. The qualification required for the particular parish under section 6 of the Metropolis Local Management Act, 1855, was the being rated upon a rental exceeding £25 per annum in respect of the occupation of premises within the parish.

Held (affirming the decision of the Queen's Bench Division, 39 W. R. 8), that, since he was not in the occupation of the club, his qualification was insufficient.—*Reg.* v. *Soutter*, C.A. 65—[1891] 1 Q. B. 57; 60 L. J. Q. B. 71; 64 L. T. 40.

See also NEGLIGENCE, 3.

MINE:—

1. *Gold mine—Gold found with other metals—Rights of Crown—Licence to work*—1 *W. & M. c.* 30, *ss.* 2, 4—5 *W. & M. c.* 6, *ss.* 2, 3.—A mine not worked or worth working except as a gold mine, though containing a certain quantity of copper, tin, iron, or lead, is not a "mine of copper, tin, iron, or lead" within the meaning of the Act 1 W. & M. c. 30, or (therefore) a "mine . . . wherein any ore . . . is . . . found . . . in which there is copper, tin, iron, or lead" within the meaning of the Act 5 W. & M. c. 6 (which two expressions—the latter Act being explanatory of the former—must be taken to mean the same thing). Such a mine is a gold mine, and consequently, being in the United Kingdom, a royal mine, and cannot be worked without a licence from the Crown.

The effect of section 3 of 5 W. & M. c. 6 is to authorize the owners of copper, tin, iron, or lead mines—that is, mines worked for, and deriving their profit mainly from, copper, tin, iron, or lead—to work them as such, though they contain also gold or silver; the rights of the Crown being protected by giving it an option to take the ore containing gold or silver at certain fixed prices, but so that, if the Crown does not choose so to take the ore, the owners may dispose of it for their own benefit. But that section does not mean that, wherever there is any one or more of the four named base metals associated with gold or silver in a mine, and without reference to the question whether or not the mine is worth working for such base metal, the owner is to be entitled to the gold or silver in case the Crown does not exercise its option of taking the mixed ore at the statutory price.

Decision of North, J. (39 W. R. 169), affirmed.—*Attorney-General* v. *Morgan*, C.A. 324—[1891] 1 Ch. 432; 60 L. J. Ch. 126; 64 L. T. 402.

2. *Offences—"Working shaft"—Guides—Metalliferous Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 77), *s.* 23, *sub-section* 10.—By section 23, sub-section 10, of the Metalliferous Mines Regulation Act, 1872, "every working shaft in which persons are raised" shall, under certain specified circumstances, be provided with guides, and persons contravening the provisions of the section are made liable to a penalty.

The shaft of a lead mine was completed, and a tunnel driven from the bottom of it for the purpose of arriving at the ore, but no ore had been gotten. The men employed in the mine were drawn up the shaft in a bucket unprovided with guides.

Held, that the shaft was a "working shaft" within the meaning of section 23, sub-section 10, and, therefore, that the owners of the mine were liable to be convicted of an offence against that section.—*Foster* v. *North Hendre Mining Co.*, Q.B.D.—[1891] 1 Q. B. 71; 60 L. J. M. C. 6; 63 L. T. 458.

3. *Wages—Payment by weight of mineral—"Actual weight gotten of mineral contracted to be gotten"—Coal Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 76), *s.* 17.—By sub-section 1 of section 12 of the Coal Mines Regulation Act, 1887: "When the amount of wages paid to any of the persons employed in a mine depends on the amount of minerals gotten by them, those persons shall be paid according to the

actual weight gotten by them of the mineral contracted to be gotten; . . . provided that nothing in the section shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in the mine that reductions shall be made in respect of stones or substances other than the mineral contracted to be gotten which shall be sent out of the mine with the mineral contracted to be gotten."

The plaintiffs were employed in the defendants' collieries to cut large coal, at wages which depended on the weight gotten. The coal raised was screened at the pit's mouth, and the defendants made deductions from the plaintiffs' wages in respect of the small coal which it was found to contain. The plaintiffs sued the defendants for the amounts so deducted.

Held, that the case of *Netherseal Colliery Co.* v. *Bourne*, 14 App. Cas. 228, under the Coal Mines Regulation Act, 1872, applied; that the deductions were illegal under section 12, sub-section 1, of the Coal Mines Regulation Act, 1887; and that the plaintiffs were therefore entitled to recover.—*Brace* v. *Abercarn Colliery Co.; Huggins* v. *London and South Wales Colliery Co.*, Q.B.D.—[1891] 1 Q. B. 496; 64 L. T. 419.

See also BOILER; FEE FARM GRANT; INTEREST, 1; WATERWORKS, 1.

MISREPRESENTATION. — See COMPANY (PROSPECTUS), 12—15.

MORTGAGE:—

1. *Absolute conveyance—Admissibility of evidence to contradict terms of the deed.*—Where the appellant had deposited with the respondent bank his title deeds to certain property in order to secure a cash credit, and afterwards executed an absolute conveyance thereof to the bank in pursuance of an agreement recited therein to the effect that the price paid should be by deducting £400 from the amount due,

Held, that, although collateral evidence was admissible to show that, notwithstanding the plain terms of the deed, the relationship of mortgagee and mortgagor still subsisted between the parties, yet in this case it was wholly insufficient to overcome the presumption that the deed of conveyance truly stated the transaction.—*Barton and Bank of New South Wales*, P.C.—15 App. Cas. 379.

2. *Foreclosure—Opening accounts—Order absolute—Discharge of receiver—Rents not accounted for by receiver—Application to re-open foreclosure and for further account.*—Some months after the usual order for foreclosure absolute had been made in favour of first mortgagees against the mortgagor and second mortgagees, and after the first mortgagees acting upon that order had actually sold portions of the mortgaged property, the mortgagor discovered that the receiver had omitted from his accounts certain rents which he had received.

The mortgagor accordingly moved that the foreclosure might be re-opened; and that the first mortgagees might be restrained from parting with the legal estate of the mortgaged property.

Held, that there was no evidence that the first mortgagees had received any of the rents for which the receiver had not accounted, and there was no reason why the foreclosure should be re-opened merely because the receiver, who was not the agent of the first mortgagees for all purposes, but was an officer of the court, had made a mistake which the mortgagor had not discovered before it was too late; that the case did not come within the authority of *Jenner-Fust* v. *Needham*, 32 Ch. D. 582, 55 L. T. N. S. 37; and that, therefore, the motion failed.—*Ingham* v. *Sutherland*, CH.D. KEK., J.—63 L. T. 614.

3. *Foreclosure—Order absolute—Direction for delivery of possession—Form of order—Identification of property—Writ of possession—Rules of Supreme Court*, 1883, *ord.* 47, *rr.* 1, 2—*Appendix H., Forms* 7a, 8.—An order for the delivery of possession of mortgaged property by the mortgagor to the mortgagee, forming part of a judgment for foreclosure absolute, ought to contain a description of the property as set forth in the mortgage deed, in order that the writ of possession may be filled up in such a way as to enable the sheriff to identify the property of which he is directed to deliver possession.—*Thynne* v. *Sarl*, CH.D. NOR., J.—[1891] 2 Ch. 79; 60 L. J. Ch. 590; 64 L. T. 781.

4. *Foreclosure—Order absolute—Evidence of non-payment of mortgage moneys.*—Upon a motion for a final order of foreclosure, an affidavit made on the 20th of February last by J. D., one of two joint mortgagees, and by James S., was tendered in evidence. John S., the other mortgagee, had in 1874 gone to reside in New Zealand, and had granted James S. a power of attorney to act for him in the matter of the mortgage. Under the authority of this power, and under power of attorney granted by J. D., James S. had attended on the 31st of January last to receive payment of the mortgage moneys.

The affidavit stated that John S. was still in New Zealand; that default had been made in payment of the mortgage moneys; and that the whole of this sum remained due to the mortgagees.

Held, that the affidavit was not sufficient, and that more recent evidence must be adduced.

At the subsequent hearing of the motion an affidavit made by James S. alone on the 21st of March last was produced. In this James S. stated that John S. was still residing in New Zealand, that J. D. was away from his home in Derbyshire, and that his whereabouts was unknown, and that to the best of his knowledge the mortgage moneys remained unpaid.

Held, that an affidavit made by James S. alone was insufficient.—*Docksey* v. *Else*, CH.D. NOR., J.—64 L. T. 256.

5. *Foreclosure—Parties—Death of mortgagor insolvent and without a personal representative before the time limited for redemption—Representative for purposes of action.*—An order for foreclosure was obtained in a foreclosure action, but the defendant mortgagor died insolvent before the expiration of the period limited for redemption of the mortgaged property. There was no personal representative of his estate, and an order was made appointing one of his next of kin to represent his estate for the purposes of the action.

Held, on a motion for foreclosure absolute, that no order would be made in the absence of a properly-constituted representative of the mortgagor's estate.—*Aylward* v. *Lewis*, CH.D. NOR., J. 552—[1891] 2 Ch. 81; 64 L. T. 250.

6. *Foreclosure—Parties—Plaintiff joined as co-defendant—Trustees of mortgagor—Representation of cestuis que trust.*—In a foreclosure action by a first mortgagee against the second, third, and fourth mortgagees, and the executors and trustees of the will of the mortgagor, the plaintiff was also joined as a defendant, as one of the second mortgagees. The persons interested under the will of the mortgagor were not made parties to the action.

Held, that a man could not be both plaintiff and defendant in an action, and that the writ and plead-

ings must be amended by striking out the name of the plaintiff as a co-defendant.

Held, that the *cestuis que trust* under the will were not sufficiently represented by the trustees, and that judgment for foreclosure could not be given in their absence.

Held, that the *cestuis que trust* were sufficiently represented by the trustees for the purpose of taking the accounts as against the mortgagees.—*Wavell* v. *Mitchell*, CH.D. KEK., J.—64 L. T. 560.

7. *Foreclosure—Subsequent sale to person entitled to redeem—Opening of foreclosure decree.*—After a decree for foreclosure one of the defendants in the action purchased the lands from the executors and trustees of the mortgagee, who had died subsequent to the decree, the purchase-money being the amount due on the mortgage and costs, payment of the principal being deferred for five years, and interest being payable in the meantime.

Held, that the foreclosure decree was not thereby opened, and the defendant could make a good title upon a sale.—*In re Power and Carton's Contract*, M.R. (Ir.)—25 L. R. Ir. 459.

7a. *Pretenced title—Possession through tenant at will—Parol evidence*—10 *Car.* 1, *sess.* 3, *c.* 15, *s.* 2 (*Ir.*)—A testator died in 1871, having, by his will, divided his farm between his two sons, the defendant and H. His widow was given, by the will, a right to live in the farmhouse, which was on the defendant's part, during her life. By deed dated the 21st of March, 1874, the defendant assigned his part of the farm to his brother H. in consideration of a covenant on the part of H. to pay the defendant after the death of their mother, an annuity of £10, and to maintain him and his sister M. during their respective lives. Previous to the execution of the deed it was verbally arranged between the brothers that the defendant should remain in possession of the farm as formerly, and pay the rent during their mother's life. Defendant remained in possession until the death of the mother in 1888, M. having predeceased her.

By deed dated the 15th of May, 1883, H. mortgaged the lands to F., and interest was duly paid thereon. F. and H. having brought a civil bill ejectment to recover the farm, the recorder of Belfast dismissed the action.

Held, by Gibson, J. (reversing the decision of the court below), (1) that evidence of the parol agreement between the defendant and H. prior to the execution of the deed of assignment of the 21st of March, 1874, was admissible to explain defendant's continuance in possession; (2) that the defendant's possession was not adverse, but that H. was in possession, through the defendant, as his tenant at will, and that, consequently, the mortgage was not void as a dealing with a pretenced title within 10 Car. 1, sess. 3, c. 15, s. 2 (Ir.)

Quære, whether an ordinary mortgage security, taken by the mortgagee in good faith, is avoided by the fact that the mortgagor is out of possession.—*Fleming* v. *Moore*, Q.B.D. (Ir.)—28 L. R. Ir. 373.

8. *Principal and surety—Covenant for repayment—Consolidation of mortgages—Covenant for repayment at a later date—Discharge of surety by giving time.*—By a covenant in a mortgage deed of the 4th of September, 1857, the mortgagor and the defendant, as surety, covenanted to pay the mortgage debt of £450 on the 4th of March, 1858. By a deed of the 15th of December, 1884, to which the defendant was not a party, this mortgage and other mortgages on other properties were consolidated. Under this deed the several mortgagees were paid off, and they assigned their mortgages to the plaintiff, with the full benefit of the covenants in the respective mortgage deed. The mortgagor by this deed covenanted with the plaintiff to repay the full amount of the mortgage debt on the 19th of January, 1885.

Held, that, by the covenant in the deed of 1884, the time for repayment of the mortgage debt of £450 contained in the deed of 1857 had been enlarged, and the liability of the defendant as surety had been discharged.—*Bolton* v. *Buckenham*, C.A. 293—[1891] 1 Q. B. 278; 60 L. J. Q. B. 261; 64 L. T. 278.

9. *Principal and surety—Covenant for repayment—Giving security—Discharge of liability on covenant—Release of security.*—Where a person joins in a mortgage as security for the mortgagor by covenanting for payment of the mortgage debt, and gives security, if the surety be discharged from the covenant by reason of the contract with the principal debtor being altered, the security given by him is also released.—*Bolton* v. *Salmon*, CH.D. CHI., J.—[1891] 2 Ch. 48; 60 L. J. Ch. 239; 64 L. T. 222.

10. *Priority—Real estate—Notice.*—W. A. R., a solicitor, having received money from a client, W. F. H., in 1883, for the purpose of investment, represented to him that he had invested it upon a mortgage, which, in fact, was one he had previously taken in his own name, and it was never transferred into the client's. W. A. R. afterwards deposited the title deeds of the mortgaged property with his bankers to secure his own overdrawn account; but, as he regularly paid interest to W. F. H. down to his death, and subsequently to his executors, the fact of this deposit was unknown to them until W. A. R.'s death in 1888, when the bank gave notice to the mortgagors of the property, the account being overdrawn to a larger amount than its value. The bank had no notice of W. F. H.'s claim at the date of the deposit, and their notice to the mortgagors was prior to any notice given by his executors.

Held, first, that W. A. R. was a trustee of the mortgage for W. F. H., and that neither W. F. H. nor his executors had been guilty of negligence such as to postpone their priority; and, secondly, that the principle of *Dearle* v. *Hall*, 3 Russ. 1, did not apply, and therefore the bank was not entitled to priority by having given notice before the executors to the mortgagors.—*In re Richards, Humber* v. *Richards*, CH.D. STI., J. 186—45 Ch. D. 589; 59 L. J. Ch. 728; 63 L. T. 451.

11. *Redemption—Attempt to fetter equity of redemption—Policy of insurance.*—C. charged a reversionary interest in real estate, to which he was entitled contingently on his surviving N., with the repayment, with interest thereon, of a sum of £10,000 advanced to C. by the trustees of an insurance society, and also with the repayment of the premiums of a policy for £34,500, which, in pursuance of the contract between C. and the trustees, was effected by the trustees on the life of C. as against that of N.

The contract also contained stipulations that, in the event of C. not having paid to the trustees the whole of the sums due by him before the death of N., the policy should belong absolutely to the trustees; that, in the event of C. paying the trustees before the death of N. the whole of the sums due to them, the trustees should forthwith assign the policy to C.; and that, in the event of C. predeceasing N. without having paid all principal moneys, interest, and costs due to the trustees, the policy should belong absolutely to them.

C. died in the lifetime of N. without having paid anything to the trustees, and C.'s legal personal representative now claimed to be entitled to redeem the policy.

The premiums on the policy had been paid by the trustees.

Held by the Court of Appeal (Bowen, L.J., dissenting), that the contract as regards the policy was part of one whole mortgage transaction; that the stipulations which provided that, in certain events, the policy should belong absolutely to the trustees were invalid, as clogging the equity of redemption, and, therefore, that C.'s representative was entitled to redeem the policy.

Decision of North, J. (38 W. R. 346), affirmed.—*Northampton (Marquis of)* v. *Pollock*, C.A. 66—45 Ch. D. 190; 59 L. J. Ch. 745; 63 L. T. 136.

12. *Redemption—Payment off by part owner of property under mistake—Presumption of intention to keep mortgage alive.*—A person who, believing himself to be the owner of an estate, pays off a mortgage upon it, when he is in fact only owner of a portion, will be presumed by the court, in the absence of any express declaration by him, to have made the payment for his own benefit, and the mortgage will be deemed to be kept alive as to the portion of the estate not belonging to him.

A testator devised hereditaments, which were subject to mortgage, to his six children, including P. and S. P. acquired three more of the six shares, and in 1859 he purchased the share of S. In 1862 S. commenced a suit to set aside this sale to P., but before the decree P. paid off the mortgage on the five-sixths of the property to which he believed himself to be entitled.

Held, that the mortgage was kept alive as against the share of S. for the benefit of P.—*In re Pride, Shackell* v. *Colnett*, CH.D. STI., J. 471—[1891] 2 Ch. 135; 64 L. T. 768.

13. *Tacking—Priority.*—A subsequent mortgagee, who, at the time he advanced his money, had no notice of any prior equitable mortgage, can, by getting in the legal estate, even after notice of the existence of a prior equitable mortgage, thereby protect himself against any claim for priority on the part of such prior equitable mortgagee, provided that the legal estate has been obtained without the violation of any trust or equity in regard to the prior equitable mortgagee against whom the legal estate is set up. The fact that the conveyance of the legal estate constituted a breach of trust as against some third person does not prevent the holder of the legal estate getting the benefit of its protection in an action for a declaration of priority brought against him by the prior equitable mortgagee.

Harpham v. *Shacklock*, 30 W. R. 49, 19 Ch. D. 207, explained and distinguished.

Decision of Kay, J. (reported 38 W. R. 663), reversed.—*Taylor* v. *Russell*, C.A. 81—[1891] 1 Ch. 8; 60 L. J. Ch. 1; 63 L. T. 593.

14. *Valuation—Valuers—Negligence—Loss—Action against valuers—Contractual relation.*—A firm of valuers were employed to value certain property with a view to its being offered as a mortgage security. The valuers were suggested by a firm of solicitors, who were to find a mortgagee, it being understood, both by the valuers and the solicitors, that the valuation was to be made on behalf of the intended mortgagee. The plaintiff, who was a client of the solicitors, became the mortgagee, on the faith of the valuation being made by the valuers. The valuation was not conducted with due skill and care, and the security turned out greatly insufficient.

Held, that the true inference to be drawn from the evidence, apart from an admission contained in the pleadings, was that the valuers were actually employed by the plaintiff; and that, as they had been negligent in the performance of the work undertaken, they were liable to the plaintiff for the damage caused by such negligence.

Decision of Romer, J. (63 L. T. N. S. 837), affirmed.—*Scholes* v. *Brook*, C.A.—64 L. T. 674.

See also BANKRUPTCY, 1; DEED; LAND, ACTION TO RECOVER POSSESSION; LIMITATIONS, STATUTE OF, 4; SHIP, 32; SOLICITOR, 6, 8, 17.

MORTMAIN.—See CHARITY, 6—8.

MUNICIPAL CORPORATION:—

1. *Election — Disqualification — Member of firm interested in contracts with corporation—Dissolution of partnership—Continuing liability of candidate—Votes thrown away—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 12, 22.—The respondent was a member of a firm interested in continuing contracts with a corporation of a borough unexpired at the time of a municipal election for that borough. Before becoming a candidate the respondent dissolved partnership, and assigned all his interest in the contracts to his partner, remaining liable, however, on bonds securing the due performance of the contracts. The corporation was not a party to the assignment. The respondent's connection with the contracts and the fact that his candidature was objected to on that ground were notorious in the ward.

Held, that the respondent was disqualified for election by section 12 of the Municipal Corporations Act, 1882; and that the votes given for him were thrown away, and the other candidate entitled to be declared elected.—*Cox* v. *Ambrose*, Q.B.D.—60 L. J. Q. B. 114.

2. *Election of councillor—Qualification—Entitled to be enrolled as a burgess—Mother succeeded by son as keeper of an inn—No assignment of lease—No transfer of licence—Rates made out in mother's name—Claim by son to be rated—Payment of rates by son—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 9, *sub-section* 2; *s.* 11, *sub-section* 2 (a); *s.* 32.—In October, 1888, J. M. went with his wife and family to live at an inn in the borough of W., of which his mother had been the licensed occupier for some years. He took over the entire management of the inn, though his mother continued to live there, and her name remained over the door, The excise licences continued to be taken out in the mother's name. There was no transfer of the licence of the premises to J. M., nor any assignment of the lease. In June, 1889, he requested the overseer to enter his name in the rate-book. His name was not so entered, but he paid the rates which became due in October, 1889, and April, 1890. His name appeared in the burgess-roll which was published on the 1st of August, 1890.

Held, by the Queen's Bench Division, that he was entitled to be enrolled as a burgess, and, being enrolled, he was qualified to be elected as a councillor.—*Unwin* v. *McMullen*, Q.B.D. 712—[1891] 1 Q. B. 694; 60 L. J. Q. B. 400.

NATIONAL DEBT COMMISSIONERS:—

Unclaimed stock—List of holders—Bank of England—Right to inspection—Mandamus—*National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *ss.* 51, 52.—The National Debt Act, 1870 (ss. 51, 52), provides for the transfer of unclaimed stock to the National Debt Commissioners and for the entry of the names in which the stock stood immediately before the

transfer, with other particulars, in a list to be kept by the Bank of England, "which list shall be open for inspection at the usual hours of transfer."

Held, that "open for inspection" meant "open for inspection by any person claiming an interest in the stock," and that a *mandamus* to the bank to permit inspection of the list ought not to go upon the application of a person who did not *bonâ fide* claim such an interest.—*Reg.* v. *Bank of England*, Q.B.D. 558—[1891] 1 Q. B. 785; 60 L. J. Q. B. 497; 64 L. T. 468.

NAVY:—

Naval discipline—Officer holding Her Majesty's commission—Ship in commission—Name borne on ship's books—Leaving ship without resignation having been accepted—Arrest—Court-martial—Naval Discipline Act, 1866 (29 & 30 *Vict. c.* 109), *ss.* 19, 87—*Marine Mutiny Act*, 1878 (41 & 42 *Vict. c.* 11)—*Naval Regulations*, 210, 211, 1906.—A commissioned officer in the Royal Navy was appointed as additional engineer on *The P.* for service on *The M.*, and his name was entered and borne on the books of *The P.* He was subsequently appointed to *The M.*, and served on her until she was paid off, when he returned on board *The P.* His name, however, was not entered afresh on the books of *The P.* He subsequently tendered his resignation, which was refused. Pending such refusal he left the country without leave, was arrested, and detained in custody pending trial by naval court-martial under the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109).

Held, on an application for a writ of *habeas corpus*, that the original appointment to *The P.* was superseded by that to *The M.*, and that the latter came to an end when *The M.*, was paid off, and that, although the officer's name still appeared under the original entry on the books of *The P.*, yet, as there had been no fresh appointment to *The P.*, and no re-entry of the officer's name on the books of that ship, he was not at the time of desertion borne on the books of *The P.*, or of a ship in commission.—*In re Hearson*, Q.B.D.—64 L. T. 535.

NEGLIGENCE:—

1. *Damages—Railway company—Lord Campbell's Act* (9 & 10 *Vict. c.* 93).—The plaintiff's father and stepmother were killed at the same time by the negligence of the defendants. The father's mother brought an action to recover damages for the death of the father, in which £100 was recovered, but only 1s. was awarded to the plaintiff. The plaintiff brought the present action to recover damages for the death of her stepmother. The stepmother earned 6s. a week, which was applied to the general support of the family. The plaintiff resided with her father and stepmother.

Held, that the verdict in the first action was no bar to the plaintiffs' right to recover in the second; and that there was evidence of pecuniary loss by the death of the stepmother.—*Johnston* v. *Great Northern Railway Co.*, EX.D. (Ir.)—26 L. R. Ir. 691.

2. *Government dockyard—Damage—Barge moored at unsafe berth—Damage to barge*—Respondeat superior—*Invitation—Liability of Government officials in charge of dockyard.*—A barge belonging to the plaintiffs was moored in Chatham Dockyard at a berth pointed out by the foreman, and the barge was there damaged. In an action to recover the amount of the damage from the Port Admiral, the Admiral Superintendent, and the Queen's Harbour Master of Chatham Dockyard, being the officials in charge of the dockyard, the jury found that the berth was unsafe, and gave a verdict for the plaintiffs.

Held, on further consideration, that, there being no Act of Parliament and no Order in Council rendering the defendants liable, their liability must be decided on common law principles, and that the doctrine of *respondeat superior* does not apply in such a case, but the doctrine of invitation does apply, and as there was no evidence that the defendants invited the plaintiff to moor the barge where they did, the defendants were not liable, and judgment must be for them.—*Wright & Son* v. *Lethbridge*, C.A.—63 L. T. 572.

3. *Metropolitan vestry — Liability of, as sewer authority—Repair of highway by contractor—Knowledge of vestry as to state of water-pipe*—5 & 6 *Will.* 4, *c.* 50, *s.* 109—18 & 19 *Vict. c.* 120, *s.* 96—25 & 26 *Vict. c.* 102, *s.* 106.—A vestry, acting as a sewer authority, laid down a new sewer, and, in so doing, a contractor employed by them laid bare a wrought-iron service water-pipe, which was about two and a half feet below the surface. The surveyor of the vestry knew that the pipe was old and rusty, and, likely, therefore, to become leaky. In filling in the trench some clay was put round the pipe, but not in such a quantity or in such a manner as to prevent it from leaking. A few months afterwards the pipe leaked, and the surrounding clay and earth, being thereby moistened, gave way under a heavily laden van, which the plaintiff was driving, and the van being overturned, the plaintiff was thrown from it to the ground, and seriously injured.

Held, that the vestry knew, or ought to have known, the character and condition of the pipe at the time it was laid bare in constructing the new sewer, and consequently were liable for negligence in not having taken special precautions against its leaking thereafter.—*Cox* v. *The Vestry of Paddington*, Q.B.D.—64 L. T. 566.

4. *Negligent driving—Foot passenger—Deafness—Contributory negligence.*—The plaintiff, who was deaf, was walking across a street in a diagonal direction where there was no crossing. The defendants' driver turned his horse and car round and proceeded to drive up the same street, and, seeing the plaintiff, shouted; but the plaintiff, who did not hear, continued on his course, and was knocked down. The jury having found a verdict for the plaintiff,

Held, that the verdict was not against the weight of evidence.—*Smith* v. *Browne*, Q.B.D. (Ir.)—28 L. R. Ir. 1.

5. *Obstruction of footway in street—Illegal act—Liability for injury received in getting over obstruction—Contributory negligence—Damages—Questions for jury*—Volenti non fit injuria.—A wooden apparatus, technically called a "slide," and used for lowering casks and other heavy and bulky goods from vans in the street into the defendants' blacklead warehouse, was placed across the pavement or footway of the street from the end of their van to the opening into the cellar of their warehouse, during the hours prohibited by the Metropolitan Police and Metropolitan Streets Acts for using the same for that purpose, thus blocking the footway; so that foot passengers were obliged either to get over the slide or to go round by the horses' heads in the roadway, or to wait until the obstruction was removed.

The "slide" was very slippery from blacklead, and in his attempt to get over it a foot passenger slipped, receiving serious injuries. In an action against the defendants for negligence, the jury found that the plaintiff had only acted reasonably and prudently in what he did, and gave him a verdict for £300 damages.

Held, that it was for the jury to decide what was the proper course for the plaintiff to adopt under all the circumstances, and to say whether or not his attempt to get over the "slide" was the act of a reasonable and prudent man; and that a new trial must, therefore, be refused.—*Lee* v. *Nixey*, Q.B.D.—63 L. T. 285.

6. *Railway company—Infant* en ventre sa mere—*Personal injuries to—Right of action.*—A statement of claim alleged that the plaintiff's mother, being quick with child—namely, with the plaintiff, to whom she afterwards gave birth—was received by the defendants to be carried as a passenger on their railway, and the defendants so negligently conducted themselves in carrying the plaintiff's mother and the plaintiff, then being *en ventre sa mere* as aforesaid, that the plaintiff was permanently injured.

Held, on demurrer, that the statement of claim disclosed no cause of action. — *Walker* v. *Great Northern Railway Co.*, Q.B.D. (Ir.)—28 L. R. Ir. 69.

7. *Railway company—Injury to passenger—Shock without physical impact — Fright — Remoteness of damage.*—In an action by a passenger in a runaway train for damages for personal injuries caused by the defendants' negligence it was proved that the plaintiff was put in great fright by the occurrence, and in consequence suffered from nervous shock, and was incapacitated from performing her ordinary work. The learned judge told the jury that if great fright was, in their opinion, a reasonable and natural consequence of the occurrence, and the plaintiff was actually put in great fright, and if injury to her health was, in their opinion, a reasonable and natural consequence of such great fright, damages for such injury would not be too remote. The jury having found a verdict in favour of the plaintiff,

Held, that the direction was right.

Victorian Railway Commissioners v. *Coultas*, 13 App. Cas. 222, not followed.—*Bell* v. *Great Northern Railway Co.*, EX.D. (Ir.)—26 L. R. Ir. 428.

8. *School—Voluntary school—Negligence of teacher—Committee of management, liability of.*—The plaintiff was a scholar in a voluntary school, and the defendant, as vicar of the parish, was a trustee of the school, and a member of the committee of management. The plaintiff was injured by the fall of a black board which was being used by a pupil teacher, who was in charge of the class in which the plaintiff was. The schoolmistress was appointed by the committee of management, but neither they nor the defendant had any control over the way in which the school was managed beyond the power of dismissing the mistress subject to an appeal by her to the bishop of the diocese.

Held, that the mere fact of the fall of the board was not evidence of negligence on the part of the mistress or the pupil teacher; and that if there had been negligence on the part of either of them the defendant would not have been liable.—*Crisp* v. *Thomas*, C.A.—63 L. T. 756.

9. *Ship—Wharfinger — Obstruction in navigable river.*—Where there is nothing foreign or strange in the condition of the bed of a river, other than what results from its normal use, wharfingers on the bank are under no obligation to remove such impediments to navigation. A ship attempting to approach a wharf to which safe access was a mere matter of time, and outside of which ridges of mud had been formed by the action of the river and the vessels stranding alongside, suffered damage.

Held, that, the river being in its normal state, and the nature of the river known to those in charge of the ship, the wharfingers were not guilty of negligence.

Decision of the Court of Appeal reversed.—*Tredegar Iron & Coal Co.* v. *Owners of Steamship "Calliope," "The Calliope,"* H.L. (E.) 641—[1891] A. C. 11; 60 L. J. P. D. & A. 28; 63 L. T. 781.

See DAMAGES; MORTGAGE, 14; SOLICITOR, 17; TRESPASS.

NEGOTIABLE INSTRUMENT:—

Pledge of securities en bloc—*Banker—Broker—*Bonâ fide *holder for value—Foreign bonds—Share warrants in English company—Companies Act*, 1867, *s.* 27.—Authority given to a stockbroker by a client to pledge the client's securities does not carry with it in law an implied authority to pledge the client's securities *en bloc* with those of others for a lump sum.

S. had deposited for custody with a stockbroker bonds of a foreign corporation, transferable by delivery from hand to hand. The stockbroker, to raise money for his own purposes, and without the knowledge of S, sold the bonds, but on the same day repurchased similar bonds of equal value, and immediately on their delivery made an entry in his books substituting the numbers of the newly-purchased bonds for the numbers of the original bonds belonging to S. The bonds so purchased were paid for by the stockbroker by means of a crossed cheque (dated the 28th of October, 1887) drawn by him on his own bank. In order to put himself in funds at the bank to meet the whole of the cheques drawn by him on that day, the stockbroker, on the same day, but after the said alteration of the numbers in his book, pledged the bonds so purchased, together with other securities, *en bloc* to the bank; and the bank thereupon credited his account with a large advance, out of which the whole of the cheques drawn by him on the 28th of October were cashed. The stockbroker subsequently absconded, and S. brought an action against the bank to recover the price of the bonds in question, which had been sold by the bank at a price admittedly fair, together with interest thereon at four per cent.

The inferences of fact drawn from the evidence by the Court of Appeal were—(*a*) that the bank knew that the bonds in question might probably belong to a client of the stockbroker; (*b*) that the bank did not believe that the stockbroker had been expressly authorized by his client to pledge the bonds *en bloc* with the securities of other persons; but (*c*) that the bank, relying on the honesty of the stockbroker, believed that he had been authorized by his client to raise some money on the bonds, and honestly believed that such authority carried with it as a matter of law authority to pledge the bonds *en bloc*.

Held, on these facts, that the stockbroker had appropriated the newly-purchased bonds to S. before pledging them to the bank, and, even assuming that the bonds in question were negotiable instruments in the full sense of the term "negotiable," yet that the bank never became *bonâ fide* holders of the bonds for value without notice, and accordingly that S. was entitled to the relief claimed.

The same stockbroker, acting on instructions from L., and having received money from him for that purpose, purchased for L. shares in a foreign company, shares in an English company, and bonds of a foreign Government. The share certificates of the foreign company were transferable by delivery from hand to hand, as were also the share warrants

of the English company, and the bonds of the foreign Government were payable to bearer.

With respect to the foreign company's shares, those purchased for L. were delivered to the stockbroker, who entered them by their numbers in his book as belonging to L. With respect to the English company's shares, those contracted to be purchased for L. were not delivered to the stockbroker, but he purchased and took delivery of a number of similar shares, and entered them as L.'s in the number book. With respect to the bonds of the foreign Government, they were contracted to be purchased for L. in two lots, and one lot so purchased was actually delivered to the stockbroker, and their numbers entered as L.'s in the number book. The other lot was not delivered to the stockbroker, but he purchased and took delivery of an equal number of similar bonds, and entered them as L.'s in his number book. The stockbroker, without the knowledge of L., pledged these shares and bonds *en bloc* with securities belonging to others, to his bank for objects and under circumstances similar to those mentioned with regard to the bonds of S.

The same inferences of fact were drawn by the Court of Appeal from the evidence in L.'s case as in the case of S.

Held, on these facts, that the shares and bonds taken by the stockbroker in substitution for those contracted to be purchased for L. had been appropriated by the stockbroker to L. before they were pledged to the bank, and, assuming that the bonds and shares in question were negotiable instruments in the full sense of the term, that the bank were not *bonâ fide* holders for value without notice, and, accordingly, that the bank should restore them to L.

Quære, whether the shares in question were negotiable instruments.

Decision of Kekewich, J., affirmed.—*Simmons* v. *London Joint-Stock Bank*, *Little* v. *London Joint-Stock Bank*, C.A. 449—[1891] 1 Ch. 270; 60 L. J. Ch. 313; 63 L. T. 789.

NEW SOUTH WALES, LAW of:—

1. *Act* 26 *Vict. No.* 20, *ss.* 1, 2—*Construction—Devolution of wife's realty after husband's tenancy by the curtesy expired.*—The effect of New South Wales Act 26 Vict. No. 20, ss. 1, 2, is to give all land which previously descended to the heir to the next of kin of the predecessors.

Held, that the proviso which follows, to the effect that "nothing herein contained shall give to any husband on the death of his wife intestate any greater interest in the real estate of his wife, or in the product thereof upon sale, than a tenancy for life by the curtesy," does not operate to prevent such real estate after the death of the husband descending under the Act to the wife's next of kin instead of to her heir-at-law.—*Plomley* v. *Shepherd*, P.C.—[1891] A. C. 244; 60 L. J. P. C. 18; 64 L. T. 94.

2 *Crown Lands Alienation Act*, 1861—*Conditional purchase in the name of an infant—Non-compliance with the conditions of the Act.*—The respondent (an infant of six years) having been entered by the appellant, under the Crown Lands Alienation Act, 1861, as a conditional purchaser of land selected by the appellant as forming part of his own run, the latter paid the deposit money, made the requisite statutory improvements at his own expense, continued to occupy the same as part of his own run, and paid the balance of the purchase-money.

In an action by the appellant after the respondent came of age to have the latter declared a trustee for him and for an order of transfer,

Held, (*a*) that the respondent was not a statutory purchaser, since the conditions of the Act were not complied with by him personally, nor by another for his benefit.

O'Shanassy v. *Joachim*, 1 App. Cas. 82, distinguished.

(*b*) That the appellant was not a statutory purchaser, since his proceedings, being under cover of the respondent's name, with a view to create in him a right subject to a resulting trust, were not a compliance with the conditions of the Act.

Barton v. *Muir*, L. R. 6 P. C. 134, distinguished.—*Tooth* v. *Power*, P.C.—[1891] A. C. 284; 64 L. T. 698.

3. *Insolvent Act*, *s.* 41—*Bill of sale—Distress for rent—Right of landlord.*

Held, that, according to the true construction of New South Wales Insolvent Act (5 Vict. No. 17), s. 41, the prohibition of "distress for rent" after sequestration of the tenant's estate does not authorize the holder of a bill of sale to take his goods (the subject of such bill) out of the hands of the landlord's bailiff in possession thereof under such distress.—*Railton* v. *Wood*, P.C.—15 App. Cas. 363; 59 L. J. P. C. 84; 63 L. T. 13.

NEW ZEALAND, LAW of:—

Pilot—Timaru Harbour Act, 1876—*The Harbours Acts*, 1878 *and* 1886—*Powers of the harbour board—Pilotage contract—Statutory liability.*

Held, that the respondent harbour board, as constituted by the Timaru Harbour Act, 1876, and the Harbours Act, 1878, had no authority under the statutes or the rules thereunder made to enter into pilotage contracts, but only to licence pilots. Consequently it could not be held responsible for the default of its harbour master, who was acting, not as harbour master, but as pilot engaged by the appellants for their vessel at the time when vessel and cargo were lost.—*Shaw, Savill, and Albion Co.* v. *Timaru Harbour Board*, P.C.—15 App. Cas. 429; 59 L. J. P. C. 77; 62 L. T. 913.

NUISANCE:—

1. *Noise—Club—Crowds—Cabs—Whistling—Injunction.*—A proprietary club was established at which entertainments consisting of pugilistic encounters were given, which caused the collection of large crowds outside the club. The noise of the shouting of the crowd, and the frequency on all nights, and until early in the morning, of whistling from the club for cabs, which, in their turn, created much noise in driving to the club, prevented the tenants and occupiers of adjoining houses from sleeping at night. In an action brought by the owners, lessees, and occupiers of a neighbouring house against the proprietor of the club,

Held, that the nuisance from the crowds and cabs was the reasonable and probable consequence of the defendant's acts, and that an injunction ought to issue to restrain it, as well as the whistling for cabs during certain hours.—*Bellamy* v. *Wells*, CH.D. ROM., J. 158—60 L. J. Ch. 156; 63 L. T. 635.

2. *Noise—Water company—Negligence—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 12.—The defendants, in the exercise of their statutory powers, sunk a shaft in land adjacent to the plaintiff's house, and for this purpose employed certain lift pumps, the noise of which seriously interfered with the plaintiff's comfort. The plaintiff having commenced an action for nuisance, the defendants substituted centrifugal pumps, which diminished the noise of the pumping. When the sinking of the shaft was commenced it became necessary to lower and lengthen the pumps from time to time,

but at the date when the centrifugal pumps were substituted the sinking of the shaft had arrived at a point at which this operation had ceased to be necessary. The defendants might have used centrifugal pumps from the commencement, but they were less convenient, on account of the difficulty of lowering and lengthening them, and on account of the increased labour attending their use, and they were not the pumps ordinarily used in sinking shafts.

Held, that the annoyance, being temporary and for a lawful object, did not amount to a nuisance at law.

Held, further, that the authority conferred on the defendants to sink the shaft included all things reasonably necessary for the execution of the work.

Fenwick v. *East London Railway Co.*, L. R. 20 Eq. 544, explained and distinguished. — *Harrison* v. *Southwark and Vauxhall Water Co.*, CH.D. WILL., J.—[1891] 2 Ch. 409; 64 L. T. 864.

3. *Pollution of stream—Local board—Neglect of public duty*—Mandamus *or Injunction—Waiver.*—In 1868 a bill was filed praying an injunction to restrain a local board from causing or permitting sewage to pass into a stream so as to be a nuisance. An answer was put in which did not raise any question as to the jurisdiction to grant an injunction. In November, 1872, the court granted an interlocutory injunction. In February, 1889, a supplemental writ was issued by leave, asking for an injunction and for damages. At the trial Kay, J., decided that the defendants had practically abated the nuisance, and that, therefore, an injunction was unnecessary, but that the defendants ought to pay certain damages. Upon objection being taken that the action was misconceived, the only remedy being by *mandamus*, and that the court had no jurisdiction,

Held, that if the proper remedy was by *mandamus*, the defendants must be taken to have waived any objection on that ground; and, further, that where there is jurisdiction to grant an injunction, damages may be given instead thereof, and that, therefore, the injunction would not be continued.—*Warwick and Birmingham Canal Co.* v. *Burman*, CH.D. KAY, J.—63 L. T. 670.

See also LOCAL GOVERNMENT, 9; LOCAL GOVERNMENT (IRELAND), 4; WATERCOURSE.

ORIGINATING SUMMONS.—See PRACTICE, 47.

PARISH CLERK.—See ECCLESIASTICAL LAW, 3.

PARLIAMENT:—

1. *Franchise—Registration of voters—Occupation franchise—Bankruptcy of occupying tenant—Subsequent acceptance of rent—Undisturbed occupation—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 20, 168—*Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 3, *sub-section* 2.—In support of an objection to the name of a voter being retained on an occupation list, it was proved that he had been adjudicated bankrupt during the qualifying period. The trustee in bankruptcy, however, had not interfered, the voter had remained in occupation, and the voter's landlord had accepted rent from him, subsequently to the adjudication. The revising barrister retained the name of the voter on the list.

Held, that the revising barrister was right.—*Mackay* v. *McGuire*, Q.B.D. 109—[1891] 1 Q. B. 250; 60 L. J. Q. B. 24; 64 L. T. 83.

2. *Franchise—Registration of voters—Disqualifying alms—Alms-person—Reform Act*, 1832 (2 & 3 *Will.* 4, *c.* 45), *s.* 36.—On an objection made to a voter that he had received disqualifying alms during the qualifying period, it was proved that the voter was, during the whole of the period, an alms-person of a certain hospital; that, as such alms-person, he received a weekly allowance of ten shillings and washing, and occupied a plot of ground assigned to him by the trustees of the charity; that the alms-persons were elected from poor persons of good character; that they could not be absent from the almshouse without the consent of the trustees; and that they were liable to be removed at the discretion of the trustees for certain causes.

Held, that such alms-persons had received disqualifying alms within the meaning of section 36 of the Reform Act, 1832, and were not entitled to be registered as voters.—*Dix* v. *Kent*, Q.B.D. 173—63 L. T. 641.

3. *Franchise—Registration of voters—Notice of objection to overseers—Signature of objector—List of names after signature—Authentication—Form I., No.* 1, *in schedule to Registration Order*, 1889—*Registration Act*, 1885 (48 *Vict. c.* 15), *s.* 18.—A notice of objection given to overseers was as follows:—"I hereby give you notice that I object to the names of the persons mentioned and described below being retained on the list as parliamentary electors for the parliamentary city of N." (signed by the objector). After the signature of the objector came a list of the names of the persons objected to. An objection was taken that this notice was a departure from the form, and was bad, on the ground that the signature of the objector ought to have been after the list of names.

Held, that the notice of objection did not substantially depart from the form in the schedule to the Registration Order, 1889, and was good.—*Sutton* v. *Wade*, *Gale* v. *Overend*, *Moore* v *Atkinson*, Q.B.D. 223—[1891] 1 Q. B. 269; 60 L. J. Q. B. 28; 63 L. T. 588.

4. *Franchise — Registration of voters — Signature of notice of claim*—6 & 7 *Vict. c.* 18, *s.* 38.—The appellant gave his agent a written authority to make and sign on the appellant's behalf a claim to vote in one of the parliamentary divisions of the county, or in the administrative county, or both, as he might seem to be qualified. A notice of claim to be placed on Division I. of the occupiers' list was thereupon prepared and signed with the appellant's name by a clerk of the agent under his direction.

Held, that the affixing of the signature to the notice of claim by the clerk instead of the agent did not establish that the appellant had not given due notice of his claim within 6 & 7 Vict. c. 18, s. 38.—*Brown* v. *Tombs*, Q.B.D.—[1891] 1 Q. B. 253; 60 L. J. Q. B. 38; 64 L. T. 114.

5. *Franchise—Registration of voters—County vote—Ownership list—Description and nature of qualification—Power of revising barrister to amend—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 24; *s.* 28, *sub-sections* 1, 12, 13—*Registration Act*, 1885 (48 *Vict. c.* 15), *s.* 1, *sub-section* 2.—The nature of the qualification of a person in the list of ownership claimants was described in the third column as "freehold house." The revising barrister, on proof that the claimant possessed a leasehold qualification in respect of the house in question, substituted "leasehold" for "freehold" in the third column.

Held (affirming the decision of the Queen's Bench Division), that the revising barrister had no power to make the alteration.—*Plant* v. *Potts*, C.A.—[1891] 1 Q. B. 256; 60 L. J. Q. B. 33; 63 L. T. 730.

6. *Franchise—Registration of voters—County vote—*

Freehold qualification—Claims of members of chapter to vote in respect of a share in the freehold lands of chapter—4 & 5 *Vict.* c. 39, *s.* 25—*Registration Act*, 1843 (6 & 7 *Vict.* c. 18), *s.* 74.—The canons residentiary of a cathedral who are entitled under 4 & 5 Vict. c. 39, s. 25, to a fixed share in the corporate revenues have no freehold qualification in respect of shares in the freehold lands of the corporation.—*Harris* v. *Phillips*, Q.B.D.—[1891] 1 Q. B. 267.

7. *Franchise—Registration of voters—Non-payment of seed rate—Disqualification.*—A person is not disqualified from being registered as a parliamentary voter by reason of the non-payment of instalments due by him for seed rate under the Seed Supply (Ireland) Act, 1880.—*Lamont* v. *Coy*, C.A. (Ir.)—28 L. R. Ir. 242.

8. *Franchise—Registration of voters—Notice of objection—Receipt of poor law relief*—48 & 49 *Vict.* c. 17, *s.* 20.—A notice of objection stating that the objection is grounded on any of the columns of the register is insufficient where the ground of objection is that the person objected to had received poor law relief during the qualifying period.—*Quinlan* v. *McCarthy*, C.A. (Ir.)—28 L. R. Ir. 246.

9. *Franchise—Registration of voters—Notice of objection—Personal service at place of abode as described in list*—13 & 14 *Vict.* c. 69, *ss.* 26, 113.—An objector served a notice of objection to the retention of a name upon the list of voters by putting the notice under the door of the house which was described in the list as his place of abode. The objector knew that the voter did not reside there; he knew where he resided; and he knew that there was no probability of the voter getting the notice.

Held, that the notice had not been duly served.

Watson v. *Pitt*, 5 C. B. 77, followed.

Gifford v. *St. Luke's, Chelsea*, 24 Q. B. D. 141, and *Allen* v. *Greensill*, 4 C. B. 100, considered.—*Magee* v. *Mortimer*, C.A. (Ir.)—28 L. R. Ir. 251.

10. *Franchise—Registration of voters—Inhabitant occupier—Rating.*—The inhabitant occupier of a dwelling-house which was rateable, and ought to have been rated, but was not rated for the relief of the poor to a rate made during the qualifying period, and during his occupation, is not entitled to the franchise. A dwelling-house which ought to have been so rated was not rated, but was subsequently valued, and the amount which the rate ought to have been was tendered, and a claim to be rated was served on the guardians, under the provisions of 13 & 14 Vict. c. 69, s. 110.

Held, that the tender and claim had no effect.

A. was an inhabitant occupier of a rated dwelling-house previously to the 20th of July, 1889, up to a date in the qualifying period subsequent to the striking of the only rate made during the qualifying period, when he went into occupation in immediate succession of another house, in which he continued to reside during the remainder of the qualifying period. The second house had formerly been rated, but having fallen into ruin was omitted from the rate-book for several years before and in the qualifying year. Subsequently to the striking of the rate in the qualifying period the house was repaired and became liable to be rated.

Held, that the case was undistinguishable from *Criglington* v. *Anderson*, 26 L. R. Ir. 131, and that A. was entitled to the franchise.

B. was an inhabitant occupier of a dwelling-house which was marked in the rate-book as "exempt," under the provisions of 48 & 49 Vict. c. 3, s. 9, and was not rated.

Held, that, even if the house was not by law exempt, it was not the function of the revising barrister to revise the rate-book or the valuation roll, and that B. was entitled to the franchise.—*McGaffigan* v. *Riddall*, *McCready* v. *Chambers*, *Hinds* v. *Chambers*, *Riddall* v. *McAleer*, *Moorehead* v. *Torish*, C.A. (Ir.)—28 L. R. Ir. 257.

11. *Franchise—Registration of voters—Compulsory absence during part of the qualifying period—Fine for drunkenness not paid at rising of court—Detention in waiting-room of gaol for twenty minutes.*—P. M. was fined by the Mayor of Londonderry for being drunk and disorderly, and in default of payment he was sentenced to be imprisoned. The fine was not paid at the rising of the Mayor's Court, and P. M. was taken to the waiting-room of the gaol before being placed in a cell. After being in the waiting-room twenty minutes the fine was paid and he was discharged.

Held, that P. M., who was otherwise entitled to the franchise, was not disqualified by such detention.—*M'Carron* v. *Chambers*, C.A. (Ir.)—28 L. R. Ir. 294.

12. *Franchise — Registration of voters — Lodger franchise—Joint and several occupation.*—G. and W. jointly rented a sitting-room, and each of them had a bed-room in the same house. The three rooms were of the requisite value.

Held (*diss.* O'Brien, C.J.), that the claimants were entitled to the franchise.—*Kelly* v. *Chambers*, *Gilliland's case*, C.A. (Ir.)—28 L. R. Ir. 289.

13. *Franchise — Registration of voters — Lodger franchise—Bed-room in hotel taken for the year—Permission to hotel proprietor to let the room during lodger's absence.*—R. M. occupied a bed-room in an hotel by the year, and had the use of a sitting-room. The lodgings were of the requisite value. He gave leave to the hotel proprietor to let the bed-room while he was absent on vacation, and the money paid by such persons was received by the proprietor of the hotel.

Held, that R. M. was entitled to the franchise.—*Kelly* v. *Chambers*, *M'Connell's case*, C.A. (Ir.)—28 L. R. Ir. 292.

See CRIMINAL LAW, 5; POOR RATE, 5.

PARTITION ACTION:—

1. *Costs—Adverse claimants.*—Action for partition of property to which plaintiff, defendant, and G. were entitled in thirds. After judgment, but before the certificate, G. died, leaving three wills, each making a different disposition of his share. The certificate found that the plaintiff and defendant were each entitled to one-third of the property, and that A. or B. or C. (the person claiming under G.) was entitled to G.'s share. Before further consideration the will under which C. claimed was established by proceedings in the Probate Court. C. applied in the partition action that the certificate might be amended by finding her entitled to G.'s share. The certificate was amended, and C. was ordered to pay to A. and B. their costs of that application. On further consideration,

Held, that C. should have her costs of the partition action, including her costs of application to amend the certificate, but not the costs which she had paid to A. and B.—*Hawkes* v. *Hawkes*, CH.D. KEK., J.—63 L. T. 488.

2. *Costs — Mortgagees of shares — Discretionary power of court—Share—Partition Act*, 1868 (31 & 32 *Vict.* c. 40), *s.* 10.—The rule in administration actions, that only one set of costs will be allowed in respect of each share, does not apply in the case

of partition actions, in which the court, by virtue of section 10 of the Partition Act, 1868, has an absolute discretion as to costs, and will, as a general rule, order the costs of all parties, including the mortgagees of any share, to be borne by the whole estate, a share being "the share of a person found to be entitled to a share by the chief clerk's certificate."

The defendants in a partition action were found to be entitled to an unincumbered moiety of the estate, and the plaintiffs were found to be entitled to the other moiety, upon which there were several mortgages. The estate was sold and the proceeds paid into court.

Held, that the costs of all parties, including the mortgagees of the plaintiffs' moiety, were payable out of the whole fund.—*Belcher* v. *Williams*, CH.D. NOR., J. 266—45 Ch. D. 510; 63 L. T. 673.

PARTNERSHIP:—

1. *Arbitration—Question of dissolution—Motion to stay proceedings.*—The question whether there ought or ought not to be a dissolution of partnership is one which, whether or not strictly within the terms of an arbitration clause in partnership articles, ought not to be referred to arbitration.—*Turnell* v. *Sanderson*, CH.D. KEK., J.—64 L. T. 654.

2. *Loans by partners—Partnership action—Costs of—Partnership debts.*—Two partners had voluntarily brought sums of money into their partnership, although there was no stipulation in the partnership agreement that they should bring in any capital, and at the date of the dissolution of the partnership pursuant to an order in an action for such dissolution, moneys were found to be due to the plaintiff and defendant respectively in respect of the sums so brought in.

Held, that the two sums were loans by the individual partners; and that the case fell entirely within the principle of the decision in *Potter* v. *Jackson*, 13 Ch. D. 845, 42 L. T. N. S. 294.

Held, therefore, that such loans must be paid out of the partnership assets in priority to the costs of the action.—*Rosher* v. *Crannis*, CH.D. CHI., J.—63 L. T. 272.

3. *Fraud of co-partner—Liability—Solicitor and client—Misrepresentation—Statute of Limitations* (21 *Jac.* 1, *c.* 16)—*Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.—S. M. deposited, between the years 1867 and 1876, with her solicitors, Messrs. M., G., & B., sums amounting to £351 for investment. G. died in 1877, B. died in 1887, and M., who was adjudicated bankrupt in 1888, died in 1890. Interest at five per cent. was paid to S. M. by the firm down to G.'s death, and by the surviving partners from then to 1886. S. M. claimed to recover from the joint assets of the partnership, which was being wound up in another action, or (if these were not sufficient) from the legal personal representatives of G. and B. and the trustee in bankruptcy of M., the sums so placed with the firm for investment, which (except as to an amount of £50) were in fact never invested, but misappropriated and applied to the purposes of the firm.

In 1876, before G.'s death, an account was rendered by the firm containing misrepresentations as to all the sums (except the £50), and by a continuance of such misrepresentations the plaintiff was prevented from discovering the truth till 1886, when the period fixed by the Statute of Limitations had expired.

The personal representative of G., who alone really defended the action, relied on a plea of this statute and the Trustee Act, 1888.

Held, that the principles laid down in *Blair* v. *Bromley*, 5 Hare, 542, 2 Phil. 354, which did not proceed on any rule or principle of equity specially applicable to trustees, applied and remained unaffected by the Trustee Act, 1888, and the plaintiff was entitled to the relief claimed by her.—*Moore* v. *Knight*, CH.D. STI., J. 312—[1891] 1 Ch. 547; 60 L. J. Ch. 271; 63 L. T. 831.

4. *Partner engaging in another business—Use of name of firm—Profits of the other business claimed as assets of the partnership—Information gained as a partner.*—If a member of a partnership firm avails himself of information obtained by him in the course of the transaction of partnership business, or by reason of his connection with the firm, for any purpose within the scope of the partnership business, or for any purpose which would compete with the partnership business, he is liable to account to the firm for any benefit he may obtain from the use of such information; but if he uses the information for purposes which are wholly without the scope of the partnership business, and not competing with it, the firm is not entitled to an account of such benefit.

A member of a firm of shipbrokers styled "H. C. & Co." assisted in the formation of a joint-stock company for building ships, and in so doing availed himself of information obtained as a member of the firm, and occasionally used the name and office paper of the firm in his correspondence on that subject. He received remuneration for his services in the formation of the company, and was made a director of the company, when formed, at a salary. He also threatened to engage in the separate business of a shipowner under the style of "H. C. & Co., shipowning." The other partners brought an action to restrain him from using the name of the firm in a separate business, and claiming an account of his profits and salary in connection with the new company.

Held (affirming the decision of Kekewich, J.), that the defendant must be restrained from using the name of H. C. & Co.; but

Held (reversing the decision of Kekewich, J.), that, as the business of the new company was beyond the scope of, and did not compete with, the partnership business, the defendant was not bound to account for the benefit obtained by him in connection with the new company.

The use by the defendant of the name and paper of H. C. & Co. in promoting the shipbuilding company was held not to be sufficient to show that, as between the defendant and his partners, shipbuilding was within the scope of the partnership business.

Dean v. *Macdonald*, 8 Ch. D. 345, explained and followed.—*Aas* v. *Benham*, C.A.—[1891] 2 Ch. 244; 65 L. T. 25.

5. *Purchase of deceased partner's share—Clause as to—Expiration of term—Continuance for purpose of winding up.*—A partnership agreement between two persons for a term of years provided that, upon the death of either partner, the surviving partner should purchase the deceased partner's share, and that the whole property of the partnership should vest absolutely in him.

Held, that this clause did not apply where the partnership term had expired, and where the partnership business was carried on solely for the purpose of winding it up.—*Myers* v. *Myers*, CH.D. CHI., J.—60 L. J. Ch. 311.

See also PRACTICE (WRIT), 61, 64—69; SOLICITOR, 17; WILL, 1.

PATENT:—

1. *Confirmation and extension—Relaxation of Rule*

No. 1 *with regard to notices—Expiration of previous foreign patent.*—By section 25 of 15 & 16 Vict. c. 83 an English patent ceases at the expiration of a prior foreign patent for the same invention.

Section 113, sub-section 1, of 46 & 47 Vict. c. 57 saves to a patentee existing at the date of the Act his right to a confirmation under 5 & 6 Will. 4, c. 83, s. 2, subject, however, to the above qualification.

The provisions of rule 1 relating to confirmation relaxed under special circumstances.

Petition for prolongation refused as inadmissible either under the Act of 1883 or the earlier law.—*In re Jablochkoff's Patent*, P.C.—[1891] A. C. 293; 65 L. T. 5.

2. *Extension—Insufficiency of accounts.*—Where the accounts filed by a patentee showed, not the result of the books, but the accountant's correction of them, and where it also appeared that the books themselves had been kept in such a way that without a very long, minute, and laborious investigation it was impossible to say whether he had been adequately remunerated or not,

Held, that a petition for prolongation must be dismissed.—*Lake's Patent*, P.C.—[1891] A. C. 240.

3. *Practice—Particulars of breaches—Application for further and better particulars—Rules of Court*, 1883, *ord.* 19, *r.* 7—*Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 29, *sub-section* 1.—The plaintiffs' patent was for improvements in railway carriage, street, and other lamps, and their specification contained four claims—viz., for a lamp, a modified form of lamp, a method of supplying heated air, and a method of distributing the heated air. The plaintiffs brought an action against the defendants for infringement, and by the particulars of breaches delivered with the statement of claim they alleged infringement by the defendants by using the mechanism claimed in those four claims, and complained of a particular lamp sold by the defendants. The defendants applied for further and better particulars, asking what parts of the specification and figures had been infringed, which of the lamps had been infringed, and whether the plaintiffs claimed all lamps with the methods of supplying and distributing the heated air, or only one of the two lamps claimed.

At the hearing of the application the plaintiffs withdrew the allegation of infringement of the first claim.

Held, that the particulars as so amended were sufficient, as they told the defendants what the plaintiffs said they had done in infringement; and that it was not the office of particulars to answer an interrogatory as to the construction of the patent.—*Wenham Co.* v. *Champion Gas Lamp Co. and Todlenhaupt & Co.*, CH.D. CHI., J.—63 L. T. 827.

4. *Practice—Particulars of objections—Amendment—Design—Patents, &c., Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 29.—The practice as to the terms on which the court gives leave to amend particulars of objection in an action to restrain infringement of a patent will be followed in a similar action with regard to a registered design.—*Morris, Wilson, & Co.* v. *Coventry Machinists' Co.*, CH.D. NOR., J.—60 L. J. Ch. 524.

5. *Prior publication—Protection in foreign country—International Convention*, 1883—*Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 103—*Patents, Designs, and Trade-Marks Act*, 1885 (48 & 49 *Vict. c.* 63), *s.* 6.—A patentee, who has obtained a patent in this country for the full period of fourteen years, cannot rely upon the protection given by section 103 of the Patents, &c., Act, 1883 (as amended by section 6 of the Patents, &c., Act, 1885), against the consequences of a prior publication in this country of a description of the same invention already patented in a foreign country, with which international arrangements have been made under the Convention of 1883.—*British Tanning Co.* v. *Groth*, CH.D. ROM., J.—60 L. J. Ch. 235; 64 L. T. 21.

6. *Specification—Amendment—Validity—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 18.—A patent was granted for "a telescope ladder for domestic and other purposes." The specification claimed—"(1) The two ladders occupying the space of one only; (2) the ready means of working by the cord; (3) the simple bracket lever by which the ladder is secured at any required length." The patentee subsequently amended his specification by leave by striking out (1), (2), and (3), and substituting "The combination in a telescope ladder herein described, of means for raising, lowering, and stopping, all as herein described and shown in accompanying drawings." In an action for infringement,

Held, upon the construction of the entire specification before amendment, that the claim was really for a combination, and that therefore the amendment was only "a correction or explanation" within section 18 of the Patents, Designs, and Trade-Marks Act, 1883, and did not make the specification as amended claim an invention substantially larger than, or substantially different from, the original claim; and consequently that the amendment did not render the patent invalid.—*Kelly* v. *Heathman*, CH.D. NOR., J. 91—45 Ch. D. 256; 60 L. J. Ch. 22; 63 L. T. 517.

7. *Specification—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 5, *sub-sections* 3, 5; *s.* 9, *sub-section* 1; *s.* 26, *sub-section* 3.—Where the complete specification required by the Patents, Designs, and Trade-Marks Act, 1883, does not conclude with a distinct statement of the invention claimed, as directed by section 5, sub-section 5, of the Act, it is not fatal to the validity of the patent.

Decision of the Court of Appeal affirmed.—*Vickers, Son, & Co.* v. *Liddell*, H.L. (E.) 385—15 App. Cas. 496; 60 L. J. Ch. 105; 63 L. T. 590.

8. *Threats—Injunction—Alleged infringement—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.—The registered owner of an invention had agreed to assign it to a company, and had commenced an action against another company for infringing it, and the company to whom the patent was agreed to be assigned had threatened the other company and their customers with legal proceedings in respect of the alleged infringement.

Held, that, under section 32 of the Patents, &c., Act, 1883, the latter company were persons aggrieved and entitled to obtain an injunction to restrain such threats; and that, the action for the infringement not having been brought by the company who had made the threats, but by the legal owner of the patent, they were not within the proviso in section 32 that the section should not apply.—*Kennington and Knightsbridge Electric Lighting Co. (Limited)* v. *Lane Fox Electrical Co. (Limited)*, CH.D. STI., J. 650—[1891] 2 Ch. 573; 64 L. T. 770.

See also COUNTY COURT, 9; PRACTICE (DISCOVERY), 31, 32.

PAWNBROKER:—

Certificate—Licence—Person being a licensed pawnbroker at commencement of Act, his assigns or suc-

cessors—Inland revenue—Pawnbrokers Act, 1872 (35 & 36 *Vict. c.* 93), *s.* 39.—The successor by purchase or assignment of a person who, at the commencement of the Pawnbrokers Act, 1872, was a licensed pawnbroker is entitled to a licence without the production of a certificate of justices within the meaning of the saving clause of section 39 of that Act.—*Reg.* v. *Commissioners of Inland Revenue, Ex parte Ohlson; Reg.* v. *Commissioners of Inland Revenue, Ex parte Garland*, Q.B.D. 317—[1891] 1 Q. B. 485; 60 L. J. Q. B. 376; 64 L. T. 57.

POOR LAW:—

1. *Election of assistant overseer—Jurisdiction of justices—Power to review election*—59 *Geo.* 3, *c.* 12, *s.* 7; 16 & 17 *Vict. c.* 65, *s.* 1.—By 59 Geo. 3, c. 12, s. 7, the inhabitants of a parish in vestry assembled are to nominate and elect an assistant overseer of the poor, and it shall be lawful for any two justices by warrant under their hands to appoint any person so nominated and elected to be assistant overseer.

Held, that the justices' duty is purely ministerial, and they have no power to hear evidence as to an objection to the validity of the election, even though such objection was taken at the time of the meeting and entered on the minutes.—*Underwood* v. *Jones*, Q.B.D.—60 L. J. M. C. 58; 64 L. T. 144.

2. *Lunatic—County asylum—Private patient becoming pauper—Chargeability—Lunatic Asylums Act*, 1853 (16 & 17 *Vict. c.* 97), *ss.* 95, 96.—A lunatic was sent by her relations from a parish in the Ipswich Union to the asylum at Macclesfield as a private patient. Subsequently they gave notice to the asylum that they would cease paying for her maintenance as a private patient. The clerk to the asylum thereupon gave notice to the guardians of the Macclesfield Union that the lunatic had been transferred to the list of pauper patients chargeable to their union. The guardians accordingly paid a sum for her maintenance.

Held, that none of the provisions of the Lunatic Asylums Act, 1853, applied to the circumstances of the case; that the lunatic was not chargeable to the Macclesfield Union; that the payment by that union was made under a mistake; and consequently that an order upon the Ipswich Union to repay the sum was bad.—*Guardians of Ipswich Union* v. *Guardians of Macclesfield Union*, Q.B.D. 221—63 L. T. 526.

3. *Lunatic—Expenses of maintenance—County lunatic asylum—Additional charge—Power to fix amount of charge—Committee of visitors—Arbitration*—16 & 17 *Vict. c.* 97, *s.* 54—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 62, 86.—By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 86, sub-section 4, "Where at the passing of this Act a borough with a separate court of quarter sessions, not being a county borough, &c., contracts with the quarter sessions of the county in which the borough is situate for the reception of the lunatics of the borough in the asylum of the county, such borough shall, on the determination of such contract, cease to have power to build a lunatic asylum, and, subject to the enactments providing for an additional charge for the maintenance of lunatics in cases where no contribution has been made towards the cost of building and furnishing an asylum, shall be liable to contribute to the county rate of the county in respect of such lunatic asylum in like manner as the rest of the county."

Held, that the meaning of the above clause must be taken to be that the committee of visitors of a county lunatic asylum have no longer the power which they formerly possessed, under section 54 of the Act 16 & 17 Vict. c. 97, of fixing the amount to be paid for the maintenance of a pauper lunatic sent to them from a borough which has not contributed towards the cost of building and furnishing the asylum; but, in case of a difference, the borough authorities are entitled to have the amount due ascertained by arbitration under section 62 of the Local Government Act, 1888.—*Howlett* v. *Mayor, &c., of Maidstone*, C.A.—[1891] 2 Q. B. 110; 60 L. J. Q. B. 570.

4. *Practice—Suspension of order of removal—Costs of maintenance of pauper during suspension—Order for payment of—Whether* ex parte *or on summons*—35 *Geo.* 3, *c.* 101, *s.* 2—4 & 5 *Will.* 4, *c.* 76, *s.* 84.—Where an order for the removal of a pauper has been suspended in consequence of the pauper's inability to travel, an application to justices by the removing union for an order for the payment by the union to which the pauper belongs of the costs of his maintenance during the period of suspension must be made upon summons, and not *ex parte*.—*Reg.* v. *Wilkinson*, Q.B.D.—[1891] 1 Q. B. 722.

5. *Settlement by residence—Removal before* 1876—*Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 36.—Section 34 of the Poor Law Amendment Act, 1876, gives a settlement in a parish by three years' continuous residence therein; and section 36 provides that "the provisions relating to settlement shall not apply to any pauper removed under any order of removal . . . before the passing of this Act."

Held, that these words in section 36, "any pauper removed," apply only to a person who was a pauper at the time the Act was passed, and so long as he remained a pauper; and that, therefore, they do not operate to deprive of the benefit of section 34 a person who had been removed under an order of removal in 1866, but who was not a pauper at the time the Act was passed, and who had resided continuously in one parish from 1870 to 1881.—*Guardians of the Poor of the Parish of Brighton* v. *Guardians of the Poor of the Strand Union*, C.A. 581—[1891] 2 Q. B. 156; 60 L. J. M. C. 105; 64 L. T. 722.

POOR LAW (IRELAND):—

1. *Accounts—Guardians—Erroneous application of moneys received by them as sanitary authority—Reopening accounts—Certificate of auditor—Rate.*—Poor law guardians, being also the rural sanitary authority, for some years erroneously applied the income arising from waterworks to the general poor law relief, and their accounts were certified as correct by the Local Government Board auditor.

Held, that, upon a subsequent audit, these accounts might be reopened, and a valid rate might be struck to meet the consequent debit certified in the poor law accounts at the last-mentioned audit.—*Reg.* v. *Guardians of Omagh Union*, Q.B.D. (Ir.)—26 L. R. Ir. 619.

2. *Guardians—Dismissal of servant—District lunatic asylum*—30 & 31 *Vict. c.* 118, *s.* 6.—Under 30 & 31 Vict. c. 118, s. 6, the board of guardians of a district lunatic asylum may dismiss their servants at their absolute will and discretion, without any misconduct on the part of the servant being alleged or proved.—*Hayes* v. *Governors of Richmond Lunatic Asylum*, Q.B.D. (Ir.)—28 L. R. Ir. 107.

POOR RATE:—

1. *Appeal—Assessment committee—Valuation list—Right of objector to appear by agent—Valuation (Metroplis) Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 19, 32.—There is nothing in the Valuation (Metroplis) Act, 1869, to limit the right of a ratepayer or body of ratepayers who object to the valuation list to

appear before the assessment committee by any authorized agent, and the assessment committee have no power to restrict the right of audience to the ratepayer himself, or a member of his family or household, or a member of the legal profession on his behalf.—*Reg.* v. *Assessment Committee of St. Mary Abbotts, Kensington*, C.A. 278—[1891] 1 Q. B. 378; 60 L. J. M. C. 52; 64 L. T. 240.

2. *Deficiency in assessments—Lands taken in consideration of owners withdrawing opposition in Parliament—Lands not used for the purposes of the works—Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 133.—A railway company purchased certain houses outside the limits of deviation in pursuance of agreements entered into with the owners in consideration of their withdrawing their opposition to the passing of the special Act. These houses were not required or used for the purposes of the works. Some of the houses were unoccupied at the time of the passing of the special Act. A deficiency having, in consequence, arisen in the assessments of the houses to the poor rate,

Held (affirming the judgment of the Queen's Bench Division, 39 W. R. 144, [1891] 1 Q. B. 182), that the company could not be heard to say, as against the parish, that the houses had not been "taken or used for the purposes of the works" within the meaning of section 133 of the Lands Clauses Act, 1845, and that the company were liable to make good the deficiency.

Held, also, that, in estimating the amount of the deficiency, the assessments of the houses, both occupied and unoccupied, at the time of the passing of the special Act, must be compared with the assessments of the houses made subsequently from time to time until the completion of the works.—*Overseers of Putney* v. *London and South-Western Railway Co.*, C.A. 291—[1891] 1 Q. B. 440; 60 L. J. Q. B. 438; 64 L. T. 280.

3. *Deficiency in assessments—Land taken by railway company—Lighting rate—Public libraries rate—Metropolitan consolidated rate—Liability of railway company—"General purposes rate," meaning of—London and South-Western Railway Act*, 1883 (46 & 47 *Vict. c. clxxxix.*), *s.* 14—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 133.—Section 14 of the London and South-Western Railway Act, 1883, provides that, while the company are possessed of any lands assessed or liable to be assessed to any sewers rate, main drainage rate, or general purposes rate, they shall from time to time, until the railway or the works thereof are completed and assessed or liable to be assessed to the respective rates, be liable to make good the deficiency in the assessment for the respective rates.

Held, that the expression "general purposes rate" in this section was intended by the Legislature to apply to all rates made for general purposes, viz., for purposes in which the great majority of parishioners have a common interest, and that, under this term, the company were bound to make good the deficiency in the assessment for the metropolitan consolidated rate, the lighting rate, and the public libraries rate respectively.—*Burrup* v. *The London and South-Western Railway Co.*, Q.B.D.—64 L. T. 112.

4. *Limits of borough—Interpretation of charter by long user—Presumption—Rateable occupation of tramway.*—The appellants having been rated to the relief of the poor of the borough of Plymouth as occupiers of a harbour, appealed upon the ground that the harbour was not within the limits of the borough.

Held, upon a case stated, that in construing the Plymouth Charter of Incorporation of 18 Hen. 6, which defined the limits of the borough, having regard especially to the fact that the harbour had been rated for the relief of the poor of Plymouth for the last 150 years, it must be presumed that the harbour was within the limits of the borough.

Held, further, that, in ascertaining the rateable value of the harbour, a tramway constructed by the appellants, but worked and maintained exclusively by a railway company and for which the railway company paid rent, must be considered in the occupation of the railway company, who were the proper persons to be rated in respect thereof.—*Sutton Harbour Improvement Co.* v. *Guardians of Plymouth*, Q.B.D.—63 L. T. 772.

5. *Part of a house—Structural severance—Separate occupation—"Dwelling-house"—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *ss.* 3, 7, 61—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26) *s.* 5.—The appellants occupied a house containing four rooms on the ground floor and five on the first floor; the front door opened into a passage, which communicated with the ground floor rooms, and also, by means of a staircase, with the first floor rooms; the only water-closet was in the backyard, which was reached from the first floor by a door opening into one of the first floor rooms and from which there was a staircase outside the house; the respective portions of the house occupied by the appellants were let to them separately, and one of them had the exclusive use and occupation of the rooms on the ground floor, and the other of the rooms on the first floor. The tenant of the first floor used the external staircase leading into the yard, and not the internal staircase, and had the only key of the door leading to the external staircase, the tenant of the ground floor having the only key of the front door.

Held, that the appellants were entitled to be separately and not jointly rated for the relief of the poor.—*Allchurch* v. *The Assessment Committee of the Hendon Union*, Q.B.D.—64 L. T. 473.

6. *Rateability—Industrial schools—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 3 (vii.).—An industrial school had been established (under the Industrial Schools Acts, 1866 and 1872) by the justices of a county, and had been transferred, under section 3 (vii.) of the Local Government Act, 1888, to the county council.

Held, that it was not occupied on behalf of the Crown, and was liable to be rated for the relief of the poor—*Durham County Council* v. *Assessment Committee of Chester-le-Street Union*, Q.B.D. 188—[1891] 1 Q. B. 330; 60 L. J. M. C. 9; 63 L. T. 46.

7. *Rateability—Residence of police officers—Occupation for public purposes—Police station.*—Certain buildings under one roof and surrounded by a wall consisted in part of private residences, occupied by the appellants, who were the chief constable and other officers of police, and their families, and in part of store-rooms, parade ground, and stables used for police purposes. There were no cells used for the reception and detention of prisoners. All the buildings were used exclusively for police purposes, the chief constable being bound to reside there as a condition of his appointment. Each officer paid a rent for the premises occupied by him, such rent being deducted from his pay. The appellants having been assessed to the poor rate in respect of the buildings occupied by them as residences,

Held, that, upon the facts, the appellants had a separate beneficial occupation of the premises,

which were used by them as private residences, and not for public purposes, and that they were therefore rateable in respect thereof.

Decision of the Queen's Bench Division (39 W. R. 174) affirmed.—*Showers* v. *Assessment Committee of Chelmsford Union*, C.A. 231—[1891] 1 Q. B. 339; 60 L. J. M. C. 55; 64 L. T. 755.

8. *Rateable value—Premises containing lace-making machinery, boiler, engine, &c.—Machinery capable of being removed without injury, &c.—Rateable value of.*—Premises were used as a manufactory for the purpose of lace-making upon which certain boilers, engines, bobbin-net, and other machines were placed for carrying on the said manufactory; such machines were essential to the use of the said premises as a bobbin-net lace factory.

The machines were each of them, as machines, separate and distinct from each other, and could be easily removed for sale or repairs.

Some were fastened to the floors by screws through the feet of the machines; others were not fastened, their own weight being sufficient to keep them steady, but, further than this, the machines were no part of the soil or hereditaments.

Held, that, although some of the machinery and plant was capable of being removed without injury to itself or to the freehold, and although it remained personal property, yet, being essentially necessary and permanently attached to the appellants' business, it was all rightly taken into account in estimating the rateable value of the premises as enhancing the value of the hereditament.—*Gifford, Fox, & Co.* v. *Chard Union*, Q.B.D.—63 L. T. 249.

9. *Rateable value — Waterworks — Local board—Basis of valuation—Water receipts—Deficiency in, to meet expenditure—Transfer from general district rate—Liability of sum transferred to be included in valuation.*—Under certain statutory powers an urban authority was empowered to construct certain waterworks and to make certain charges for the supply of water. For the year ending in March, 1889, their expenditure in respect of the waterworks account was £14,107, and their receipts for water charges was only £5,700. To make up the deficiency a sum of £8,404 was transferred from the general district rates, this sum being used, as to £5,680, part thereof, in paying instalments of loan, and the balance of £2,724 for purposes other than instalments of loan. No part of this sum of £8,404 was received in respect of water charges, or of a rate in aid, nor was it applied towards the working expenses. It was admitted that the £5,680 could not be included in the calculation for estimating the rateable value; but the assessment committee contended that the sum of £2,724 ought to be included, in addition to the £5,700.

Held, that, as this sum of £2,724 was not available as an item of gross profits in the hands of a hypothetical tenant, it could not be included in the receipts for the purpose of arriving at the net rateable value.—*Merthyr Tydfil Local Board* v. *Assessment Committee of the Merthyr Tydfil Union*, Q.B.D. 255—[1891] 1 Q. B. 186; 60 L. J. M. C. 42; 63 L. T. 647.

POWER of APPOINTMENT:—

1. *Benefit to donee of power—Release of power—Marriage settlement—Right to transfer of funds.*—Under his marriage settlement the plaintiff had a power of appointment amongst children, and, in default of appointment, the children were entitled to funds as therein mentioned. Two children obtained a vested interest, one of whom died a bachelor and intestate. Letters of administration to his estate were granted to the plaintiff, who subsequently released his power of appointment over the fund, and asked for a declaration of his rights and a transfer to himself of one moiety of the trust funds as tenant for life of, and entitled in remainder to, that moiety.

Held, that, in the exercise of its discretion, the court will not assist the donee of a power to obtain a personal benefit through his having released that power.

Cunynghame v. *Thurlow*, 1 Russ. & My. 436n, followed.—*In re Radcliffe, Radcliffe* v. *Bewes*, CH.D. NOR., J. 457—[1891] 2 Ch. 662; 60 L. J. Ch. 436; 64 L. T. 386.

2. *Exercise—General devise—Power of revocation and new appointment—Wills Act, s.* 27.—By deed executed in 1870 real estate was appointed to K. B. and her husband during their joint lives and the life of the survivor of them, and ultimately to trustees upon trust for sale and to divide the proceeds equally between the children of C. at twenty-one or marriage, with power to K. B. and her husband, during their joint lives by deed, and to the survivor by deed or will, to revoke the uses therein declared and to declare other uses.

The joint power of revocation and new appointment was never exercised, nor the power of the survivor by deed.

K. B. died in 1890, having survived her husband, and, by her will, made after her husband's decease, devised all her real estate to trustees for sale, and to divide the proceeds equally between the two children of C. The testatrix had no real estate of her own.

Held, that the general devise did not operate under section 27 of the Wills Act as an exercise of the power of revocation, and that, therefore, the appointment under the deed of 1870 not being revoked, the real estate in question did not pass under K. B.'s will.—*In re Brace, Welch* v. *Colt*, CH.D. NOR., J. 508—[1891] 2 Ch. 671; 60 L. J. Ch. 505; 64 L. T. 525.

3. *Exercise—Married woman—General testamentary power of appointment over property in reversion—Will not referring to power—General bequest—Wills Act* (1 *Vict. c.* 26), *s.* 27.—A married woman, who had a general testamentary power of appointment over a trust fund, which was subject to the life interests of herself and her husband, but had no separate property and no other power of disposition or appointment over property, by her will, not referring to the power, bequeathed a sum of £400 to her brother, and the residue of all her properties, of whatsoever kind, "and any properties which may have become to me, or may become to me hereafter by will or otherwise," to her husband, whom she appointed executor. She died leaving her husband and brother surviving. The question was whether the legacy of £400 was presently payable.

Held, that the will must be construed as an appointment of the reversionary fund, as to £400 part thereof to the brother, and as to the residue thereof to the husband; and that, therefore, the legacy of £400 was not payable until the reversionary fund actually fell into possession.—*In re Ludlam, Ludlam* v. *Ludlam*, CH.D. KAY, J.—63 L. T. 330.

4. *Exercise — Real estate — Particular power — General words—Power to appoint among children in tail — Appointment of life estate.* — By a family partition deed of the 5th of September, 1837, a general power of appointment over real estate was given to a husband and wife. By a deed of the 9th of September, 1837, they exercised that power

under the authority implied by his employment is binding on the client.

Matthews v. *Munster*, 36 W. R. 78, 20 Q. B. D. 141, distinguished.—*Lewis* v. *Lewis*, CH.D. KEK., J. 75—45 Ch. D. 281; 59 L. J. Ch. 712; 63 L. T. 84.

COSTS—

15. *Copyright, infringement of—Dramatic copyright—Recovery of less than £10—Statutory right to "full indemnity"—3 & 4 Will. 4, c. 15, s. 2—5 & 6 Vict. c. 97, s. 2—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.—A plaintiff who has recovered penalties in an action brought under 3 & 4 Will. 4, c. 15 for infringement of dramatic copyright is entitled to have his costs taxed on the footing of obtaining a "full indemnity" under 5 & 6 Vict. c. 97, s. 2, although the sum recovered be less than £10, neither the general provisions of the Judicature Acts and Rules as to costs, nor section 116 of the County Courts Act, 1888, applying to such a case.

Hasker v. *Wood*, 33 W. R. 697, followed.—*Reeve* v. *Gibson*, C.A. 420—[1891] 1 Q. B. 652; 60 L. J. Q. B. 451.

16. *Copyright, infringement of—Taxation—"Full costs"—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *s.* 26. —The term "full costs" in section 26 of the Copyright Act, 1842, merely means ordinary costs as between party and party.

Irwine v. *Reddish*, 5 B. & Ald. 796, and *Jamieson* v. *Trevelyan*, 3 W. R. 172, 10 Ex. 748, approved.—*Avery* v. *Wood*, C.A. 577.

17. *Counsel—Refreshers—Ord.* 65, *r.* 27 (48).—The trial of an action occupied less than five hours on the first day, and was concluded on the next day, having occupied altogether five hours and sixteen minutes.

Held, on taxation of costs, that a refresher fee to counsel could not be allowed.—*Walker* v. *Crystal Palace District Gas Co.*, Q.B.D. 716—[1891] 2 Q. B. 300; 65 L. T. 86.

18. *County court—Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *ss.* 3, 9—*R. S. C.*, 1883, *ord.* 65, *r.* 1.—Section 9 of the County Courts Admiralty Jurisdiction Act, 1868, which enacts that a person taking proceedings in a superior court which they might, under section 3 of that Act, have taken in a county court, shall not be entitled to costs, unless the judge before whom the cause was tried shall certify that it was a proper cause to be tried in a superior court, is inconsistent with, and is repealed by, ord. 55, r. 1, of R. S. C., 1875, and ord. 65, r. 1, of R. S. C., 1883.

Tenant v. *Ellis*, 6 Q. B. D. 46, approved.—*Rockett* v. *Clippingdale*, C.A.—[1891] 2 Q. B. 293; 64 L. T. 641.

19. *"Good cause"—Trial with jury—Discretion of judge—Place of trial—Ord.* 65, *r.* 1.—The plaintiff, who lived in Cheshire, sued the defendant, who lived in Flintshire, for a sum of £640. The plaintiff not naming a place of trial, the action was tried in Middlesex, the defendant not having applied to change the venue. The jury found a verdict for the plaintiff for £200.

Ordered, on an application on behalf of the defendant, under ord. 65, r. 1, that the plaintiff should be allowed, as against the defendant, one-third of his costs, such costs to be taxed treating the trial as having taken place at Chester, and that the defendant should be allowed, as against the plaintiff, two-thirds of his costs, such costs to be taxed treating the trial as having taken place in Middlesex.

The plaintiff, who carried on business at Halifax, in Yorkshire, brought an action against the defendants, a railway company, to recover damages for personal injuries and loss of trade sustained by him owing to a collision which occurred on their railway near Halifax, claiming £262 for injuries, and £6,388 for loss of trade. The plaintiff named Middlesex as the place of trial. The defendant applied to change the venue to Leeds, but the application was refused. The jury found a verdict for the plaintiff for £800.

Ordered, on an application on behalf of the defendants under ord. 65, r. 1, that the plaintiff should have his costs so far as related to the claim for personal injuries, such costs to be taxed treating the trial as having taken place at Leeds, and should pay to the defendants all their costs so far as related to the claim for loss of trade, such costs to be taxed treating the trial as having taken place in Middlesex, and also the difference in the expenses of the defendants' medical evidence arising from the action having been tried in Middlesex instead of at Leeds. —*Roberts* v. *Jones*, *Willey* v. *Great Northern Railway Co.*, Q.B.D.—[1891] 2 Q. B. 194; 60 L. J. Q. B. 441.

20. *Set off of costs—R. S. C.*, 1883, *ord.* 65, *r.* 27, *sub-rule* 21.—A party, who under a former order in the action was entitled to certain costs out of the estate, appealed from an interlocutory order, and his appeal was dismissed with costs. The respondent asked that under ord. 65, r. 27, sub-rule 21, these costs might be set off against the costs which the appellant was entitled to receive, the certificate of the taxation of which was ready for signature. The court declined to order set-off, but directed that no costs should be paid out to the appellant for a fortnight, so as to give the respondent time to carry in his bill of costs of the appeal, that the set-off might be considered by the taxing master.—*In re Crawshay, Dennis* v. *Crawshay*, C.A. —45 Ch. D. 318; 63 L. T. 597.

20a. *Solicitor and client costs—Representation order —R. S. C.*, 1883, *ord.* 16, *r.* 32; *ord.* 65, *r.* 1.—On an adjourned summons for the decision of the court as to the construction of a will, three classes of issue were interested under the will, and representation orders had been made in respect of each class.

Held, that costs must be allowed as between solicitor and client.—*In re Davies, Jenkins* v. *Davies*, CH.D. KEK., J.—64 L. T. 824.

21. *Taxation—Motion to rectify register—Interlocutory motions.*—A motion to remove a shareholder's name from the register came on for hearing on July 23, 1889, when the applicant was not present. The court ordered the motion to stand over upon the applicant paying to the company "all their costs of such motion incurred up to the present time, including the costs of the hearing of this motion this day." Upon the motion coming on again, the application to remove the name was granted with costs, except the costs ordered to be paid as above. The taxing master allowed the company the costs of two interlocutory applications prior to the order of July 23, 1889, in one of which the costs were to be costs in the action, and in the other no order was made.

Held, that the taxing master had acted on a wrong principle in including these costs in the costs of the motion which the applicant was ordered to pay.

The court refused to interfere with the discretion of the taxing master in allowing the company costs for items which were utilized at the postponed hearing.—*In re Metropolitan Coal Consumers' Association, Wainwright's case*, CH.D. KAY, J.—63 L. T. 216.

22. *Taxation—Plaintiff successful on some issues*

and failing on others—General costs of action, how apportioned—Form of order.—A plaintiff in the Chancery Division succeeded on the substantial part of his claim and failed on a subordinate part, but the form of order adopted referred it to the taxing master to tax the defendant's costs of so much of the action as related to the issue on which the plaintiff failed, and to tax the plaintiff's costs of the rest of the action, and directed the said costs of the defendants to be set off against the said costs of the plaintiff, and the balance to be certified, and ordered the defendants to pay such certified balance to the plaintiff. It appeared that in the taxing master's office in the Chancery Division it was the established practice, where the order was in the above form, to apportion the general costs of the action between the plaintiff and defendant according to the number of issues on which they had respectively succeeded, without regard to the relative importance of such issues, but that, where the plaintiff was intended to have such general costs, the form of order is adopted which gives him "the costs of the action, except so far as they have been increased by the issue" on which he has been unsuccessful. The general costs of this action having, in accordance with the above rule, been apportioned between the plaintiff and defendants in moieties, the plaintiff took out a summons to review the taxation.

Held (affirming the decision of Kekewich, J.), that, though the plaintiff got less than he was fairly entitled to, that was owing to the adoption of the wrong form of order (a mistake which could not now be rectified), and that it would be wrong to disturb the settled practice of the chancery taxing office, in accordance with which the taxation under the form of order here adopted had been correctly worked out.

Semble, having regard to the case of *Sparrow* v. *Hill*, 29 W. R. 490, 705, 7 Q. B. D. 362, 8 Ibid. 479, the practice in the Queen's Bench Division differs in this respect from that of the Chancery Division.

Bowen, L.J., called attention to the importance of the proper authority making methodical inquiry into the diversity, both of opinion and practice, existing in this respect on the chancery and common law sides of the court, with a view to their assimilation.

Knight v. *Pursell*, 28 W. R. 90, and *Harley* v. *Hunt*, 32 S. J. 8, W. N., 1887, p. 184, followed.—*Jenkins* v. *Jackson*, C.A. 242—[1891] 1 Ch. 89; 60 L. J. Ch. 254; 63 L. T. 688.

See also PRACTICE, 3.

DEFAULT—

23. *Counter-claim—Default of defence thereto—Mode of obtaining judgment—R. S. C.*, 1883, *ord.* 23, *r.* 4; *ord.* 27, *rr.* 2, 11.—Where a plaintiff makes default in delivering a defence to a counter-claim, the defendant cannot sign judgment upon default, but must move for judgment under ord. 27, r. 11.

Higgins v. *Scott*, 21 Q. B. D. 10, 36 W. R. Dig. 155, followed.—*Jones* v. *Macaulay*, C.A. 211—[1891] 1 Q. B. 221; 60 L. J. Q. B. 258; 64 L. T. 621.

24. *Non-appearance of defendant—Amendment of writ—Service of amended writ—Rules of Court*, 1883, *ord.* 19, *r.* 10; *ord.* 28, *r.* 10.—When a defendant has made default in appearing to a writ, and the writ is subsequently amended, the amended writ need not be served upon the defendant who has made default in appearance; but filing it at the Central Office is sufficient.—*In re Hartley, Nuttall* v. *Whittaker*, CH.D. NOR., J. 604—[1891] 2 Ch. 121; 64 L. T. 786.

25. *Short cause—Setting aside judgment in default of defence—Length of notice—Chancery Judges' Regulations*, 1876.—Under the regulations made by the Master of the Rolls and the Vice-Chancellors in 1876, motions for judgments in actions are entered in the cause book, and, if marked "short," will be placed in the paper on the first short cause day after the day for which notice has been given.

The plaintiff gave notice of motion for judgment for the 14th of March, 1891. The case was marked "short," and the 14th of March was the regular short cause day. The defendant not appearing, judgment was given for the plaintiff.

The defendant moved that judgment be set aside, on the ground that the case was placed in the paper prematurely.

Held, that "the first short cause day after the day for which notice is given" means "the first short cause day available after the giving of the notice"; but, having regard to the circumstances of the case, the judgment was set aside and leave given to defend the action on payment of costs of the motion and costs subsequent to the statement of claim.—*Green* v. *Moore*, CH.D. NOR., J. 421.

DISCOVERY—

26. *Documents—Affidavit—Documents of title—Privilege—Interrogatories in cross-examination—Contentious affidavit.*—The defendant in an action for recovery of land having made an affidavit of documents which stated that he had in his possession certain documents numbered and tied up in a bundle marked with the letter A, and that he objected to produce such documents, on the ground that they related solely to his own title, and did not in any way tend to prove or support the title of the plaintiffs, the plaintiffs administered interrogatories to the defendant, asking whether such documents did not include a will mentioned in the statement of claim and relied upon by the plaintiffs in support of their title, and whether the defendant had ever seen the will, and, if so, when last and where. The defendant objected to answer the interrogatories. The plaintiffs thereupon applied for an order that the defendant should further answer, and at the hearing sought to make use of an affidavit in contradiction of defendant's affidavit of documents.

Held, that the affidavit of documents was sufficient, and need not allege that the documents did not impeach the defence; that a contentious affidavit was not admissible to contradict the defendant's affidavit of documents, and that the plaintiffs were not entitled to a further answer.

The decision of the Court of Appeal (23 Q. B. D. 287) affirmed.—*Morris* v. *Edwards*, H.L. (E.)—15 App. Cas. 309; 60 L. J. Q. B. 292; 63 L. T. 26.

27. *Documents—Deposit—Application for increase of deposit—Time of application—R. S. C.*, 1883, *ord.* 31, *rr.* 12, 26; *ord.* 65, *r.* 6.—The power of the court, under ord. 31, r. 26, to make an order for payment into court of a sum of money, in addition to the £5 originally deposited, as security for the costs of discovery, is not limited to the time when the order for discovery was made, but may be exercised subsequently, if the court considers that the circumstances of the case require it.

In order to properly comply with an order for discovery by affidavit of documents, the documents ought not only to be set out in bundles, but each document must be ear-marked by marking it specially, so that the party seeking discovery may be in a position to specify any particular document he may want to see.

Hill v. *Hart-Davies*, 26 Ch. D. 471, 32 W. R. Dig. 150, approved.—*Cooke* v. *Smith*, C.A. 273—[1891] 1 Ch. 509; 60 L. J. Ch. 573; 64 L. T. 484.

28. *Documents—Deposit—Two defendants—Separate defences—R. S. C.*, 1883, *ord.* 31, *r.* 26.—In an action against two defendants, who appeared by the same solicitor, but severed their defences, the plaintiff applied for discovery of documents.

Held, that, the defendants being sued jointly in substance as well as in form, the plaintiff was not bound, under ord. 31, r. 26, to pay into court more than one sum of £5.—*Joyce* v. *Beall*, Q.B.D. 316—64 L. T. 137.

29. *Documents—Documents disclosed in answer to interrogatories—Inspection of—R. S. C.*, 1883, *ord.* 31, *rr.* 15-18.—A plaintiff sued upon an agreement, and, in answer to interrogatories, stated that the agreement was in writing, and was contained in three documents referred to.

Held, that the defendant was entitled to an order for inspection under ord. 31, rr. 15-18, on the ground that these were "documents referred to in an affidavit in the cause," and that a further application for discovery, to be accompanied with a further deposit of £5, was not necessary.—*Moore* v. *Peachey*, Q.B.D. 592.

30. *Documents—Ships' papers—Action on marine policy of insurance—Part transit over land—Appendix K, No.* 19.—In an action on a policy of insurance whereby certain goods were insured during their transit by post from Cadiz to Alexandretta, in Syria, the defendants sought to obtain from the plaintiff, prior to the delivery of the defence, the ordinary affidavit of ships' papers.

Held, that, inasmuch as the policy covered such portion of the transit as was by land as well as the portion which was by sea, the peculiar practice relative to the affidavit of ships' papers was not applicable, but that the defendants were entitled to discovery in the ordinary form under ord. 31, r. 12.—*Henderson* v. *Underwriting and Agency Association*, Q.B.D. 528—[1891] 1 Q. B. 557; 60 L. J. Q. B. 406; 64 L. T. 774.

31. *Interrogatories—Patent action—Interrogatories as to use of process described in specification—Names of customers—Plea of "secret process."*—In a patent action the plaintiff delivered interrogatories asking step by step whether the defendant had used, and to what extent, the process, or any part of it, described in the specification, and asking also the names of some of his customers. The defendant set up a plea of "secret process," objecting to answer the interrogatories, on the ground that the answer would disclose his secret.

Held, that the defendant could not, by pleading a secret process, claim to decline to refuse discovery as to how far, either alone or in combination with his own process, he had used the plaintiff's.

Semble, also, that the names of customers must be disclosed.—*Ashworth* v. *Robert*, CH.D. KEK., J. 170—45 Ch. D. 623; 60 L. J. Ch. 27; 63 L. T. 160.

32. *Interrogatories—Patent action—Further particulars—Patent Law Amendment Act*, 1852 (15 & 16 *Vict. c.* 83), *s.* 41—*Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 29.—Where a defendant in a patent action alleges, in his particulars of objections, general user of the plaintiff's alleged invention previous to the date of the letters patent, he may be compelled to answer interrogatories asking for the names and addresses of persons so using it as alleged.—*Alliance Pure White Lead Syndicate* v. *MacIvor's Patents and Others*, CH.D. NOR., J. 487.

33. *Interrogatories—Security for costs of—Action against several defendants — Separate defences — Separate deposits of £5—Ord.* 31, *r.* 26.—Where a plaintiff delivers interrogatories to, and seeks discovery from, several defendants who have severed in their defence, separate sums of £5 must be paid into court in each case.

Smith v. *Reed*, 28 S. J. 84, W. N., 1883, p. 196, followed.

Eder v. *Attenborough*, 37 W. R. 507, 23 Q. B. D. 130, distinguished. — *Liverpool and Manchester Aerated Bread Co.* v. *Firth*, CH.D. STI., J. 269—[1891] 1 Ch. 367; 60 L. J. Ch. 153; 63 L. T. 677.

DISTRICT REGISTRY—

34. *Writ—Originating summons—Removal of proceeding as of right—Rules of Court*, 1883, *ord.* 35, *rr.* 13, 14, *and* 16.—An originating summons was taken out in the Liverpool District Registry by a tenant for life against the trustees of a testator's will and infants, asking for an account and the appointment of a new trustee. The testator's property was situate in Leicestershire, Lancashire, Scotland, and London, and comprised a large brewery in Lancashire. The testator, by his will, appointed three persons living in Lancashire as trustees of his will, and the defendant A. The plaintiff and the defendant A. lived in London, and the surviving trustee in Lancashire. On summons by the defendant A. asking as a matter of right that the proceedings might be removed from the Liverpool District Registry to London,

Held, that the proceedings did not come within the terms of ord. 35, rr. 13 and 14, of the Rules of Court, 1883, the proceedings not having been commenced by writ.

Held, that rule 16 of order 35 applied, and an important part of the property being situate in Lancashire, and three of the trustees appointed by the will being Lancashire men, the summons must refused.—*In re Thwaites, Yerburgh* v. *Aston*, CH.D. KEK., J.—63 L. T. 747.

EJECTMENT—

35. *Judgment in default of appearance—Person not named as defendant—Ord.* 12, *r.* 25.—The plaintiff issued a writ against J. to recover possession of a house, and signed judgment in default of appearance. The sheriff, in pursuance of a writ of possession, ejected H., who was in possession, and put in the plaintiff. H. had no knowledge of the action, and did not claim to hold through J. On an application by H. that the writ of summons, and all subsequent proceedings in the action, be set aside for irregularity, and that the plaintiff restore possession of the house to the applicant,

Held, that the right order was, that the judgment and subsequent proceedings be set aside, the plaintiff to go out of any possession obtained under the judgment; the order to take effect only if the applicant within twelve days elect to be added as defendant; applicant to be at liberty to appear upon filing an affidavit that at the time of the issue of the writ he was in possession by himself or his tenant; the order to be without prejudice to any right plaintiff might thereafter have to sign judgment against J. upon filing a proper affidavit.—*Minet* v. *Johnson*, C.A.—63 L. T. 507.

GARNISHEE ORDER—

36. *Affidavit of judgment creditor alleging specific debt—Affidavit of garnishee specifically denying—Ord.* 45, *r.* 1.—Where, on an application for a garnishee order, the applicant specifies a particular debt owing by the garnishee to the judgment debtor, it is not sufficient for the garnishee to deny that he owes that particular debt, but he must state that he is not indebted to the judgment debtor at all.

On such an application it is sufficient for the applicant to state that he is informed and believes that the garnishee is indebted to the judgment debtor.

Coren v. *Barne*, 37 W. R. 415, 22 Q. B. D. 249, approved.—*De Pass* v. *Capital and Industries Corporation* (*Vinall, Garnishee*), C.A. 231—[1891] 1 Q. B. 216; 60 L. J. Q. B. 253; 64 L. T. 43.

INJUNCTION—

37. Ex parte *injunction*—Ex parte *motion to dissolve—Notice—Undertaking as to damages—Undertaking to amend writ—Conditions—Non-compliance.*—The court declined to hear *ex parte* a motion to dissolve an *ex parte* injunction. An *ex parte* injunction was obtained by the plaintiffs shortly before two o'clock on a Saturday afternoon on condition that a party should be added as plaintiff for the purpose of his counsel giving on his behalf the usual undertaking as to damages. The writ was not amended until the following Tuesday morning whilst a motion was being made to dissolve the injunction. The court dissolved the injunction without deciding the merits, on the ground that the plaintiffs had not fulfilled the terms on which the injunction was granted, and had thereby left the defendant without the protection of the undertaking as to damages.—*Spanish General Agency Corporation* v. *Spanish Corporation.*—CH.D. KEK., J.—63 L. T. 161.

37a. Ex parte *injunction—Suppression of facts—Motion for injunction or to continue* interim *order—Motion to discharge* interim *order—Whether necessary.*—This was a motion by the plaintiffs for an injunction, or in the alternative to continue an *interim* order already obtained *ex parte*. The *interim* order was irregularly obtained on suppression of material facts. No cross notice of motion to discharge the *interim* order was given by the defendant.

Held, that the court may discharge an *ex parte* order without a formal notice of motion to discharge being given by the defendant.

The court on the evidence granted an injunction in the terms of the *interim* order, but discharged the *interim* order, the plaintiffs to pay the costs of it in any event.—*Boyce* v. *Gill*, CH.D. KEK., J.—64 L. T. 824.

38. *Libel—Application to restrain publication—Jurisdiction of the High Court—Rules upon which the court exercises discretion.*—Jurisdiction to grant an injunction to restrain the publication of an alleged libel pending trial or after verdict has existed in the common law courts since the Common Law Procedure Act, 1854, and in the Chancery Division since the Judicature Act, 1873, and by section 25, subsection 8, of the latter Act any judge of the High Court can grant such an injunction where it shall appear "just or convenient." But the court will be very cautious against granting such an injunction in any action for defamation previous to trial where justification of the defamation is pleaded, and will, as a rule, decline to interfere in such cases.

Per Kay, L.J.—An affidavit by the defendant pleading justification of a libel in opposition to an interlocutory motion for restraining the publication must show the grounds of his belief in such justification, and, in default of any such grounds being shown, the court is justified in granting such an injunction.—*Bonnard* v. *Perryman*, C.A. 435—[1891] 2 Ch. 269.

39. *Libel—Interlocutory injunction to restrain publication—Annoyance—Proof of immediate injury.*—An interlocutory injunction will not be granted to restrain the publication of statements not shown to be likely to cause immediate injury to the person or property of the party seeking the injunction, notwithstanding that such statements are calculated to cause him extreme annoyance; that they appear *primâ facie* to be wholly unjustifiable; that, unless justified, they are grossly libellous; and that the plaintiff had previously obtained a verdict for £1,000 damages (which had not been paid) for the publication by the defendant of similar, or practically identical, statements.—*Salomons* v. *Knight*, C.A. 506—[1891] 2 Ch. 294; 64 L. T. 589.

40. *Mandatory injunction — Restoration of fence wrongfully broken down—Uneducated defendant—Form of order.*—In an action to restrain a defendant from permitting certain fences to remain broken down and removed, the court ordered the defendant, who was in a humble position in life, to restore and replace the fences which he had broken down and removed, instead of making a negative order restraining him from permitting the fences to remain broken down and removed.—*Bidwell* v. *Holden*, CH.D. NOR., J.—63 L. T. 104.

41. *Mandatory* interim *injunction—Altering* status quo *after notice of motion for injunction.*—The defendant in a light and air case, after receiving notice of motion for an interlocutory injunction, put on a number of men, who worked night and day, and ran up his building to a height of nearly forty feet before he received notice that an injunction had been granted against him.

Held (affirming the decision of Stirling, J.), that he ought to be ordered to restore the *status quo ante* by pulling down the building at once, without reference to the question, to be decided at the trial, whether the plaintiff was entitled to the access of light and air which he claimed.—*Daniel* v. *Ferguson*, C.A. 599—[1891] 2 Ch. 27.

JUDGMENT AND ORDER—

42. *Order drawn up, but not passed and entered—Oversight—Order re-drawn* nunc pro tunc.—Where an order has been drawn up, but never passed and entered, the court allowed the order to be re-drawn up, passed, and entered *nunc pro tunc.—In re Jones, Bullis* v. *Jones*, CH.D. STI., J. 619.

NEW TRIAL—

43. *Jurisdiction of Court of Appeal—Power to enter judgment for party moving, instead of granting new trial—Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 1—*R. S. C.*, 1883, *ord.* 58, *r.* 4.—On motion for a new trial under 53 & 54 Vict. c. 44, the Court of Appeal has jurisdiction, instead of granting a new trial, to direct judgment to be entered for the party moving, or to make any order which ought to have been made by the court below, in the same way as it could do upon an ordinary appeal.—*Allcock* v. *Hall*, C.A. 443—[1891] 1 Q. B. 444; 60 L. J. Q. B. 416; 64 L. T. 309.

44. *Official referee—Action tried before—Court in which to move—Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 1.—Where there has been a trial before an official referee, a motion for a new trial must be made in the Queen's Bench Division, and not in the Court of Appeal.—*Gower* v. *Tobitt*, C.A. 193.

45. *Stay of execution pending application for new trial—Judicature Act*, 1890 (53 & 54 *Vict. c.* 44).—In the absence of special circumstances the court will not grant a stay of execution pending an application for a new trial where the judge before whom the case was tried has declined to stay execution.—*Monk* v. *Bartram*, C.A. 310—[1891] 1 Q. B. 346; 60 L. J. Q. B. 267; 64 L. T. 45.

See PRACTICE, 54.

46. *Verdict against the weight of evidence—Undue influence—Mental incapacity.*—Where a new trial is sought to be obtained on the ground that the verdict in the court below was against the weight of evidence, in a case where there was some evidence

out of the jurisdiction.—The plaintiffs, an English company, entered into certain agreements in India with an Indian firm relative to the manufacture of indigo and the sale and disposal of the proceeds of the indigo so manufactured. The agents in England of the Indian firm were an English firm, consisting of five out of the six members of the Indian firm, several of whom were resident in India. The Indian firm consigned the indigo to the English firm as their agents, on behalf of the plaintiff company, and drew bills against it on the latter, who, upon such bills being presented, dishonoured them, on the ground of their exceeding the amount authorized. The English agents having then taken up the bills and sold the indigo, the plaintiff company commenced an action against them claiming the indigo and other relief, and all the members of the English firm appeared to the writ. On a motion for an interlocutory injunction, the plaintiff company introduced charges of fraud against the native servants of the Indian firm. The plaintiff company subsequently obtained leave *ex parte* to amend their writ by adding the Indian firm as defendants and by making consequential amendments, and to issue a concurrent writ for service out of the jurisdiction, but on that application they did not go into the question of fraud. They then amended their writ, and added a claim against the new defendants, the Indian firm, which raised entirely fresh causes of action arising out of alleged breaches in India by the Indian firm of the agreements. The Indian firm then moved to discharge the order which had been obtained *ex parte*, and North, J., granted the application.

Held, by the Court of Appeal, that the order giving leave to amend was rightly discharged, but that, under the circumstances, the plaintiffs ought to be allowed to amend their original writ by substituting the names of the individual members of both firms who were resident within the jurisdiction for the name of the English firm, and by adding a claim for relief in respect of breaches of the agreements, and that the members of both firms who were resident out of the jurisdiction ought to be allowed to set aside their appearances, and that the order to be made must be without prejudice to any application by the plaintiffs for leave to add as parties all or any of the members of the said firms so resident out of the jurisdiction, and to serve them with the amended, or a concurrent, writ.

Western National Bank of New York v. *Perez*, 39 W. R. 245, [1891] 1 Q. B. 304, followed.—*Indigo Co.* v. *Ogilvy*, C.A. 646—[1891] 2 Ch. 31; 64 L. T. 846.

62. *Indorsement — Special indorsement — Leave to enter final judgment—"Liquidated demand in money with interest arising on a trust"—Interest claimed by way of damages—Ord.* 3, *r.* 6.—The plaintiffs by their writ claimed to have a legacy of £2,750 "which has remained unpaid by reason of a breach of trust on the part of the defendants, and which is now due from them upon a trust," paid by the defendants with interest at four per cent. per annum from the 12th of April, 1885. The will directed that interest at the rate of four per cent. per annum should be paid on this legacy from the death of the wife; she died on the 12th of April, 1885. Upon an application for judgment under order 14,

Held, that the writ claimed the interest payable under the will, and not interest payable as damages, and, therefore, the writ was specially indorsed under ord. 3, r. 6.—*Ha[illegible]* v. *Br[illegible]*, CH.D. NOR., J.—60 L. J. Ch. 88.

63. *Renewal of writ after expiration of twelve months—Statute of Limitations—Ord.* 8, *r.* 1; *ord.* 64, *r.* 7.—The time for renewing a writ of summons will not be extended after the expiration of twelve months from the date of the issue of the writ where, in the absence of such renewal, the plaintiff's claim would be barred by the Statute of Limitations.

Doyle v. *Kaufman*, 26 W. R. 98, 3 Q. B. D. 7, 340, followed.—*Hewett* v. *Barr*, C.A. 294—[1891] 1 Q. B. 98; 60 L. J. Q. B. 268.

64. *Service—Foreign firm—Partners all resident out of jurisdiction—Service on alleged partner temporarily within jurisdiction—R. S. C.*, 1883, *ord.* 9, *r.* 6; *ord.* 11.—In an action against a foreign firm having no place of business in England, all the partners of which were resident and domiciled abroad, service of the writ was effected on the appellant (who was alleged to be a partner) while temporarily in England. He entered an appearance, and applied to have the service set aside, on the ground that he was not a partner.

Held, by Lord Esher, M.R., that the foreign firm was properly served under ord. 9, r. 6, by service on the appellant, and that the service could not be set aside.

Held, by Lindley and Bowen, L.JJ., upon the authority of *Russell* v. *Cambefort*, 37 W. R. 701, 23 Q. B. D. 526, that ord. 9, r. 6, did not apply to the case of foreign firms, and that the service was bad as against the firm; but, further, that, if the plaintiff should elect to amend the writ so as to state that the appellant was sued together with the other partners (naming them), the service should stand as against the appellant, the appellant having by appearing waived the irregularity in the nomenclature of the writ.

Pollexfen v. *Sibson*, 34 W. R. 534, 16 Q. B. D. 792; *O'Neil* v. *Clason*, 46 L. J. Q. B. 191, 25 W. R. Dig. 208; and *Shepperd* v. *Hirsch, Pritchard, & Co.*, 38 W. R. 745, 45 Ch. D. 231, not followed.—*Western National Bank of New York* v. *Perez Triana & Co.*, C.A. 245—[1891] 1 Q. B. 304; 60 L. J. Q. B. 272; 64 L. T. 543.

65. *Service—Foreign firm—Partnership—R. S. C.* 1883, *ord.* 9, *r.* 6; *ord.* 11, *rr.* 1 (e), 7; *ord.* 16, *r.* 14.—The Rules of the Supreme Court as to suing partners in the name of their firm, and as to service on persons sued as partners in their firm name, do not apply to a partnership firm all the members of which are foreign subjects domiciled and residing abroad; and, even where the cause of action against such firm is one within the terms of ord. 11, r. 1 (e), and the plaintiff has obtained leave to issue and serve notice of a writ against such firm out of the jurisdiction, and has served it abroad on one of the partners, the court has no jurisdiction, if no appearance has been entered, to allow the plaintiff to sign judgment, in default of appearance, against such firm.

Russell v. *Cambefort*, 37 W. R. 701, 23 Q. B. D. 526, and *Western National Bank of New York* v. *Perez Triana & Co.*, 39 W. R. 245, [1891] 1 Q. B. 304, followed.—*Dobson* v. *Festi[illegible]* 481—[1891] 2 Q. B. 92; 60 L. J. Q. B. [illegible]; 64 L. T. 551.

66. *Service—Foreign firm—Part[illegible]—[illegible] against foreign firm in firm name—R. S. C.* [illegible] *ord.* 9, *r.* 6.—A writ was issued against the defendants in the name of their firm. The firm was a foreign firm, carrying on business at Buenos Ayres, and consisted of three partners, all of them foreign subjects. Two of the partners were resident and domiciled abroad, and one was residing in England at the date of the issue of the writ. The partner in England used a room in London for the

purposes of the business of the firm. The writ having been served on the partner in England, he moved to set aside the writ and the service.

Held, following the decision in *Western National Bank of New York* v. *Perez Triana & Co.*, 39 W. R. 245, [1891] 1 Q. B. 304, that ord. 9, r. 6, did not apply to the case of a foreign firm, the only mode of suing a foreign firm being to issue the writ against the partners individually, and obtain leave to serve them under order 11; and that the writ and the service must be set aside.—*Heinemann & Co.* v. *Hall & Co.*, C.A. 485—[1891] 2 Q. B. 83; 64 L. T. 548.

67. *Service—Partnership—Service on manager of firm—Subsequent service on partner—Judgment signed against firm before expiration of eight days from service on partner—Right of partner to set aside such judgment—R. S. C.*, 1883, *ord.* 42, *r.* 10.—If a writ of summons be served on a partner in a firm after having been served on the manager of the firm, judgment ought not to be signed against the firm until after the expiration of eight days from the last service, and if judgment be signed against the firm before the expiration of eight days from the service on the partner, though after the expiration of eight days from the service on the firm, such judgment is premature, and will, on the application of the partner, be set aside.—*Alden* v. *Beckley & Co.*, Q.B.D. 8—25 Q. B. D. 543; 60 L. J. Q. B. 87; 63 L. T. 282.

68. *Service — Partnership — Action against firm carrying on business in England — One partner domiciled and resident abroad—Service on another partner resident within jurisdiction—Summary judgment against firm—Ord.* 9, *r.* 6; *ord.* 14, *r.* 1.—Two persons, subjects of a foreign State, carried on business as co-partners in England. One of them resided in England, the other resided and was domiciled abroad. A writ having been issued against them in the name of their firm, the partner resident in England was served with such writ under ord. 9, r. 6, and appeared. There being no defence to the action, judgment was entered against the firm under order 14.

Held, that the service on the partner was a good service on the firm, and that judgment was rightly entered against the firm.—*Lysaght* v. *Clark & Co.*, Q.B.D.—[1891] 1 Q. B. 552; 64 L. T. 776.

69. *Service out of jurisdiction—Contract—Place of payment—Ord.* 11, *r.* 1 (e).—A contract which may be performed either within the jurisdiction or outside it is not a contract "which, according to the terms thereof, ought to be performed within the jurisdiction" within the meaning of ord. 11, r. 1 (*e*). —*Bell & Co.* v. *Antwerp, London, and Brazil Line*, C.A. 84—[1891] 1 Q. B. 103; 60 L. J. Q. B. 270; 64 L. T. 276.

70. *Service out of jurisdiction—Concurrent remedy —R. S. C.*, 1883, *ord.* 11, *rr.* 1 (f), 2.—Under subsection (*f*) of rule 1, order 11, of R. S. C., 1883, which enables the court to allow service out of the jurisdiction where "any injunction is sought as to anything to be done within the jurisdiction," the court has jurisdiction, on a motion supported by proper evidence, to grant a limited injunction as to acts to be done within the jurisdiction; but, in the exercise of its discretion, having regard to all the circumstances—especially to the fact that a Scotch court has partial seisin of the case, and proceedings are about to be taken in Scotland—the court may refuse to allow service out of the jurisdiction.

A remedy which depends on the will and pleasure of another person is not a concurrent remedy within the meaning of R. S. C., 1883, ord. 11, r. 2.—*In re De Penny, De Penny* v. *Christie*, CH.D. CHI., J. 571 —[1891] 2 Ch. 63; 60 L. J. Ch. 518; 64 L. T. 521.

71. *Substituted service—Defendant out of jurisdiction—Ord.* 9, *r.* 2.—The plaintiff, having issued a writ against the defendant and being unable to discover her address, obtained an order for substituted service upon her solicitor. It then appeared that she had gone abroad before the writ was issued without any intention of evading service, and had remained out of the jurisdiction ever since.

Held, that, the writ being a writ for service within the jurisdiction, the order for substituted service could not be maintained.

Fry v. *Moore*, 37 W. R. 565, 23 Q. B. D. 395, followed.—*Wilding* v. *Bean*, C.A. 40—[1891] 1 Q. B. 100; 60 L. J. Q. B. 10; 64 L. T. 41.

See also PRACTICE, 24.

See also ADMIRALTY; BILL OF SALE, 13; COUNTY COURT; DIVORCE, 15-20; LUNATIC, 2; MORTGAGE, 3, 4, 6; PRINCIPAL AND AGENT, 2; PROBATE, 21—26; SOLICITOR, 4; WILL, 17.

PRACTICE (IRELAND):—

1. *Attachment of debts—Pension of retired district-inspector of Royal Irish Constabulary.*—The pension of a retired district-inspector of the Royal Irish Constabulary, granted, under 37 & 38 Vict. c. 80, on retirement owing to ill-health, may be attached to answer a judgment debt, as being granted for past services only.—*Murphy* v. *Green*, C.A. (Ir.)—26 L. R. Ir. 610.

2. *Attachment of debts—Pension of retired town clerk—Receiver—Local Officers' Superannuation (Ireland) Act*, 1869 (32 & 33 *Vict. c.* 79), *s.* 7.—A receiver cannot be appointed over a pension granted to a retired town clerk under 32 & 33 Vict. c. 79, as the pension is, by section 7 of the Act, neither assignable nor chargeable with debts.—*Brenan* v. *Morrissey*, Q.B.D. (Ir.)—26 L. R. Ir. 618.

3. *Cash under control of court—Investment of—Costs of application to change investment—R. S. C., 4th February*, 1889.—Funds in court ordered to be invested in debenture and guaranteed stocks of Irish railways.

What are special circumstances within the rule of the 4th of February, 1889, considered.

The costs of the application to change the investment ordered to be paid by the applicants, the tenants for life.

Johnston v. *O'Neill*, 23 L. R. Ir. 430, approved.—*In re Nesbitt's Trusts*, C.A. (Ir.)—25 L. R. Ir. 447.

4. *Charging order — Priority.*—A. obtained a charging order on a fund standing in the name of the accountant of the Landed Estates Court to the credit of a matter then pending. Subsequently, after the amalgamation of the office of the Accountant in the Court of the Land Judges with the office of the Accountant-General in Chancery, B. obtained a charging order on the same fund. The fund was afterwards transferred to the credit of an action pending in the Chancery Division.

Held, that A.'s charging order was entitled to priority.—*In re Slator, Lalonette* v. *O'Brien*, M.R. (Ir.)—25 L. R. Ir. 453.

4a. *Charging order—Attachment and transfer of Government Stock to answer judgment debt—Common Law Procedure Act*, 1853, *s.* 33.—Where the court makes an order to transfer to the sheriff Government Stock standing in the books of the Bank of Ireland, attached under a charging order, the proper order is to direct the defendant, and not the bank directors, to execute the transfer.—*M'Goldrick* v. *Campbell*, Q.B.D. (Ir.)—28 L. R. Ir. 318.

4b. *Default of appearance—One of several defendants not served—Judgment against co-defendant.*—In an action for a liquidated demand against A. and B. on foot of a joint debt, the writ being specially indorsed, the court allowed judgment in default of appearance to be entered against A. without prejudice to the plaintiff's right to proceed against B., who had not been served.—*Rice* v. *Dillon*, EX.D. (Ir.)—28 L. R. Ir. 376.

5. *Discovery—Lease—Tenant of lands ordered to be sold.*—A conditional order to make discovery of a lease may be made against a tenant of lands ordered to be sold in an action.—*Webb* v. *Webb*, M.R. (Ir.)—27 L. R. Ir. 42.

6. *Discovery—Inspection of documents by accountant—General Order* 31, *r.* 17.—A shareholder in a joint-stock company brought an action to have his name removed from the register on the ground of fraudulent misrepresentation in the prospectus issued by the company, and applied for leave to inspect, by an accountant, books of account disclosed in the affidavit of documents made by the secretary of the company.

Held, under the special circumstances of the case, and to save expense, that the order might be made.

Bonnardet v. *Taylor*, 1 J. & H. 383, followed.—*Gibney* v. *Clayton*, M.R. (Ir.)—27 L. R. Ir. 75.

7. *Interpleader—Costs*—9 & 10 *Vict. c.* 64.—Where upon a sheriff's interpleader summons the execution creditor abandons the execution, the latter must pay the costs of the interpleader summons to the claimant, and the expenses of the execution to the sheriff.—*Hyland* v. *Lennox*, Q.B.D. (Ir.)—28 L. R. (Ir.) 286.

8. *Particulars—Action for crim. con.—Affidavit.*—In an action for crim. con. the defendant is entitled to particulars from the plaintiff of the times and places when and where the alleged acts were committed, if he makes an affidavit denying the alleged acts, and stating that he is ignorant of the ground of the charges made against him, and that the application is made *bonâ fide.*

Echlin v. *Brady*, 10 Ir. Jur. N. S. 188, and *Lagan* v. *Gibson*, I. R. 9 C. L. 507, overruled.—*Keenan* v. *Pringle*, C.A. (Ir.)—28 L. R. Ir. 135.

9. *Pleading — Amendment of — Ejectment.* — An amendment in a statement of claim in ejectment may be allowed which has the effect of substituting an equitable title for a legal one. — *Feehan* v. *Mandeville*, Q.B.D. (Ir.)—28 L. R. Ir. 90.

10. *Pleading irrelevant pleas—Fraud—Matters of evidence—General Order* 18, *r.* 16, *and Schedule, r.* 23.—In an action on a policy of life insurance the insurance company, in their statement of defence, pleaded that the assured had been guilty of a series of insurance frauds upon the defendant company and other insurance companies, and set out in detail a conspiracy by the assured with another person to effect insurances on the life of the assured, and to pretend to be dead by leaving his clothes on the seashore and disappearing.

Held, affirming the order of the Queen's Bench Division, that these pleas must be struck out.—*Provincial Bank of Ireland* v. *Brocklebank*, C.A. (Ir.)—26 L. R. Ir. 572.

11. *Probate—Proof of will in solemn form—Trial before court itself—Costs—Rule* 46 (*cont.*).—The Judicature Act has not altered the rule of the Prerogative Court that a next of kin is entitled to require a will to be proved in solemn form, or the practice as to costs where a party disputing a will serves notice under rule 46 (cont.) and submits to have the case tried before the court itself.—*Holland* v. *Holland*, P. & M.D. (Ir.)—27 L. R. Ir. 369.

12. *Receiver—Judgment creditor appointed—Accruing gales of rent.*—Judgment creditor appointed receiver over the accruing gales of a net head-rent for a limited number of years, estimated as sufficient to satisfy the judgment.—*Orr* v. *Grierson*, C.A. (Ir.)—28 L. R. Ir. 20.

13. *Receiver—Judgment creditor—Shares of personal estate of intestate — Administration not taken out.*—A judgment debtor was entitled, as one of the next of kin of an intestate, to whom no administration had been taken out, to a share of his personal estate.

Held, that the judgment creditor was entitled to have a receiver appointed over the share.—*Mullane* v. *Ahern*, EX.D. (Ir.)—28 L. R. Ir. 105.

14. *Remitting action—Notice of motion—Amendment—Common Law Procedure Amendment Act*, 1870 (33 & 34 *Vict. c.* 109), *s.* 6.—A notice of motion to remit the action to a civil bill court, other than that of the division in which, according to the affidavit in support of the motion, the defendant resided, was amended by the court, and the action was remitted to the proper division.—*Sayers* v. *Quinn*, EX.D. (Ir.)—26 L. R. Ir. 582.

15. *Remitting action—Joinder of causes of action—Detinue—County Courts Act*, 1877 (40 & 41 *Vict. c.* 56), *s.* 51.—The joinder of other causes of action in tort with a claim in detinue does not preclude the action being remitted for trial to the county court under section 6 of the Common Law Procedure Amendment Act, 1870, as extended by section 51 of the County Courts Act, 1877.—*Lowry* v. *Webb*, Q.B.D. (Ir.)—28 L. R. Ir. 110.

16. *Remitting action — Contract — Amendment of writ — Reducing claim — Common Law Procedure (Ireland) Act*, 1870.—A plaintiff before action made a statutory declaration that she had sold certain goods to the defendant for £20, and soon afterwards issued a writ for the price of the same goods, claiming £55.

Held, that the court had power, on the application of the defendant, to amend the writ by reducing the claim to £20, and to remit the action under section 5 of the Common Law Procedure (Ireland) Act, 1870.—*Jeffrey* v. *Gibson*, Q.B.D. (Ir.)—28 L. R. Ir. 284.

17. *Service out of jurisdiction — Administration summons—Foreigner resident out of the jurisdiction—Judicature (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 57)—*General Order* 10, *rr.* 1, 2.—A foreigner resident out of the British dominions, whom it is intended to make a party to proceedings to be commenced by administration summons, must be served with notice of the summons, and not with the summons itself.—*In re M'Laughlin, Roulston* v. *M'Laughlin*, M.R. (Ir.)—25 L. R. Ir. 513.

18. *Stop order—Order restraining transfer of stock—Chancery (Ireland) Act*, 1867 (30 & 31 *Vict. c.* 44), *s.* 170.—An application for an order restraining the transfer of stock under the Chancery (Ireland) Act, 1867, s. 170, should be made by motion *ex parte*, and not on petition.—*Ex parte Prudential Assurance Co.*, M.R. (Ir.)—25 L. R. Ir. 446.

18a. *Trial, place of — Changing — Judicature (Ireland) Act*, 1877.—Principles as to the selection and change of place of trial in actions in the Queen's Bench and Exchequer Divisions under the Judicature (Ireland) Act, 1877, as stated by Barry, L.J., in *Hegarty* v. *Mackay*, 28 L. R. Ir. 339, followed.

Per Barry, L.J., the 33rd section of the Judicature (Ireland) Act, 1887, manifests the intention of the Act to terminate all arbitrary privilege of the plaintiff to select and retain his venue and to restore in a considerable degree the old common law right of the defendant to have certain actions tried in the place where the cause of action arose.

In cases where, under the common law as modified by the English Rule No. 18, H. T., 1853, the defendant was entitled to change the venue to the place where the cause of action arose, he is still entitled to do so unless it should be shown to the court or judge by the plaintiff that it is more reasonably consistent with the convenient and speedy despatch of business that the case should be tried elsewhere. — *M'Couchy* v. *Madden*, C.A. (Ir.) —28 L. R. Ir. 338.

19. *Writ—Non-service within twelve months—Renewal—Claim barred by Statute of Limitations—General Order* 64, *r.* 7.—Where a writ of summons was not served within twelve months, and the cause of action had in the meantime become barred by the Statute of Limitations, the court, following *Doyle* v. *Kaufman*, 3 Q. B. D. 340, refused to extend the time for its renewal under General Order 64, r. 7.—*Magee* v. *Hastings*, Q.B.D. (Ir.)—28 L. R. Ir. 288.

20. *Writ — Specially-indorsed writ — Leave to deliver statement of claim—Rules of* 1891, *ord.* 20, *r.* 1 (*a*).—Where a writ is specially indorsed, the plaintiff must obtain leave under ord. 20, r. 1 (a), before he can deliver a statement of claim, even though the defendant on appearing required a statement to be delivered.—*Salters' Co.* v. *M'Cleary*, Q.B.D. (Ir.)—28 L. R. Ir. 283.

See CRIMINAL LAW (IRELAND), 1.

PRESCRIPTION.—See COPYHOLDS; EASEMENT, 1; LIGHT, 1; WATERCOURSE.

PRETENCED TITLE.—See JUDGMENT, 1; MORTGAGE, 7a.

PRINCIPAL and AGENT:—

1. *Agreement to employ for a term certain—Employer's place of business destroyed by fire—Condition of continued existence of place of business, whether implied—Foundation of contract.*—The defendant, a manufacturer, entered into a written contract with the plaintiff to employ him as agent, canvasser, and traveller for a term of five years certain, determinable at the end thereof by three months' notice in writing on either side, the plaintiff on his part agreeing to "do his utmost to obtain orders for and sell the various goods manufactured or sold" by the defendant, as should "be from time to time forwarded, or submitted by sample or pattern" to the plaintiff, who was to be remunerated by commission at a specified rate on all goods sold by him for the defendant. The defendant's manufactory having been burnt down when there were still nealy three years of the five unexpired, he made no attempt to resume his business or carry it on elsewhere, or to afford the plaintiff any further employment.

Held, that a condition that the defendant's manufactory should continue to exist could not be implied in the contract, which was such that the destruction of the manufactory did not render it impossible of performance, and that the plaintiff was entitled to substantial damages.

Rhodes v. *Forwood*, 24 W. R. 1078, 1 App. Cas. 256, distinguished.

Taylor v. *Caldwell*, 11 W. R. 726, 3 B. & S. 826, explained.

Decision of Grantham, J., reversed.—*Turner* v. *Goldsmith*, C.A. 547—[1891] 1 Q. B. 544; 60 L. J. Q. B. 247; 64 L. T. 301.

2. *Appointment of agent—Agent to purchase—Conveyance—Declaration of trust—Statute of Frauds* (29 *Car.* 2, *c.* 3), *ss.* 4, 7—*Practice—Pleadings—Amendment—Ord.* 19, *r.* 15.—The plaintiff, being desirous of purchasing a house, asked the defendant to attend the sale and "be his friend." The defendant attended the sale, bid for the house, which was knocked down to him, paid for it out of his own money, and took a conveyance in his own name. The plaintiff brought this action for a declaration that the defendant was his agent and a trustee of the house for him. The defendant, by his statement of defence, denied the agency, and pleaded section 4 of the Statute of Frauds; but at the trial the defendant's counsel, in argument, relied on section 7, and, after the plaintiff's counsel had replied, the defendant's counsel applied for leave to amend the statement of defence by pleading section 7.

Held, that the amendment could not be allowed at so late a stage of the action, and, therefore, that it was not open to the defendant to rely on section 7; but

Held, on the evidence, that the plaintiff had failed to establish that the defendant had been constituted his agent, and, therefore, that the action should be dismissed.

Bartlett v. *Pickersgill*, 4 East, 577 note (b), 1 Eden, 515, 1 Cox, 15, is not overruled by *Heard* v. *Pilley*, 17 W. R. 750, L. R. 4 Ch. App. 548, and is still sound law.—*James* v. *Smith*, CH.D. KEK., J. 396 —[1891] 1 Ch. 384; 63 L. T. 524.

3. *Authority of agent to borrow—Liability of principal where agent exceeds his authority.*—Where an agent under his power of attorney possessed implied authority to raise money by loan for the purpose of carrying on the business affairs intrusted to him, which authority under circumstances of emergency must be deemed to include power to borrow on exceptional terms outside the ordinary course of business,

Held, that the lender was not bound to inquire whether in the particular case the emergency had arisen or not; but that he was entitled to recover from the principal if he lent to the agent *bonâ fide*, and without notice that the agent was exceeding his mandate.—*Montaignac* v. *Shitta*, P.C.—15 App. Cas. 357.

4. *Bribery of agent—Action against briber to recover excess price fraudulently obtained—Right of briber to plead satisfaction by agent — Form of agreement between corporation and fraudulent agent in satisfaction of their claim against agent*—Ultrà vires.—Where an agent, under the influence of bribes, persuades his principal to pay a price for goods obtained from a contractor, advancing the bribe, in excess of the price at which the contractor was in fact willing to sell, the principal has a right of action against both agent and contractor, whether jointly or severally, for two distinct and independent frauds, and it is immaterial upon which right of action he first sues. The fact that the principal, before action against the contractor, had entered into an agreement with the agent, whereby, on condition of the agent depositing securities to cover the amount of the bribes retained by him, the principal undertook to take action at the agent's request, against the contractors who had advanced the bribes, and to credit the agent with the sums so recovered from the contractors by discharging his securities from liability to that amount, cannot be pleaded as a defence by the contractor, because

such an agreement does not amount to the release of a joint tort-feasor, but only to the postponement of the principal's independent right of action against his agent; and (*per* Lord Esher, M.R.) that, in the case of a corporation, such an agreement, binding the corporation to sue at the request of their agent, was *ultrà vires.—Mayor, &c., of Salford* v. *Lever*, C.A. 85—[1891] 1 Q. B. 168; 60 L. J. Q. B. 39; 63 L. T. 658.

See also LANDLORD AND TENANT (IRELAND), 2; SHIP (CO-OWNERS), 28, 29.

PRINCIPAL and SURETY:—

1. *Giving of time—Discharge of personal liability—Release of property—Tenants in common—Covenant to pay mortgage debt—Redemption action—Parties.*—Where a surety pledges his personal credit by note, covenant, or otherwise, and by the same contract pledges his goods or charges or mortgages his lands as security for the same debt, any alteration of the contract without his consent discharges the surety from all personal liability, and releases the property which the surety had included in his contract.—*Bolton* v. *Salmon*, CH.D. CHI., J. 589—[1891] 2 Ch. 48; 60 L. J. Ch. 239; 64 L. T. 222.

See BANKRUPTCY (PROOF), 34; MORTGAGE, 8, 9.

PROBATE:—

1. *Administration, grant of—Foreign will disposing of property abroad—Intestacy as to English estate—Grant.*—The deceased left a will expressly limited to her property abroad, which was proved by the executors in the foreign court; but she died intestate as to her property in this country.

Held, that administration of the property in this country might be granted to her sole next of kin.—*In the Goods of Mann*, P.D. & A.D.—[1891] P. 293.

2. *Administration, grant of—Grant to a son, passing over the husband.*—Where the husband of an intestate had been cited to take out letters of administration to the personal estate and effects of his wife, and had entered no appearance to the citation, the court passed him over and made a grant of administration to the only son of the intestate.—*In the Goods of Moore*, P.D. & A.D.—[1891] P. 299.

3. *Administration, grant of—Joint grant—Widow and two elder sons—Consent of minor.*—A man who died intestate left a testamentary paper which he had signed, but which was not duly executed, in which he expressed a wish that his property should be divided equally between his wife and his five children, and that his business should be carried on by his wife and his two elder sons, whom he appointed his executors. All the children were of full age except the youngest, who was twenty years and six months old, and all the persons interested were desirous that a joint grant of administration should be made to the widow and the two elder sons.

Held, that there were special circumstances to justify the court in making a joint grant as prayed.—*In the Goods of Dickinson*, P.D. & A.D.—[1891] P. 292; 64 L. T. 808.

4. *Administration, grant of—Official receiver—Security given in bankruptcy proceedings—Personal bond of administrator accepted—Sureties dispensed with.—In the Goods of Knapp, In the Goods of Robins*, P.D. & A.D.—63 L. T. 252.

5. *Administration, grant of—Residuary bequest—"All other effects"—Grant.*—A testator bequeathed to his wife "all my furniture, jewellery, pictures, wearing apparel, and other effects belonging to me at the time of my decease." The will went on to make specific bequests to his wife of money, shares, securities, &c., and it directed her to pay his debts, and left it to her discretion whether she would provide for his sons and daughters by a previous marriage and a nephew. It contained no bequests to any other person.

Held, that the words "all other effects" constituted his wife residuary legatee.—*In the Goods of Jupp*, P.D. & A.D.—[1891] P. 300.

6. *Administration, grant of—Testamentary appointment—New Zealand probate—Confirmation of appointment in will—Omission from probate—Limited grant of administration refused.*—The testator, whose domicil of origin was Scotch, executed a testamentary appointment while on a visit to this country, in the exercise of a power contained in his marriage settlement. He afterwards acquired a domicil in New Zealand and there duly executed a will in which he referred to this testamentary appointment and confirmed it. The executors named in the will obtained probate of it in New Zealand; but no mention of the testamentary appointment was made in the probate. The registrar of the English court refused to pass an exemplification of the probate, on the ground that the testamentary appointment was not referred to in it. The appointee then moved for a grant of limited administration with the testamentary appointment annexed.

Held, that the application must be refused, the proper course being for the executor to apply to the New Zealand court for the grant of a fresh probate including the testamentary appointment.—*In the Goods of Crawford*, P.D. & A.D.—15 P. D. 212; 60 L. J. P. D. & A. 16; 63 L. T. 232.

7. *Administration bond—Grant to committee of lunatic executor—Estate found to be larger than original estimate—Sureties allowed to give a bond to double the amount actually in the hands of the administratrix.*—An executor, who was also sole legatee, having been found to be a lunatic by inquisition, his committee took out letters of administration for his use and benefit, and entered into a bond jointly with a guarantee society for double the sum of £4,569, at which the value of the estate was then estimated. It was afterwards found that the estate was entitled to a further sum of £4,492, and a second bond was required. The administratrix had paid into court to the account of the lunatic £6,823, retaining in her hands, after paying debts and testamentary expenses, £650.

Held, that the sureties might be allowed to enter into a bond in double the amount remaining in the hands of the administratrix.—*In the Goods of Cormack*, P.D. & A.D.—[1891] P. 151; 63 L. T. 710.

8. *Administration with will annexed, grant of—Property requiring protection—Sole executor abroad—General power of attorney by executor—Grant to attorneys.*—The sole executor of a will was abroad, with the intention of not returning for two years, and three or four months must elapse before communications could be had with him. The court had made a grant *ad colligenda* to the widow of the testator, but this was found insufficient to protect the estate. The sole executor, before leaving England, had granted a general power of attorney to two persons, who applied for a grant of administration with the will annexed.

Held, that, on the general terms used in the power of attorney, the court was justified in making the grant.—*In the Goods of Barker*, P.D. & A.D. 560—[1891] P. 251.

9. *Administrator* pendente lite, *appointment of—Testamentary suit—Application of a creditor not a party to the suit for the appointment of an administrator*—20 & 21 *Vict.* c. 77, s. 70.—Where the parties to a testamentary suit took no steps to bring it to trial, and an action had been commenced in the Chancery Division in which a receiver had been appointed, this court, on the application of a creditor not a party to the testamentary suit, appointed an administrator *pendente lite.—In the Goods of Evans*, P.D. & A.D.—15 P. D. 215; 60 L. J. P. D. & A. 18; 63 L. T. 254.

10. *Administrator* pendente lite—*General grant reduced to a limited grant.*—An administrator *pendente lite*, who was also the executor of the will in dispute, had taken out a general grant of administration, but found a difficulty in obtaining sureties to the administration bond to the full amount of the testator's estate.

Held, that the grant might be limited to the amount to be received in respect of two mortgages which were about to be paid off, together with the amount of one half-year's dividends on certain shares, such mortgage debts and shares forming part of the estate of the deceased.—*Askew* v. *Askew*, P.D. & A.D.—[1891] P. 174; 60 L. J. P. D. & A. 52; 64 L. T. 145.

11. *Alteration of will—Clerical error.*—The draft of a will for which the testator had given instructions was read over and explained to him by his solicitor. By the testator's request the word "including" was altered to "excluding" in a clause relating to the name and arms of the testator, and it was believed, at that time, that the alteration so made in the draft was correctly copied in the engrossment of the will. The latter was duly executed by the testator under that belief. Although he subsequently executed two codicils he never again saw the will, which remained in the custody of the solicitor. It was found, after the testator's death, that the word had been altered in the engrossment in a different part of the will, through a clerical error. Upon motion by the executors to substitute the word "excluding" for "including," where altered by the said clerical error, and also to make the alteration from "including" to "excluding" where the same had been made in the draft will,

Held, that the clerical error should be rectified, but that the court could not take upon itself to make the other alteration in the will.—*In the Goods of Huddleston*, P.D. & A.D.—63 L. T. 255.

12. *Alteration of will—Cutting by testatrix—Partial revocation—Probate granted in mutilated state.*—A testatrix, having duly executed her will, proceeded some time afterwards to cut out, with a pair of scissors, the name of one G. P., who was named as an executor therein, wherever the said G. P.'s name appeared in the document. She stated to one or more persons that she had "cut G. P. out of her will," her alleged reason being on account of some disagreement which had arisen between the said G. P. and his wife, who was a daughter of the testatrix.

Held, that the will was only partially revoked, and that it was entitled to probate in the state in which it was found upon the death of the testatrix. —*In the Goods of Leach*, P.D. & A.D.—63 L. T. 111.

13. *Alteration of will—Interlineations and alterations made before the execution of a codicil—Grant of probate.*—Interlineations and alterations in a will admitted to probate where it was proved that they had been inserted before the date of the execution of a codicil to the will.—*Tyler* v. *Merchant Taylors' Co.*, P.D. & A.D.—15 P. D. 216; 63 L. T. 779.

14. *Attesting witnesses — Position of signature—Grant of probate.*—The court granted probate of a will in which the attesting witnesses had written their signatures in the margin, in two separate places, opposite two alterations in the body of the will, without having signed the attestation clause, on being satisfied that the signatures of the witnesses were meant to attest the signature of the testator.

Roberts v. *Phillips*, 4 E. & B. 450, 3 W. R. C. L. Dig. 219, followed.—*In the Goods of Streatley*, P.D. & A.D. 432—[1891] P. 172; 60 L. J. P. D. & A. 56.

15. *English will disposing of property in this country—Executors—Swiss independent will—Swiss law—Administration by State—Objections to incorporation—Form of grant.*—A testator possessed of property in this country and in Switzerland made a will according to the English law disposing of his property here only, and by it declared that it was to take effect concurrently with, and independently of, a prior will dealing with his Swiss property only. On the application of the executors of the English will for probate of it only, it was proved that, if the Swiss will were incorporated in the probate, the executors would have no power to deal with the Swiss property, there being no executors appointed under the Swiss law, and if they attempted to deal with it they might come into conflict with the officers of the Swiss courts whose duty it would be to administer the Swiss estate.

The court granted probate to the executors of the English will only upon their filing a certified copy of the Swiss will in the registry, and directed a note to be made on the English probate that such copy had been so filed.

In the Goods of Astor, 24 W. R. 539, 1 P. D. 150, followed and explained.—*In the Goods of Granet De la Rue*, P.D. & A.D. 64—15 P. D. 185; 63 L. T. 253.

16. "*Executor according to the tenor*"—*Grant of probate—Right to legacy.*—As a general rule where there is a direction in a will to pay debts, and no person is nominated to pay them, and all the personal estate is bequeathed to a person by name, the court will grant probate of the will to such person as "excutor according to the tenor."

The court made the grant without prejudice to any question as to the right to a legacy bequeathed to the testator's executor.—*In the Goods of Tandy*, P. & M.D. (Ir.)—27 L. R. Ir. 114.

17. *Married woman—Will of real estate—Exercise of power of appointment and devise—Appointment of executors—Right to probate—Existing grant of administration.*—A married woman, having a power of appointment over, and being absolutely entitled to, real estate subject to the exercise of such power, by her will appointed and devised the same, and appointed executors. She had no personal estate, and her will did not purport to dispose of any. Her husband obtained a grant of administration to her estate, on the ground that she had died intestate, except as to realty. One of the devisees under the will applied for probate, the executors other than the husband having renounced or died.

Held, that the devisee was entitled to the grant, but that the court could not make a grant to him until the existing grant to the husband was revoked. —*In the Goods of Hornbuckle*, P.D. & A.D. 80—15 P. D. 149; 59 L. J. P. D. & A. 78; 63 L. T. 464.

18. *Mistake in will—Intention to give equally to two—Name of first legatee repeated—Execution in ignorance of mistake—Grant omitting name in second*

legacy.—A testator instructed his solicitor that he wished to give £10,000 to each of his daughters, G. and F., but by inadvertence G.'s name was inserted in the draft and in the will in both clauses, F.'s name being omitted from the second, where it ought to have been. The draft was brought to the testator, but not read over to him, an epitome, in which the names were correctly stated, being read instead. The will was executed by the testator without being read to or by him, and in ignorance of the mistake.

Held, that the court would, on motion, with the consent of all parties interested, grant probate of the will omitting the name of G. from the second of the two clauses.—*In the Goods of Boehm*, P.D. & A.D. 576—[1891] P. 247; 64 L. T. 806.

19. *Mutilation—Grant of probate.*—The testatrix duly executed her last will. At some date subsequently she added something in writing at the foot of the will. She afterwards appeared to have cut off this addition, and, in doing this, cut through the name of one of the attesting witnesses. Sufficient, however, remained for the name to be still legible. There was also a piece cut out in the margin of the will. The signature of the testatrix and all the other material parts of the will remained intact.

The court, upon motion, admitted the document to proof in its mutilated form.—*In the Goods of Taylor*, P.D. & A.D.—63 L. T. 230.

20. *Part of will lost—Secondary evidence—Declaration by testator after execution—Grant of probate.*—A declaration made by a testator after the execution of his will may be admitted as secondary evidence of the contents of part of the will, where that part has been lost, and probate granted accordingly.—*In the Goods of Ball*, P. & M.D. (Ir.)—25 L. R. Ir. 556.

21. *Practice—Costs—Order against infant defendant, against the guardian* ad litem, *and against a defendant who had appeared, but had not pleaded.*—The executrix having propounded a will, the sister and infant niece of the deceased were made defendants as the next of kin. The sister appeared but did not plead, and the infant appeared by her mother, who was appointed guardian *ad litem*. On behalf of the infant a statement of defence was filed alleging insanity and undue influence. The court at the trial pronounced for the will, with costs. The registrar having refused upon taxation to order payment of the costs against any but the guardian *ad litem* of the infant,

The President (Sir J. Hannen) ordered payment of the taxed costs by the two defendants and the guardian *ad litem*, and amended the decree accordingly.—*Vivian* v. *Kennelly*, P.D. & A.D.—63 L. T. 778.

22. *Practice—Defendant's interest questioned—Interrogatories—Motion to strike out defence.*—In an interest suit, where the real question in dispute was the defendant's legitimacy, upon motion by the plaintiff to strike out the statement of defence,

The court held that this was too serious a matter to be decided upon motion, and dismissed the application, with costs.—*In the Goods of Harrington*, P.D. & A.D.—63 L. T. 228.

23. *Practice—Infant—Defendant a minor residing out of jurisdiction—Refusal to enter an appearance—Official solicitor nominated guardian* ad litem—*Contentious Rules of Probate Court*, 1862, *r.* 74—*R. S. C.*, 1883, *ord.* 13, *r.* 1.—The defendant in a probate action was a minor resident out of the jurisdiction. Notice of the writ had been served upon her and upon her guardian nominated by the foreign court, but no appearance had been entered on her behalf, and it appeared that her guardian declined to enter an appearance.

The court, holding that the practice was governed by ord. 13, r. 1, and not by rule 74 of the Contentious Rules of the Probate Court, 1862, nominated the official solicitor of the court to be the defendant's guardian *ad litem*, and ordered that his costs should be part of the costs of the plaintiff, who was the executor propounding the will.—*White* v. *Duvernay*, P.D. & A.D.—[1891] P. 290.

24. *Practice—Place of trial named in statement of claim—Venue changed to Middlesex—Convenience—Trial ordered at assizes.*—In a probate suit, where the nominal plaintiff, who was claiming an intestacy, had inserted the place of trial in his statement of claim, the defendants, who were propounding a will of the deceased and upon whom the onus of proof at the trial would lie to establish that will, applied upon summons to change the venue from the assizes to Middlesex, and the judge made the order. Upon the plaintiff's appealing, upon motion, to set aside the order,

Held, that the order was right, that the venue should stand changed, and that the case should come on for trial in this court, the more especially as there appeared to the judge a doubt as to whether the case could be conveniently disposed of at the approaching assizes.

From this order the plaintiffs, upon special leave given, appealed to the Court of Appeal: whereupon the court, after consulting the judge appointed to preside at the assizes in question, and having ascertained from him that the cause list was a light one, and that the case could, without difficulty be disposed of at the approaching assizes, directed the case to be so tried.—*Jackson* v. *Braithwaite*, C.A.—63 L. T. 231.

25. *Practice—Production of documents—Documents belonging to solicitor—Ord.* 37, *rr.* 5, 7—*Privileged communication.*—The defendants in an action by the plaintiff propounding a will having applied for inspection of documents, it appeared that the solicitor for the plaintiff had for many years acted as solicitor for the testatrix whose will was in dispute, and had in his possession diaries, extracts from diaries, cash ledgers, bankers' cash books containing entries and memoranda relating to the deceased and her affairs, which documents were the private property of the solicitor.

Held, affirming the decision of Jeune, J., that an order could not be made on the plaintiff to produce them for inspection.

Held, also, affirming the decision of Jeune, J., that the solicitor could not be compelled, under ord. 37, r. 7, to produce these documents for the purpose of discovery, nor to be called for examination at this stage of the proceedings under ord. 37, r. 5.

Held (reversing the order of Jeune, J.), that an affidavit by which a party objected to produce documents because she claimed them "to be privileged, as communications between herself and her solicitor," was insufficient to protect them, it being necessary to show that the letters were professional communications of a confidential character.—*O'Shea* v. *Wood*, C.A.—[1891] P. 286; 65 L. T. 30.

26. *Practice—Right to begin—Plea of fraud—Plea not established—Costs.*—In a probate suit the plaintiff claimed a decree of intestacy, and the defendant set up a will which had been duly executed by the deceased in her favour, and of which she was sole executrix. The only issue was one of fraud, which had been pleaded by the plaintiff, the alleged fraud being that the defendant

had led the testator to believe that she was capable of contracting, and that she had contracted, a valid marriage with him, whereas in fact her real husband was then and still alive. The plaintiff opened the case, and in the result

The court found that the plea of fraud had failed, and pronounced for the will in the defendant's favour, but left each party to pay their own costs.—*Tate* v. *Tate*, P.D. & A.D.—63 L. T. 112.

27. *Revocation of will by marriage — Indian divorce—Marriage of parties in England within six months of final decree—Indian Divorce Act*, 1869, *No.* 4, *s.* 57.—A respondent and co-respondent in a divorce suit in India, in which a decree absolute was pronounced on November 27, 1879, came to this country and were married on February 3, 1880. On February 6 the co-respondent duly executed a will by which he bequeathed all his property to his "reputed wife." On April 2, 1880, the parties went through a second form of marriage.

Held, that the first marriage, having been celebrated within six months from the date of decree absolute for divorce, contrary to the prohibition in section 57 of the Indian Divorce Act, 1869, No. 4, was invalid, and that the will was revoked by the subsequent marriage.

Scott v. *Attorney-General*, 11 P. D. 128, distinguished.—*Warter* v. *Warter*, P.D. & A.D.—15 P. D. 152; 59 L. J. P. D. & A. 87; 63 L. T. 250.

28. *Seaman's will—Surgeon in the navy—Letter written before sailing*—1 *Vict. c.* 26, *s.* 11.—A surgeon in the navy wrote a letter, some parts of which were testamentary, on board a Queen's ship at Devonport. The ship was lost at sea and the surgeon drowned.

Held, that the letter was entitled to probate as the will of a "seaman being at sea," within section 11 of 1 Vict. c. 26.—*In the Goods of Rae*, P. & M.D. (Ir.)—27 L. R. Ir. 116.

29. *Testamentary document—Deed poll—Execution as a will—Extrinsic evidence—Administration.*—The deceased, prior to her death, executed a deed poll, which was duly witnessed by two witnesses, who signed as witnesses in the presence of each other. The person who drew up the document regarded it as a will, and added the words, "And in the presence of each other." The sole beneficiary was present, and under the deed understood that she was to receive nothing until after the death of the deceased, and after the execution of the document she promised to give, at the request of the deceased, £10 to E. C. after her death, as she had omitted to mention it in the paper.

Held, that the beneficiary was entitled to administration, with the paper annexed, as the last will and testament of the deceased. As the document was ambiguous, extrinsic evidence was admissible to show whether the deceased intended it to operate as a testamentary document.—*In the Goods of Slinn*, P.D. & A.D. 175—15 P. D. 156; 59 L. J. P. D. & A. 82; 63 L. T. 229.

30. *Testamentary documents—Will revoked by later will—Subsequent execution of codicil—Construction—Revival—Probate of earlier will and of codicil.*—The testator died at Calcutta in April, 1888. By a will made in 1873 he appointed three persons (two of whom had since died) to be his executors, and after disposing of all his property, appointed his wife, "during her widowhood, and, after her death, his trustees therein named and the survivors or survivor of them, guardians of my infant children for the time being."

In 1878 he executed a holograph will, at the foot or end of the will of 1873, in these terms: "I hereby revoke the above will in its entirety, declaring all its provisions null and void, and constitute my wife the sole heiress and executrix of any property I may die possessed of." In 1882 the testator executed a further testamentary document, as follows: "I declare this to be a codicil to my last will. I hereby confirm my said will in all respects, and particularly the appointment therein of my wife as guardian of my infant children, and I hereby appoint my sister, L. C. Griffith, guardian of my infant children after the death of my said wife." The widow now moved the court for directions.

Held, that the word "confirm" in the codicil, coupled with the reference to the guardianship of the infant children, no mention of which was made in the revocative second will, was sufficient to revive the earlier will of 1873 as against the second will of 1878, and that probate should go of the will of 1873 and the codicil of 1882, as together constituting the true last wishes of the deceased.—*In the Goods of Van Cutsem*, P.D. & A.D.—63 L. T. 252.

31. *Testamentary documents—Revival—Mistake of law and fact—Effect.*—The testatrix, forgetting the existence of a will and codicil duly executed by her in 1885, or under a misapprehension as to the legal effect thereof upon an earlier will and codicil, executed, in 1889, a "second codicil" to the earlier will and codicil, which she thereby purported to "ratify and confirm." The solicitors who drew the first will and codicil and the last codicil knew nothing of the existence or execution of the intermediate will and codicil until after the death.

Held, that the first will and codicil were not revived by the last codicil.—*In the Goods of Turner*, P.D. & A.D.—64 L. T. 805.

32. *Two wills—Property in England and Canada—Independent grant for English will—Affidavit as to movables.*—A testator possessed of property in England and Canada made two wills, each purporting to be independent of the other, and disposing only of the estate situate in the country to which it referred.

Held, that probate might be granted of the English will on an affidavit being filed exhibiting a copy of the Canadian will, and a statement that such affidavit had been filed being indorsed on the probate; but that an affidavit must be made that the movable chattels bequeathed by each will were actually at the time of the death of the testator in the country to which the will which disposed of them referred.—*In the Goods of Seaman*, P.D. & A.D. —[1891] P. 253; 64 L. T. 805.

33. *Two wills—Separate disposition of property in England and Scotland—Debts charged on one estate only—Grant.*—A testator executed two testamentary papers, one disposing exclusively of property in Scotland, the other dealing solely with property in England. By the Scotch testamentary paper all the testator's debts were charged on the Scotch estate. Two of the executors of the English will were trustees of the Scotch estate. The court being satisfied that no creditor would be prejudiced, made a grant of probate of the English will alone, without requiring the Scotch deed to be incorporated, upon condition that a certified copy of such deed was filed and a note to that effect made on the probate.—*In the Goods of Fraser*, P.D. & A.D.—[1891] P. 285; 64 L. T. 808.

34. *Will and codicils—Different executors for different properties—Grant of probate.*—The probate should contain the whole, and not a part only, of the testamentary documents of the deceased. The testatrix made a will disposing of property in Ireland, and

appointing executors, and a codicil of even date disposing of property in America and appointing a different person executor thereof, and later on a second codicil substituting a new executor in the place of one named in the will. The court granted probate of all three documents to the executors named in the will and second codicil without reserving power to the executor named in the first codicil.—*In the Goods of Power*, P. & M.D. (Ir.)—25 L. R. Ir. 509.

35. *Will procured by beneficiary—Not read over—Not know and approve contents*—Onus *on beneficiary propounding will—Probate refused.*—The court is to approach with suspicion the consideration of a will procured and propounded by a person taking a large benefit thereunder, although the will may have been prepared by a solicitor, and although fraud is not pleaded by the person opposing the will, and where there was no testamentary incapacity on the part of the testator or the witnesses.

Where a beneficiary, who had procured and subsequently propounded a will, failed, under those circumstances, to satisfy the court, by affirmative and conclusive evidence, that the testator did, in fact, know and approve of the contents of the will which he had actually executed,

The court, applying and acting upon the principles laid down by the House of Lords in *Fulton* v. *Andrew*, L. R. 7 E. & I. App. 461, 32 L. T. N. S. 209, refused probate of such will, with costs. —*Brown* v. *Fisher*, P.D. & A.D.—63 L. T. 465.

See also EXECUTOR, 2; WILL, 33.

PROBATE (IRELAND).—See PRACTICE (IRELAND), 11.

PROBATE DUTY.—See REVENUE, 10.

PUBLIC HEALTH ACT, 1875.—See LOCAL GOVERNMENT, 1, 8-14; WATERWORKS, 2.

RAILWAY:—

1. *Abandonment—Parliamentary deposit—Rights of creditors.*—By a private Act authorizing the construction of a railway, provision was made for the return of the parliamentary deposit to the depositors on the completion of the undertaking. By section 37 if the undertaking was not completed within the prescribed time the deposit should be applicable towards compensating landowners; and if no such compensation was payable the deposit should be either forfeited to the Crown, or, in the discretion of the court, if the company had been ordered to be wound up or a receiver had been appointed, should be paid to such receiver or the liquidator of the company, or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof. The company having allowed their powers to lapse, a private Act was passed which authorized the return of the deposit to the depositors subject to the provisions of section 37 of the earlier Act. There was no enactment, nor any order of the court, directing the winding up of the company, nor had a receiver been appointed.

Held, upon a petition by the depositors for the return of the deposit, that the creditors of the company had no claim against the deposit.—*In re Enniskillen and Bundoran Railway Co.*, M.R. (Ir.)—25 L. R. Ir. 472.

2. *Agreement for purchase of lands "or such portion as the company may require"—Time within which option to be exercised—Completion of purchase.* —In December, 1883, an agreement was entered into between the plaintiff of the one part and a railway company, the predecessors of the defendant company, of the other part, which, after reciting that by a special Act of 1882 the company had obtained power to construct certain railways, and for that purpose to take certain lands of the plaintiff, provided that the company should pay for the purchase of such lands, "or for such portions or portion thereof as the company may require," and for the fee simple thereof, at the rates therein mentioned; that the purchase should be completed on or before the 1st of January, 1885, and that, if not completed by that day, the company "should thenceforth pay to the vendor interest on the purchase-money after the rate of £5 per cent. per annum." By a special Act of 1885 the company obtained an extension of time for the compulsory purchase of lands till the 18th of August, 1887, and for the completion of their works till the 18th of August, 1890. By a special Act of 1887 the defendant company was incorporated for the purpose of taking over the entire undertaking of the old company. The plaintiff complained that the defendant company refused to carry out the agreement, and accordingly brought an action claiming specific performance of it. The defendant company, on the other hand, insisted that they were not under any obligation to purchase any of the lands comprised in the agreement except as and when they required them for the construction of their railway and works, which, in fact, they were not at present in a position to make.

Held, that, unless the defendant company had stated that they required certain of the plaintiff's lands, the agreement could not now be enforced against them, the company having an option to say what lands they required; and that the reasonable inference to be drawn from the agreement was that the time within which such option was to be exercised was the 1st of January, 1885.

Held, therefore, that the agreement was not enforceable either against the plaintiff or the defendants, and that the action failed.—*Wentworth* v. *The Hull and North-Western Junction Railway Co.*, CH.D. KEK., J.—64 L. T. 190.

3. *Debenture-holders—First charge—Gross traffic receipts—"Working expenses"—Priority—Wye Valley Railway Act*, 1866 (29 & 30 *Vict. c. ccclvii.*), *ss.* 17, 19, 50, *and* 53.—The plaintiff on behalf of himself and all other the debenture stock holders of the defendant company claimed a declaration that they were entitled to a first charge on the gross traffic receipts arising under an agreement made between the defendant company and the Great Western Railway Co. scheduled to the Wye Valley Railway Act, 1866, and confirmed and made binding upon the companies parties thereto by section 53 of that statute.

Clause 11 of the agreement provided that the interest on the bonds and debentures of the defendant company not exceeding £76,600 should be a first charge on the gross receipts, and should be paid thereout by the Great Western Railway Co., and should be repaid to that company by the defendant company out of its proportion of the divisible receipts from time to time; and that in case of any deficiency of such proportion in any half-year the amount of such deficiency should be a charge on any moneys payable by the Great Western Co. to the defendant company in any subsequent half-year.

The defendant company sought to apply out of gross traffic receipts moneys required for the purpose of discharging certain outgoings which were absolutely necessary in connection with the branches or subsidiary works of the defendant company's undertaking.

Kekewich, J., decided that the charge claimed by

the plaintiff was conferred by the provisions of clause 11, which contained a clear expression of the rights of the debenture stockholders; and that in the face of that charge the defendant company was not entitled to apply the gross traffic receipts in payment of its working expenses so as to diminish the moneys coming to the debenture stock holders.

On appeal: Held (affirming the decision of Kekewich, J.), that the plaintiff's charge had absolute priority over the claim made by the defendant company.

In re The Eastern and Midlands Railway Co., 45 Ch. D. 367, 63 L. T. N. S. 181, 604, distinguished.—*Proffitt* v. *The Wye Valley Railway Co.*, C.A.—64 L. T. 669.

4. *Passenger travelling without payment of fare—Demand of fare—Criminal proceedings—Regulation of Railways Act*, 1889 (52 & 53 *Vict. c.* 57), *s.* 5, *sub-section* 3.—A passenger having been summoned under the Regulation of Railways Act, 1889, s. 5, sub-section 3 (*a*), for travelling without having previously paid his fare, and with intent to avoid payment thereof (the passenger having travelled in a higher class of carriage than that for which he had a ticket), the magistrate dismissed the summons, on the ground that, the ticket collector having demanded the excess fare, the railway company could not afterwards proceed criminally.

Held, that the decision of the magistrate was wrong.—*Noble* v. *Killick*, Q.B.D.—60 L. J. M. C. 61.

5. *Railways (Ireland) Act*, 1860 (23 & 24 *Vict. c.* 97), *s.* 2—*Compulsory purchase—Purchase-money lodged in court—Interest—Payment out—Annuitant—Consent.*—A railway company took lands under their compulsory powers and lodged the amount found by the certificate of the arbitrator in court under section 2 of the Railways (Ireland) Act, 1860, and went into possession of the lands. The company did not apply to have the money invested or transferred to the credit of the sum awarded by the final award of the arbitrator.

Held, that the company were liable to pay interest on the purchase-money from the date at which they went into possession of the lands.

Held, also, that the money could not be paid out to the owner without the consent of the holder of an annuity charged thereon.—*In re Dublin, Wicklow, and Wexford Railway Co., Ex parte Jordan*, V.C. (Ir.)—27 L. R. Ir. 79.

6. *Rates—Division of rates into component parts—"Person interested"—Owner of private branch railway—Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48), *s.* 14.—The owner of a branch line communicating with the defendants' line collected goods and loaded them upon trucks, and handed over the trucks at the junction to the defendants. The applicant also received from the defendants at the junction goods for delivery on the branch line.

Held, that the applicant was entitled to an order under section 14 of the Regulation of Railways Act, 1873, as a "person interested" within the meaning of that section, requiring the defendants to distinguish in their rate-book how much of the rate was for each of the charges therein specified which together constituted the total rate.—*Tomlinson* v. *London and North-Western Railway Co.*, R. & C.C.—63 L. T. 86.

7. *Rates—Terminal charges—Station accommodation—Clerkage—Shunting—Service incidental to the business of a carrier—The Great Northern Railway and East Lincolnshire Railways Acts Amendment Act*, 1850 (13 & 14 *Vict. c. lxi.*), *s.* 13.—The statute 13 & 14 Vict. c. lxi. provides (section 13) that, "with respect to the conveyance of goods and minerals, the said companies may lawfully demand and receive as the maximum rate of charge for the conveyance thereof along their railways, including the tolls for the use of the railways, and wagons or trucks, and locomotive power, and every expense incidental to such conveyance, except a reasonable sum for loading, covering, and unloading, and for delivery and collection, and any other services incidental to the business or duty of a carrier, where such services, or any of them, are or is performed by the said companies . . . any rates or sums not exceeding," &c.

Held, that, on the true construction of the section, the companies were entitled to make charges, in addition to the maximum rate, in respect of station accommodation for merchandise, and of the share of the general expenses of the station, of supervision, of clerkage, and of shunting attributable to the merchandise traffic as "services incidental to the duty or business of a carrier."—*Sowerby & Co.* v. *Great Northern Railway Co.*, C.A.—60 L. J. Q. B. 467.

8. *Receiver—Unpaid capital—Execution—Companies Clauses Act*, 1845 (8 & 9 *Vict. c.* 16), *s.* 36—*Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 4.—The appointment of a receiver of the undertaking of a railway company under section 4 of the Railway Companies Act, 1867, does not affect the right of a judgment creditor to issue execution against unpaid capital under section 36 of the Companies Clauses Act, 1845.

Unpaid capital is not receivable by a receiver appointed under section 4 of the Railway Companies Act, 1867.

E. H. was appointed receiver and manager of the West Lancashire Railway Co. He held shares in the company, which purported to be fully paid up, but which had in fact been issued at a discount, and on which it was alleged that moneys still remained due. The Rock Life Assurance Co. held debenture stock of the railway company on which interest was in arrear. The suing officer of the insurance company, having recovered judgment in respect of the arrears, gave notice of an application to the Queen's Bench Division, under section 36 of the Companies Clauses Act, 1845, for leave to issue execution against E. H. to the extent of the moneys remaining due in respect of his shares. The railway company thereupon moved to commit him for contempt of court in instituting proceedings against the receiver without the leave of the court for the purpose of obtaining moneys alleged to be receivable by him in his capacity of receiver.

Held, that the respondent was within his rights, and that the motion must be dismissed with costs.—*In re West Lancashire Railway Co.*, CH.D. STI., J.—63 L. T. 56.

9. *Receiver and manager—Application of moneys in hands of receiver—"Working expenses and proper outgoings"—Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *ss.* 4, 23.—When a receiver of the undertaking of a railway company has been appointed in pursuance of section 4 of the Railway Companies Act, 1867, the moneys received by him must be applied first in providing for the "working expenses" of the railway, even if by the company's special Act a fixed dividend on shares and the interest on debentures forming the capital raised for a particular undertaking of the company are charged on the gross receipts of that undertaking.

When a railway company has purchased rolling stock on the terms of paying for it by a series of instalments at fixed times, the stock not becoming the property of the company until the complete payment of all the instalments, and the vendor

having the right to seize the stock on default in payment of any one instalment, the "working expenses" include such instalments as they become due, and also overdue instalments.

By virtue of a special Act of a company a certain loop line was constituted a "separate undertaking" and the capital raised for the purpose of constructing the loop line was constituted "separate capital." A receiver having been appointed under section 4 of the Railway Companies Act, 1867,

Held (by Kay, J., and the Court of Appeal), upon the construction of the special Act as a whole, that the dividend upon, and interest in respect of, the separate capital were not "working expenses" or "proper outgoings" within the meaning of section 4 and were to be postponed to working expenses.—*In re Eastern and Midlands Railway Co.*, C.A.—45 Ch. D. 367; 63 L. T. 604.

10. *Statutory powers—Subway under Metropolitan street—Power to construct necessary works within lines of deviation—Permanent interference with foot or carriage way prohibited—Erection of station beyond fixed general line of buildings—Construction of general and special Acts—Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 75—*City of London and Southwark Subway (Kennington Extension, &c.) Act*, 1887 (50 & 51 *Vict. c. cv.*), *ss.* 4, 25, *and* 27.—A railway company were empowered by their special Act, passed in 1887, to construct in the metropolis, within limits of deviation shown on deposited plans, a subway with all necessary works and conveniences, and to acquire specified lands compulsorily for the purpose, and were prohibited from making any approach to the subway in such a manner as to interfere after the completion thereof with the carriage or footway of any street.

Held, on case stated, that, notwithstanding the 75th section of the Metropolis Management Amendment Act, 1862, the Act empowered the company to erect, on land compulsorily acquired within the limits of deviation, a station beyond the general line of buildings of a street as fixed by the superintending architect of the London County Council.—*The City and South London Railway Co.* v. *The London County Council*, Q.B.D.—[1891] 2 Q. B. 513; 60 L. J. M. C. 99.

11. *Undue preference—Effect of competition—"Necessity of lower charge for securing in the interests of the public the traffic in respect of which it is made"—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 2—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *ss.* 7, 27.—By the Railway and Canal Traffic Act, 1888, s. 27, sub-section 1: "Whenever it is shown that any railway company charge one trader or class of traders or the traders in any district lower tolls, rates, or charges for the same or similar merchandise, or lower tolls, rates, or charges for the same or similar services than they charge to other traders or classes of traders or the traders in another district, or make any difference in treatment in respect of any such trader or traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the company." By sub-section 2: "In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the court having jurisdiction in the matter or the commissioners, as the case may be, may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing, in the interests of the public, the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant: Provided that no railway company shall make, nor shall the court or the commissioners sanction, any difference in the tolls, rates, or charges made for, or any difference in the treatment of home and foreign merchandise in respect of the same or similar services."

On a complaint by an association of traders in grain and flour at Liverpool against the London and North-Western Railway Co. for undue preference in respect of the lower rates charged by them for the carriage of these goods from Cardiff to Birmingham as compared with those charged for the carriage of them from Liverpool to Birmingham, a shorter distance, it appeared that the trade of the applicants had suffered through the competition in the Birmingham market of grain and flour from the Bristol Channel and Severn ports, but that only a very small quantity was carried by the respondents from Cardiff to Birmingham. Two other railways competed with the respondents between Cardiff and Birmingham, and the lower rates complained of had been fixed with a view to competition by the respondents with the rates charged by other railways from ports in the Severn to which grain and flour were brought by sea, and which were nearer to Birmingham than Cardiff.

Held, that the facts showed an undue perference by the respondents.

Semble, that the effect of section 27 of the Railway and Canal Traffic Act, 1888, is not to limit the court in dealing with questions of alleged undue preference to the consideration whether or not the lower charge is necessary in the interests of the public.—*Liverpool Corn Trade Association* v. *London and North-Western Railway Co.*, R. & C.C.—[1891] 1 Q. B. 120; 60 L. J. Q. B. 76; 63 L. T. 564.

12. *Undue preference—Grouping rates—Reasonable distances—Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25) *s.* 29.—Certain works belonging to the applicants were situated at a point on the line of the Furness Railway Co. at a distance of eighteen miles from the junction of the line of that company with the line of the London and North-Western Railway Co., and other works of the district were situated thirty-eight miles from that junction. Iron ore and coke were obtained from the same sources in all these works, which also made the same description of pig-iron and sent it to the same markets. The railway companies, as a means of fixing the rates, grouped all these works together and charged them a uniform rate of carriage, except that the applicants were charged at the rate of sixpence per ton less for coke than the other works,

Held, that, so far as the rate for coke was concerned, the railway companies had made sufficient allowance for the difference in distance between the works; but as regards the iron ore rates the places grouped together were at such distances apart as to create an undue preference.—*The North Lonsdale Iron and Steel Co.* v. *Furness Railway Co.*, R. & C.C.—60 L. J. Q. B. 419; 64 L. T. 122.

13. *Undue preference—Rates—Parcels delivery—Forwarding agents—Carriers—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 2.—A railway company undertook to deliver parcels addressed to F., a carrier, who, upon receiving them, distributed them to his customers. Several parcels addressed to F. were delivered to C., who acted as agent of the railway company, and who sent them direct to F.'s customers. C. was a carrier on his own

account, besides being agent for the railway company. The railway company charged F. full rates, but they kept a "favoured list," the persons appearing on it being charged lower rates. C. delivered the parcels to F.'s customers at the lower rates, but as between C. and the railway company it was understood that if he did so in the course of his employment as agent, he must pay the difference to the railway company.

Held, that as between F.'s customers and himself the railway company were delivering to the customers at a lower rate than they charged to F., and that this was an undue preference.—*Ford & Co.* v. *London and South-Western Railway Co.*, R. & C.C. —60 L. J. Q. B. 130; 63 L. T. 841.

See also BUILDING CONTRACT; INTEREST, 2; LAND TAX; NEGLIGENCE, 1, 6, 7; POOR RATE, 2, 3.

RECEIVER.—See LANDLORD AND TENANT (IRELAND), 3; PRACTICE, 49; PRACTICE (IRELAND), 12, 13; RAILWAY, 8, 9; VENDOR AND PURCHASER, 7.

RECOGNIZANCE.—See CROWN.

RESTITUTION of CONJUGAL RIGHTS.—See DIVORCE, 21, 22.

RESTRAINT of TRADE:—

1. *Validity — Covenant — Construction.* — Agreements in restraint of trade are to be construed according to the principles of construction applicable to all other agreements, and are not to be approached with any *primâ facie* presumption against their validity.

Leather Cloth Co. v. *Lorsont*, 18 W. R. 572, L. R. 9 Eq. 345, discussed.

The test in each case of the validity or invalidity of an agreement in restraint of trade is whether, on the true construction of the agreement, the restraint is or is not, having regard to the nature of the business and the character of the employment, greater than is reasonably required for the protection of the employer.—*Mills* v. *Dunham*, C.A. 289—[1891] 1 Ch. 576; 60 L. J. Ch. 362; 64 L. T. 712.

2. *Validity—Consideration—Illegality.*—The members of an association agreed not to sell mineral waters below a certain price, or below such other higher price as the committee might from time to time direct. The agreement was to last for ten years, and a penalty was provided for breach of its provisions.

Held, that the agreement was in restraint of trade, and was not enforceable.—*Urmston* v. *Whitelegg Brothers*, Q.B.D.— 63 L. T. 455.

3. *Validity—Reasonable limits—Limit of space.*—By agreement made the 6th of June, 1885, by D. & Co., of London, foreign carriers (thereinafter referred to as "employers"), of the one part, and L. of the other part, the employers agreed to engage L. as their clerk on certain conditions, which L. agreed to observe and perform. And the agreement contained the following covenant:—"The said L. agrees that he will not within twelve calendar months after the termination of this agreement, from whatever cause, carry on or be engaged in, or interested, directly or indirectly, in the cities of London, Birmingham, Liverpool, England, and New York, United States, or within fifty miles thereof of each of the above-named places, either as principal, clerk, agent, or otherwise, in any business similar to the business now or hereafter to be carried on by employers." On the 21st of February, 1891, the defendant gave the plaintiffs a month's notice to terminate the engagement, and on leaving the plaintiffs he entered into the service of a rival firm in London, and, as the plaintiffs alleged, solicited the custom of the customers of the plaintiffs. The plaintiffs had not any trade with Birmingham, but a considerable business with the other places mentioned in the agreement. This was a motion on the part of the plaintiffs asking, in the terms of the covenant (omitting the words "or hereafter" near the end), that the defendant might be restrained by injunction from committing a breach of the agreement.

Held, that the limit of time was reasonable; also that of space, with the exception of Birmingham, with which place the plaintiffs appeared to have no connection; that the words "principal, clerk, agent, or otherwise" in the agreement were not too wide; that the words "now or hereafter" in the agreement were not reasonable; and that the court could separate the different parts of the covenant, holding part good and part bad.

Injunction therefore granted in terms of the notice of motion, omitting the word "Birmingham," and adding the words "during the employment of the defendant by the plaintiffs.—*Davies, Turner, & Co.* v. *Lowen*, CH.D. KEK., J.—64 L. T. 655.

REVENUE:—

BODIES CORPORATE AND UNINCORPORATE—

1. *Exemption—Property appropriated and applied for the promotion of science—Customs and Inland Revenue Act*, 1885 (48 & 49 *Vict. c.* 51), *s.* 11, *sub-section* 3.—The property of the Institution of Civil Engineers, being legally appropriated and applied for the promotion of the "science" of civil engineering, comes within the exemption under sub-section 3 of section 11 of the Customs and Inland Revenue Act, 1885, and is consequently not liable to the duty imposed by that section.

Decision of the Court of Appeal (36 W. R. 598, 20 Q. B. D. 621) affirmed (Lord Halsbury, L.C., dissenting).—*Commissioners of Inland Revenue* v. *Forrest*, H.L. (E.) 33—15 App. Cas. 334; 60 L. J. Q. B. 281; 63 L. T. 36.

EXCISE—

2. *Spirits—Illicit distillation—Spirits found in house*—1 & 2 *Will.* 4, *c.* 55, *s.* 17.—To constitute an offence under 1 & 2 Will. 4, c. 55, s. 17, the house or place where illicit spirits are found must be one in which illicit distillation was intended to be, and was being, or had been, carried on.—*Doherty* v. *M'Clelland*, EX.D. (Ir.)—28 L. R. Ir. 168.

INCOME TAX—

3. *Deductions — Brewers acting as bankers and money-lenders for their customers—Losses or bad debts in the money-lending branch—Deduction of such losses from profits of the brewery business*—5 & 6 *Vict. c.* 35, *s.* 100, *Schedule D.*—A firm of brewers carried on, in connection with their brewery business, a branch business of banking and money-lending confined to the customers of the firm, which they were entitled to do under their memorandum of association. They advanced money by way of loan or advance to their customers, upon various classes of security, such as deposit of deeds, mortgage, and promissory notes. They received money on deposit from their customers, and acted generally as bankers for such customers, but in no case was any loan or advance made by way of permanent investment. Losses in the nature of bad debts having been incurred in the banking and money-lending branch of the business,

Held, that the banking or money-lending branch was an adjunct to the brewery business, only one business being carried on; that the loans were not capital invested; and that the brewers were

entitled to deduct the losses in the money-lending branch from their gains in the brewery branch in making their return for income tax.—*Reid's Brewery Co.* v. *Male*, Q.B.D. 459—[1891] 2 Q. B. 1; 60 L. J. Q. B. 340; 64 L. T. 294.

4. *Deductions—Gasworks belonging to municipal corporation—Profit on trade with private customers—Deductions—Expenditure incurred in lighting streets—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule D, Cases I. and II.*—The corporation of a borough were empowered by Act of Parliament to erect gasworks and light the streets without contracting for the purchase of gas; and they were further empowered, after sufficiently lighting the streets, to supply gas to any persons who should be willing to pay for it.

Held, that, in estimating the profits of their trade with their private customers, for the purpose of assessment to the income tax, they were not entitled to deduct the amount expended in the public lighting of the streets.—*Dillon* v. *Corporation of Haverfordwest*, Q.B.D. 478—[1891] 1 Q. B. 575; 60 L. J. Q. B. 477; 64 L. T. 202.

5. *Deductions—Offices of master and mistress of national school—Money necessarily expended in performance of duties of office—Expense of keeping servant—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 51, *Schedule E.*—The respondent and his wife were the master and mistress of a national school, and received a joint salary for their services. An assessment to the income tax was made upon the respondent under Schedule E. He claimed to deduct a sum in respect of expenses necessarily incurred by him in keeping a servant, in order that his wife might be able to perform her duties as schoolmistress.

Held, that such deduction could not be allowed,—*Bowers* v. *Harding*, Q.B.D. 558—[1891] 1 Q. B. 560; 60 L. J. Q. B. 474; 64 L. T. 201.

6. *Exemption—Bursar of college—Salary as bursar—Exemption from income tax in respect of such salary—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 146, *Schedule E.*—The principal bursar of St. John Baptist College, Oxford, claimed to be exempt from income tax on his salary of £450 a year which he received as such bursar, on the ground that, though not actually a member of the corporation of the college, his salary is "by statute" a charge upon the revenues of the corporation, and is therefore equally exempt from direct taxation. The principal bursar is an officer appointed for five years by the president and fellows, who are members of the foundation, and he is, by the statutes of the college, one of the necessary officers of the college.

Held, that, as he was not one of the body who constitute the college, but merely an officer appointed by the president and fellows, he was not entitled to the exemption claimed, but was liable to be assessed for income tax, under Schedule E of section 146 of 5 & 6 Vict. c. 35, upon the salary which he received as bursar.—*Langton* v. *Glasson*, Q.B.D. 476—[1891] 1 Q. B. 567; 60 L. J. Q. B. 356; 65 L. T. 159.

7. *Exemption—Hospital—Hospital supported substantially by charitable funds—Exemption from inhabited house duty—5 & 6 Vict. c. 35, Schedule A—48 Geo. 3, c. 55, Schedule B (Exemptions), case 4.*—A lunatic hospital had been carried on upon its present site for thirty years; it was a building provided for the reception and relief of lunatics who are not paupers, for whose maintenance and medical attendance sums from 10s. to 40s. a week are paid; it was founded and built with charitable donations, and managed by persons who derive no pecuniary benefit therefrom, but who assist it by their subscriptions. The annual reports showed that the hospital is substantially supported by funds derived from charitable sources, and the real property on which the hospital is carried on is vested in trustees upon trust to be used as a lunatic hospital.

Held, that, as the hospital was substantially supported from charitable sources, it came within the exemption in rule 6 of Schedule A of the Income Tax Act, and was not liable to be assessed to income tax under that schedule; also, that it was not liable to inhabited house duty, as it came within the exemption of case 4, Schedule B, of 48 Geo. 3, c. 55, as being a "hospital provided for the reception or relief of poor persons."

Needham v. *Bowers*, 37 W. R. 125, 21 Q. B. D. 436, distinguished. — *Cawse* v. *Committee of the Lunatic Hospital, Nottingham*, Q.B.D. 461—[1891] 1 Q. B. 585; 60 L. J. Q. B. 485; 65 L. T. 155.

8. *Profits — Company in the United Kingdom—Branch establishments abroad—Profits earned abroad not remitted to the United Kingdom—5 & 6 Vict. c. 35, s. 100—16 & 17 Vict. c. 34, s. 2, Schedule D.*—The appellants were a banking company registered under the Joint-Stock Companies Acts, having their head office in London and branches in Mexico. The directors in London exercised the general control and management of the business in London and abroad. The dividends were paid in London, where the directors and shareholders met. A portion of the profits earned in Mexico not having been remitted to England,

Held (affirming the judgment of the Queen's Bench Division), that, as the business carried on by the appellants in London and Mexico was one business, income tax was payable upon the profits of the business, though not actually received in England.

Colquhoun v. *Brooks*, 38 W. R. 289, 14 App. Cas. 493, distinguished.—*London Bank of Mexico and South America* v. *Apthorpe*, C.A. 564—[1891] 2 Q. B. 378.

LEGACY DUTY—

9. *Direction to carry on business—Annual sum to be paid to trustees and a beneficiary, if and so long as they carry on the business—Legacy Duty Act*, 1845 (8 & 9 *Vict. c.* 76), *s.* 4.—A testator devised his business to his executors and trustees, upon trust to carry on the business in conjunction with a son of the testator, and directed that each of the executors and trustees whilst carrying on the business, and that the son whilst managing the business in conjunction with them, should receive specified annual sums out of the profits of the business.

Held, that these annual sums were legacies, and liable to legacy duty.

In re Pooley, 37 W. R. 17, 40 Ch. D. 1, discussed.

Decision of North, J. (39 W. R. 233), affirmed.—*In re Thorley, Thorley* v. *Massam*, C.A. 565—[1891] 2 Ch. 613; 60 L. J. Ch. 537; 64 L. T. 515.

PROBATE DUTY—

10. *Partnership — Local situation of business in England or India.*—In an action for probate duty it appeared that the deceased had been a member of a partnership firm. By the articles of partnership it was provided that the business should be the carrying on and working of certain silks and indigo concerns, and zemindaries for the production or manufacture or working of indigo and silk and other produce, and for the sale in Calcutta or shipment for realization in Europe of such produce. The articles further provided that the entire busi-

ness of the firm in India should be carried on by certain managing agents who were required to be partners, who were alone entitled to use the name of the firm, to keep the books, and prepare the balance-sheets, and who were also empowered (but subject to the opinion of the committee hereinafter mentioned) to determine what branches of business should be undertaken. A committee of the partners in England was appointed to advise with the agents, both in London and Calcutta, on all matters affecting the interest of the partnership, and, subject to the approval of a general meeting of the partners, to decide all matters affecting the partnership. It was further provided that, on the death of any partner, his representatives should not become partners in respect of his shares, but that the interest of the deceased partner should cease from the 30th of September next after his decease, with power for the representatives to sell the share within a stipulated period, or else to receive its fair value. A firm in London were declared to be the agents of the partnership in Europe, to whom the produce of the firm was to be consigned and the proceeds of the sales in India were to be remitted. The London agents were to make the advances necessary for carrying on the business, and held a mortgage over the assets which were vested in trustees resident in the United Kingdom. The estates cultivated by the firm were situate in India, and the business properly so called was entirely carried on there. There were sixteen partners, all but two of whom resided in the United Kingdom.

Held (reversing the decision of the Court of Session, 16 Court Sess. Cas., 4th series (Rettie), 959), that the share or interest of the deceased in the partnership was not property situated in the United Kingdom, and was therefore not liable to probate duty.—*Laidlay* v. *Lord Advocate*, H.L. (SC.) —15 App. Cas. 468.

STAMP—

11. *Settlement—"Definite and certain amount of stock"—Contingent reversionary interest settled—Stock vested in trustees with power to vary investments —Stamp Act*, 1870 (33 & 34 *Vict. c.* 97), *s.* 3, *schedule*, "*Settlement.*"—By a marriage settlement the settlor's reversionary and contingent interests in divers specified sums of stock vested in trustees, with powers of varying the investments, were settled.

Held, that the settlement was an "instrument . . . whereby . . . a definite and certain amount of stock . . . is settled or agreed to be settled" within the definition of the word "settlement" in the schedule to the Stamp Act, 1870, and that it accordingly required an *ad valorem* stamp of 5s. for every £100, as provided by that schedule.—*Onslow* v. *Commissioners of Inland Revenue*, C.A. 373 —[1891] 1 Q. B. 239; 60 L. J. Q. B. 138; 64 L. T. 211.

SUCCESSION DUTY—

12. *Vendor and purchaser—Sale of expectancy in real estate—"Free from incumbrances"—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *s.* 42.—The heir presumptive of an owner in fee simple of real estate contracted to sell his expectancy "free from incumbrances." The contract contained no express stipulation as to the succession duty to become payable in respect of the vendor's succession.

Held, as between the vendor and the purchaser, that the purchaser was liable to bear such succession duty.

Cooper v. *Trewby*, 8 W. R. 299, 28 Beav. 194, approved.—*In re Langham's Contract*, C.A. 156—60 L. J. Ch. 110.

See also LAND TAX; PAWNBROKER.

REWARD for INFORMATION LEADING to CONVICTION.—See ARREST.

RIVER.—See COPYHOLDS.

RULES of COURT:—

Ord 3, r 6 See PRACTICE, 62
Ord 8, r 1—See PRACTICE, 63
Ord 9, r 1—See ADMIRALTY, 8
r 2—See PRACTICE, 71
r 6—See PRACTICE, 64, 68
r 10—See ADMIRALTY, 8
Ord 11—See PRACTICE, 64
r 1 (e)—See PRACTICE, 65, 69
r 1 (f)—See PRACTICE, 70
r 1 (g)—See ADMIRALTY, 9; PRACTICE, 61
r 2—See PRACTICE, 70
r 7—See PRACTICE, 65
Ord 12, r 25—See PRACTICE, 35
Ord 13, r 1 See PROBATE, 23
Ord 14, r 1 See PRACTICE, 68
Ord 16, r 4 See TRUSTEE, 3
rr 6, 11—See PRACTICE, 48
r 14—See PRACTICE, 65
r 32—See PRACTICE, 20a
r 48—See PRACTICE, 47, 48
r 55—See PRACTICE, 47
Ord 19, r 3—See SOLICITOR, 1
r 7—See PATENT, 3
r 10—See PRACTICE, 24
r 15—See PRINCIPAL AND AGENT, 2
Ord 22—See SOLICITOR, 1
Ord 23, r 4—See PRACTICE, 23
Ord 25, rr 2, 3—See PRACTICE, 6
r 4—See PRACTICE, 7
Ord 27, rr 2, 11—See PRACTICE, 23
Ord 28, r 10—See PRACTICE, 24
Ord 31, r 12—See PRACTICE, 27
rr 15-18—See PRACTICE, 29
r 26—See PRACTICE, 27, 28, 33
Ord 34—See WILL, 17
Ord 35, r 6a (1), (2) See SOLICITOR, 4
rr 13, 14, 16 See PRACTICE, 34
Ord 36, rr 6, 7—See PRACTICE, 57
r 32—See PRACTICE, 58
rr 48-50—See PRACTICE, 50
rr 50, 52a—See PRACTICE, 52
rr 54, 55—See PRACTICE, 51
Ord 37, r 5—See PROBATE, 25
r 7—See PRACTICE, 60; PROBATE, 25
Ord 38, r 8—See PRACTICE, 1
Ord 40, r 7—See PRACTICE, 51
Ord 42, r 10—See PRACTICE, 67
Ord 44, r 2—See PRACTICE, 11
Ord 45, r 1—See PRACTICE, 36
Ord 47, rr 1, 2 See MORTGAGE, 3
Ord 52, r 5—See PRACTICE, 11
Ord 55, rr 3-8 See PRACTICE, 47
r 70—See COMPANY, 30
Ord 58, r 3 See PRACTICE, 6
r 4—See PRACTICE, 43
r 15—See PRACTICE, 5, 6, 7, 54
Ord 59, r 10—See COUNTY COURT, 3
r 12—See COUNTY COURT, 3, 4
r 16—See COUNTY COURT, 4
Ord 62, r 18—See SOLICITOR, 4
Ord 64, r 7—See PRACTICE, 7, 63
Ord 65, r 1 See PRACTICE, 18, 19, 20a
r 6—See PRACTICE, 27
r 9—See PRACTICE, 3
r 27 (21)—See PRACTICE, 20
r 27 (48) See PRACTICE, 17
Ord 68, r 1—See DIVORCE, 17

SAILING RULES.—See SHIP, 15, 17 23.

SALE of FOOD and DRUGS ACTS.—See cases under ADULTERATION.

SALE of GOODS:—

Stoppage in transitu—*Duration of right of unpaid vendor.*—Where goods are delivered to a carrier to be carried to a destination indicated at the time of sale, it is immaterial whether the carrier is or is not thereby constituted an agent of the purchaser for the purpose of passing the property to him.

The *transitus* lasts until the destination is reached. —*Lyons* v. *Hoffnung*, P.C. 390—15 App. Cas. 391; 59 L. J. P. C. 79; 63 L. T. 293.

SALVAGE.—See SHIP, 36, 37, 38.

SCHOOL.—See NEGLIGENCE, 8.

SCHOOL BOARD:—

Member—Imprisonment for "crime"—Conviction by court of summary jurisdiction—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *Schedule II., Part I., r.* 14—*Criminal Law and Procedure* (*Ireland*) *Act*, 1887 (50 & 51 *Vict. c.* 20).—The plaintiff, who was a member of a school board, was punished by imprisonment under the Criminal Law and Procedure (Ireland) Act, 1887, for "taking part in a criminal conspiracy to interfere with the administration of the law."

Held, that the offence for which he had been punished was a "crime" within the meaning of rule 14 of Schedule II., Part I., of the Elementary Education Act, 1870, and that, in consequence, he ceased to be a member of the school board, and his office had become vacant.—*Conybeare* v. *London School Board*, Q.B.D. 288—[1891] 1 Q. B. 118; 60 L. J. Q. B. 44; 63 L. T. 651.

SCOTCH ARRESTMENT.—See CONFLICT OF LAWS, 1.

SCOTCH LAW:—

1. *Arbitration — Reduction of decree arbitral—Jurisdiction of arbitrator—Scotch Act of Regulation*, 1695, *s.* 25—*Constructive corruption of arbitrator.*—The Act of Regulation of 1695, which provides that "for the cutting off of groundless processes in time coming the lords of session sustain no reduction of any decreet arbitral pronounced on a prescribed submission upon any cause or reason whatsoever unless that of corruption, bribery, or falsehood to be alleged against the judges arbitrators" was intended to put an end to the practice which had previously obtained of reviewing awards upon the merits, but not to prevent the courts from setting aside an award where the arbitrator has exceeded his jurisdiction, or has disregarded any of the expressed conditions of the submission, or the conditions implied by law, or has been guilty of misconduct in the course of the reference or in the making of the award.

There is nothing to warrant the conclusion that the word "corruption" in the above Act of Regulations should receive any other than its ordinary construction, and it cannot be taken to include irregular conduct on the part of the arbitrator with no suggestion of any corrupt motive.

The appellants contracted with the respondents, a railway company, to construct two sections of a railway, the second section to be ready on the 30th of September, 1884, "or on or before such respective days thereafter as might be respectively fixed by the arbiter after named," the appellants to be liable in all damages occasioned by their failing to complete the works, and as compensation for loss of profits, should the sections not be in a state to be open for traffic by the times stipulated, the appellants to be bound to pay the respondents £20 as the liquidated and agreed on compensation for every day which the sections should remain unfinished. The contract contained a clause referring to an arbitrator "all disputes and differences which should arise between the parties in reference to the contract or in regard to the construction of it, or of the specifications, conditions, and schedules." The specifications and conditions for the construction of the second section contained a clause to the effect that a specified portion of the embankment of the line should not be formed until the contractor for the bridge over the River Spey had completed the works in connection with the erection of the east abutment of the bridge, &c. The line was not completed till the 1st of May, 1886.

On application to the arbitrator after the time specified for the completion of the works as to the settlement of their accounts under the contracts, he found the appellants entitled to an extension of six months as regarded the completion of the second part of the works, but that they were liable in penalties for each day's delay from the 30th of March, 1885, to the 1st of May, 1886. It appeared that the appellants did not obtain access to the ground on which the embankment was to be formed till February, 1886.

Held, affirming the decision of the Court of Session (16 Court Sess. Cas., 4th series (Rettie), 843), that the award was good on the face of it, and there was no evidence that the arbitrator had awarded damages in respect of delay caused by the bridge not being completed.

Opinion expressed in *Alexander* v. *Bridge of Allan Water Co.* as to "constructive" corruption (7 Court Sess. Cas., 3rd series (Macph.), at p. 498), disapproved.—*Adams* v. *Great North of Scotland Railway Co.*, H.L. (SC.)—[1891] A. C. 31.

2. *Arrestment* ad fundandam jurisdictionem—*Judgment for costs—Solicitor's lien—Act* 23 & 24 *Vict. c.* 127, *s.* 28.—The appellant, a domiciled Englishman, being defendant in an action in the Queen's Bench Division, obtained, on the 25th of April, 1887, judgment for costs against W., the plaintiff, who was a domiciled Scotchman. On the 26th of May the respondent executed in Scotland an arrestment *ad fundandam jurisdictionem* against W. of the amount due under the judgment, and his summons was served on the appellant on the following day.

On the 13th of June the appellant's solicitors in the action in the Queen's Bench Division obtained a charging order, under 23 & 24 Vict. c. 127, s. 28, upon the costs recovered by him in the action.

Held, affirming the decision of the Court of Session (16 Court Sess. Cas., 4th series (Rettie), 927), Lord Morris dissenting, that, even assuming that the charging order was retrospective in its operation, the arrestment was effectual for the purpose of founding jurisdiction, as such arrestment could in no way affect the operation of the charging order.—*North* v. *Stewart*, H.L. (SC.)—15 App. Cas. 452; 63 L. T. 718.

3. *Bankruptcy—Sequestration—Oath of creditor—Verity of—Appeals* in formâ pauperis—*Bankruptcy* (*Scotland*) *Act*, 1856 (19 & 20 *Vict. c.* 79), *ss.* 9, 15, 22.—Decision of the Court of Session affirmed. Censure upon bringing an appeal to the House of Lords *in formâ pauperis* for which there was not the slightest shadow of foundation.—*Blair* v. *North British and Mercantile Insurance Co.*, H.L. (SC.)—15 App. Cas. 495.

SCOTCH SEQUESTRATION.—See COMPANY, 45.

SEAMAN.—See PROBATE, 28.

SEDUCTION:—

Service — Parent — Animus revertendi. — A girl under age was seduced by her master while in his service, and afterwards, having quitted his service, gave birth to a child in her father's house.

Held, that the father could not maintain an action for seduction, though the girl intended to return home at the termination of her service.—*Gladney* v. *Murphy*, Q.B.D. (Ir.)—26 L. R. Ir. 651.

SEPARATE PROPERTY of WIFE.—See cases under MARRIED WOMAN.

SEQUESTRATION.—See ECCLESIASTICAL LAW, 3.

SETTLED LAND ACTS:—

1. *Absolute trust for sale vested in trustees—Application by tenant for life for leave to exercise power of sale—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 63—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *ss.* 6 (1), 7.—A testator directed that, if his residuary personal estate should be insufficient for payment of his debts, funeral and testamentary expenses, and legacies, they should be paid out of the proceeds of the sale of his residuary real estate, and he devised his residuary real estate to trustees upon trust for sale and investment, and to hold the trust funds in trust for two ladies during their joint lives, and for the survivor during her life, with remainder for their children, and if neither should have a child who attained a vested interest the testator gave the property to the trustees absolutely. Neither of the two ladies had married. The residuary personalty proved insufficient for the payment of legacies as well as debts. In 1887 the trustees commenced an action for the administration of the testator's estate in the Lancaster Palatine Court, and, under an order made in that action, money was raised by mortgage of the residuary real estate for payment of the legacies, and it was certified to be for the benefit of all parties interested that the sale should be postponed. All charges prior to the interest of the two ladies were paid off.

Held, on the application of the two ladies, that they should have leave, under section 7 of the Settled Land Act, 1884, to sell the real estate remaining unsold.—*In re Harding's Settled Estate*, CH.D. NOR., J. 118—[1891] 1 Ch. 60; 60 L. J. Ch. 277; 63 L. T. 539.

2. "*Capital money*" — "*Improvements*" — *Land settled by deed—Will bequeathing money to be invested in lands to be settled to same uses—One settlement for purposes of Act—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 (1), 33; 25 (*xix.*) (*xx.*).—By deed of settlement made in 1872 certain lands stood limited upon trusts for persons by way of succession, and the settlement gave the trustees power to sell. Other lands were subsequently devised by will to the trustees for the time being of the settlement of 1872 upon the same trusts as were declared in the settlement of 1872 concerning the lands therein comprised; and by the same will the testator bequeathed his residuary personal estate to his three executors (one of whom was also a trustee of the settlement of 1872) upon trust to convert and invest in the purchase of lands to be settled upon the trusts in the will declared concerning the lands therein devised. Part of the testator's residuary personal estate now consisted of a large sum of money remaining as yet uninvested in the hands of the executors.

Held, by the Court of Appeal (reversing North, J.), that, having regard to sections 2 (1) and 33 of the Settled Land Act, 1882, and to the scope and purport of that Act, this money was "capital money" arising under the Act for the purposes both of the settlement of 1872 and of the will, or of either of them—the two constituting really one settlement for the purposes of the Act; and, consequently, that, as such "capital money," it might be applied in effecting improvements on the lands comprised in the settlement of 1872.

In re Mackenzie's Trusts, 31 W. R. 948, 23 Ch. D. 750, and *In re Tennant*, 37 W. R. 542, 40 Ch. D. 594, approved.

Held, by North, J., that, in the case of settled land consisting of a mining property, the erection of a new pumping engine and of new pumps for the purpose of carrying out an effective system of drainage were "improvements" authorized under section 25, sub-sections (xix.), (xx.), of the Settled Land Act, 1882.—*In re Mundy's Settled Estates*, C.A. 209—[1891] 1 Ch. 399; 60 L. J. Ch. 273; 64 L. T. 29.

3. *Costs—Sale by tenant for life—Property not sold—Costs of attempted sale—Capital money—Charge on settled land—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 4, 21 (*x.*) 46 (*sub-section* 6), 47, 55 (*sub-section* 3).—The costs, charges, and expenses incurred by a tenant for life of settled land in an unsuccessful attempt to sell the property may be paid out of capital moneys arising under the Settled Land Acts.

In re Llewellin, Llewellin v. *Williams*, 36 W. R. 347, 37 Ch. D. 317, considered and followed.

When there are no capital moneys out of which such costs, charges, and expenses can be paid, the court has jurisdiction, upon an application by the tenant for life for directions as to the payment of such costs, charges, and expenses, to order that the same be raised by means of a charge on the settled property.—*In re Smith's Settled Estates*, CH.D. KEK., J. 590—[1891] 3 Ch. 65; 60 L. J. Ch. 613; 64 L. T. 821.

4. *Heirlooms—Sale by tenant for life—Discretion of court to allow sale—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 37, 53.—In exercising the power of sale of heirlooms conferred upon a tenant for life of settled estate by section 37 of the Settled Land Act, 1882, the tenant for life is, by force of section 53, in the position of a trustee with a discretionary power to sell, and must have regard not to his own interests alone, but to the interest of all persons entitled under the settlement, the interest of those more remotely entitled being of less weight than the interest of those nearer to the succession.

The court, in giving its sanction to any such proposed sale, must in the exercise of its judicial discretion be satisfied that, under the circumstances of each particular case, the sale is reasonable and proper, having regard to the interests of all parties entitled.—*In re the Earl of Radnor's Will Trusts*, C.A.—45 Ch. D. 402; 59 L. J. Ch. 782.

5. *Tenant for life — Owner of settled annuity charged on land—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 15, 58—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 10.—R. devised the mansion house and demesne of B. and other lands to F. (his wife) for life with remainder as she should by will appoint. F. entered into possession, and devised the estate to trustees, and created a number of perpetual rent-charges upon the lands, some of which were strictly settled and some were devised to individuals in fee, and subject thereto she devised the estate in fee. On the death of F. an application was made under the Settled Land Acts for the sanction of the court to a contract for the sale of the mansion house and demesne.

Held, (1) that the estate was "settled land"

under the will of R., but there was no one under the will of F. who had the powers of a tenant for life within section 58 of the Settled Land Act, 1882; (2) that though the sale of each settled rent-charge might be carried out under the Settled Land Acts, the annuitants had no power to sell the mansion house and demesne or any part of the land.

The fact that part of an estate is settled land within the Acts does not render the entirety so.

Dictum of Malins, V.C., in *In re Shepheard's Settled Estate*, L. R. 8 Eq. 571, questioned.—*In re Bective Estate*, M.R. (Ir.)—27 L. R. Ir. 364.

See LANDLORD AND TENANT (IRELAND), 15; WILL, 2.

SETTLEMENT:—

1. *Construction—Limitation—Estate tail or in fee—Portions.*—By a marriage settlement lands were limited to the husband and wife successively for life, remainder to the first son of the marriage and the heirs of such first son, remainder to the second and other sons of the marriage and their heirs respectively, with remainder to the issue female of the marriage and their heirs as tenants in common, "subject, in case there should be a son and a younger child or younger children" of the marriage, to a charge of £1,000 for such younger child or younger children. There were issue of the marriage one son, who died after his father, but in the lifetime of his mother, and three daughters.

Held, (1) following *Doe* v. *Smeddle*, 2 B. & A. 126, that the son took an estate tail, and the daughters estates as tenants in common in fee; (2) that, the daughters having succeeded to the estates in fee, the portions could not be raised.—*In re Smith's Estate*, L.J. (Ir.)—27 L. R. Ir. 121.

2. *Forfeiture—Life interest—Proviso for cesser on alienation—Agreement to settle—Settlement pursuant thereto.*—By an agreement for a settlement made in contemplation of marriage, C. agreed that, after the marriage should have been solemnized, a settlement should be executed, whereby any moneys and property which he should receive and be entitled to under the will of his mother, should be settled in trust for his wife for life, then for himself for life, then for the children of the marriage. The marriage took place, and a settlement was subsequently executed pursuant to the agreement. The mother, having under her father's will a power to appoint a sum of money among her children, appointed by will a part thereof, to be held upon trust for C. for his life, subject to a proviso for the cesser of his life interest if he should at any time assign, charge, or otherwise dispose of it, or attempt so to do.

Held, that the agreement and settlement did not apply to the life interest of C., which he was incapable of assigning, and that the forfeiture intended to be avoided had not taken place.—*In re Crawshay, Walker* v. *Crawshay*, CH.D. NOR., J. 682—60 L. J. Ch. 583; 65 L. T. 72.

3. *Marriage articles—Claim by husband to wife's property included in articles—Husband's right by survivorship—Non-performance of contract by husband—Assignee in bankruptcy of husband—Contract between adult and infant.*—The assignee in bankruptcy of H. W., the husband of J. W., deceased, obtained a grant of letters of administration to J. W., and as such assignee and administrator claimed to be entitled to H. W.'s marital right to a share of certain trust funds in which J. W. had an interest, and to which, but for his bankruptcy, H. W. would have been entitled, having survived J. W.

H. W. by marriage articles contracted to settle his property specified therein upon certain trusts, and by the same articles J. W., then a minor, contracted to settle (in certain events which happened) her interest in the said trust funds for H. W. absolutely. H. W. failed to perform his part of the articles, and no settlement was ever executed in pursuance thereof.

Held, that neither H. W. nor his assignee was entitled to receive any benefit out of the property of J. W., the subject-matter of the articles, unless and until H. W. performed the obligation imposed upon him by his contract.

Marriage articles executed by an adult and an infant, there being no settlement under the Infants' Settlement Act (18 & 19 Vict. c. 43), nor any afterwards executed in pursuance of the articles, though voidable by the infant on attaining twenty-one, are binding on the adult.—*In re Smith's Trusts*, V.C. Ir.)—25 L. R. Ir. 439.

4. *Marriage settlement—Limitation in favour of volunteers—Subsequent conveyance by settlor.*—A limitation in a marriage settlement in favour of the settlor's illegitimate child and his issue, not being within the marriage consideration, may be defeated by a subsequent conveyance by the settlor to a purchaser for value, unless such result would involve the defeat of other limitations within the marriage consideration. Special agreement between the parties thereto in favour of the limitation, acceptance by one of the parties of different interests in the settled property from those which the law would have given, omission to provide therein for all or some of the issue of the marriage, are insufficient to support such limitation against a purchaser for value.

Mackie v. *Herbertson*, 9 App. Cas. 303, approved.

Clarke v. *Wright*, 6 H. & N. 849, dissented from.

Newstead v. *Searles*, 1 Atk. 264, and *Clayton* v. *Lord Wilton*, 6 M. & S. 67, explained.—*De Mestre* v. *West*, P.C.—[1891] A. C. 264; 64 L. T. 375.

5. *Policy of life insurance—Inability of settlor to pay premiums—Power of court to sanction surrender.*—Where a policy of insurance has been settled upon marriage, and the settlor (the husband) is unable to perform his covenant to keep up the policy, the court can authorize the trustees to sell or surrender the policy, and obtain a fully paid-up policy in lieu thereof, even though there are funds out of which the premiums may be and have been paid by the trustees, provided it is satisfied that the sale or surrender would be for the benefit of the wife and children of the marriage.—*Steen* v. *Peebles, In re Steen's Trusts*, M.R. (Ir.)—25 L. R. Ir. 544.

6. *Voluntary settlement—Assignment to trustees—Debts secured by bills of sale—Debts got in during lifetime of settlor—Liability of settlor's estate.*—P. executed a voluntary settlement in favour of his wife and other relatives, by which he assigned to two trustees certain property, including four debts secured by registered bills of sale, for which he gave them power to sue, upon trust to convert the trust property into money, and execute all necessary assurances for this purpose. P. died intestate, having in his lifetime got in the four debts in question.

Held (affirming the decision of the court below), that the debts were completely assigned by the voluntary settlement, and the estate of the settlor was liable to make good to the trustees the amount of the debts got in by the settlor.—*In re Patrick, Bills* v. *Tatham*, C.A. 113—[1891] 1 Ch. 82; 60 L. J. Ch. 111; 63 L. T. 752.

See also BILL OF SALE, 9; DIVORCE, 21—26; INFANT, 4—6; LANDS CLAUSES ACT, 1; POWER OF APPOINTMENT; REVENUE, 11.

SHERIFF:—

Fees—Preparing for sale—Withdrawal of execution—Percentage—Ship—Sheriffs Act, 1887 (50 & 51 *Vict. c.* 55), *s.* 20—*Order of the* 31*st of August*, 1888—*Table of Fees, paragraph* 7.—By paragraph 7 of the Table of Fees annexed to the Order of the 31st of August, 1888, made under the Sheriffs Act, 1887, s. 20, the sheriff's fee "for the inventory and valuation, cataloguing, lotting, and preparing for sale when no sale takes place by reason of the execution being withdrawn, satisfied, or stopped" is fixed at "two and a half per cent. on the value of the goods."

A sheriff's officer seized a ship under a *fi. fa.*, valued and prepared it for sale in one lot, but made no inventory or catalogue in connection with it.

Held, that paragraph 7 did not apply to such a subject-matter as a ship, and that the sheriff was not entitled to the two and a half per cent.—*Cohen* v. *De Las Rivas*, Q.B.D. 539—64 L. T. 661.

SHIP:—

BILL OF LADING—

1. *Chartered ship—Liability of owner—Principal and agent—Master—Charterer's shipping agent ashore.*—The defendant, being the owner of a ship and registered as managing owner, chartered her for a period of four months to G. It was provided by the charter-party that the captain, officers, and crew (with the exception of the chief engineer), should be appointed and paid by the charterer, and they were in fact so appointed and paid. The charter-party reserved to the owner sufficient space for ship's officers, crew, tackle, and stores; and it was also thereby provided that the captain should be under the orders of the charterer, and that the charterer should indemnify the owner from all liability arising from the captain signing bills of lading. The plaintiffs shipped on board her certain bales of cotton under bills of lading some of which were signed by the captain and the rest by the firm of R. K. & Co., who acted as the charterer's agents at the port of shipment. Neither the captain nor R. K. & Co. had any authority to sign bills of lading on behalf of the defendant. This fact was, however, unknown to the plaintiffs, who had no knowledge that the ship was under charter, but shipped the cotton under the belief that the bills of lading were signed on behalf of and with the authority of the owner. At the time the bills of lading were signed the defendant knew who the captain was, also who the charterer's shipping agents were, but he had no knowledge of the fact or circumstances of the shipment. The cotton having, during the currency of the charter, been lost at sea (as was alleged) by perils not excepted by the bill of lading, the plaintiffs sued the defendant for the loss.

Held, by Charles, J., that the plaintiffs, in the absence of notice to the contrary, were entitled to assume that the persons signing the bills of lading had authority from the owner to sign them on his behalf, and that the defendant was consequently, under the circumstances, responsible for the safe carriage of the goods; and that he was so as well in respect of the goods specified in the bills of lading signed by R. K. & Co. as in respect of those specified in the bill of lading signed by the captain.—*Banmvoll Manufactur Von Scheibler* v. *Gilchrest and Furness*, Q.B.D.—[1891] 2 Q. B. 310; 60 L. J. Q. B. 605; 65 L. T. 87.

2. *Deviation—"Necessity"—Liability of shipowner.*—The "necessity" which will justify a ship in deviating from the proper course of her voyage exists where the deviation is reasonably necessary, and in considering whether it is so danger, distance, accommodation, expense, and every other material circumstance must be taken in account; and if a competent master who is obliged to put back for repairs chooses one port in preference to a nearer one in *bona fide* exercise of his judgment for the benefit of both the shipowner and the owner of the cargo, the court or a jury ought not on light grounds to come to the conclusion that the deviation was unauthorized.

Goods were shipped by the plaintiffs at Swansea in the defendant's vessel for delivery at New York under a bill of lading which contained the usual exception from liability for collision. The vessel after leaving Swansea encountered bad weather, was injured, and the goods damaged by water, and it became necessary to put back to a port of refuge. The master cast anchor at Queenstown and telegraphed for directions to the defendants, who were shipbuilders at Bristol, but did not communicate with the plaintiffs. The defendants directed him to bring the ship back to Bristol. On her way to Bristol she was run into in the Avon by another vessel and sunk. At the trial of an action for non-delivery of the goods, on the ground that the vessel deviated from her course by proceeding to Bristol, and that the loss occurred after such deviation, it appeared that the ship was a general ship, and that there were other shippers of goods besides the plaintiffs, and, although Bristol was sixty miles further than Swansea from Queenstown, the vessel could have been repaired at less expense and with more despatch at the defendant's shipyards there than at Swansea, and that the defendants had other vessels into which they could have transhipped the goods. It did not however appear that Bristol was a more convenient place than Swansea for improving the condition of the damaged cargo. The judge left to the jury the question whether the master exercised the discretion of a reasonable man in the interests of the ship and cargo in going to Bristol instead of remaining at Queenstown or going to Swansea. The jury found that there was no deviation.

Held, first, that there was no misdirection by the judge in not telling the jury that the plaintiffs, as owners of the cargo, ought to have been communicated with at Queenstown, and consulted as to what ought to be done; secondly, that the judge was not bound to direct the jury that, upon the facts as proved, there was no evidence of necessity for the ship to return to Bristol; thirdly, that the evidence was sufficient to support the verdict on the ground that the master had acted for the best, having regard to the interests of the owners of the goods as well as of the shipowners.—*Phelps, James, & Co.* v. *Hill*, C.A.—[1891] 1 Q. B. 605; 60 L. J. Q. B. 382; 64 L. T. 610.

3. *Exceptions—Damage to cargo.*—A cargo of grain, shipped under a bill of lading, was damaged on the voyage by sea water entering the ship's hold through a rivet hole in one of the stanchions supporting the main rail, the rivet having "started" owing to the heavy seas encountered on the voyage. After discovering the leakage the master did not take proper means to prevent its continuance. The bill of lading contained an exception of "perils of the sea, . . . collisions, stranding, and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners."

Held, that the shipowner was protected by the exceptions from liability for the damage to the cargo.—*The Cressington*, P.D. & A.D.—[1891] P. 152; 60 L. J. P. D. & A. 25; 64 L. T. 329.

4. *Exceptions—"All other conditions as per charter"—Charter-party containing further excepted peril—Exception of loss occasioned by negligence.*—By a bill of lading goods were to be delivered, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted, unto order or assigns, they paying freight for the said coals, and all other conditions as per charter, with average accustomed." The charter-party contained a clause specifying the same exceptions as the bill of lading, with the following addition:—"Negligence clause as per Baltic Bill of Lading, 1885." This negligence clause excepted strandings and collisions, and all losses and damages caused thereby, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners. The vessel stranded in consequence of the negligence of the master or crew, and the goods were lost. In an action by the indorsees of the bill of lading against the shipowner for the loss of the goods,

Held (affirming the judgment of Huddleston, B.), that the words in the bill of lading, "all other conditions as per charter," incorporated only such conditions as were to be performed by the receiver of the goods, and did not incorporate the negligence clause; and that the shipowner was therefore liable.

Russell v. *Niemann*, 17 C. B. N. S. 163, 12 W. R. C. L. Dig. 121, approved.—*Serraino* v. *Campbell*, C.A. 356—[1891] 1 Q. B. 283; 60 L. J. Q. B. 303; 64 L. T. 615.

5. *Exceptions—"Thieves of whatever kind, whether on board or not, or by land or sea"—Thefts by stevedores employed by shipowner.*—Goods were shipped under a bill of lading which provided that the shipowner should not be liable for any loss or damage caused by (*inter alia*) "thieves of whatever kind, whether on board or not, or by land or sea." The goods were stolen during the stowage by some of the stevedore's men, who were paid by and in the service of the shipowner.

Held, that the words "thieves of whatever kind" did not relieve the shipowner from liability for thefts committed by persons in his service.—*Steinman & Co.* v. *Angier Line*, C.A. 392—[1891] 1 Q. B. 619; 60 L. J. Q. B. 425; 64 L. T. 613.

CHARTER-PARTY—

6. *Advanced freight—"One-third freight, if required, to be advanced, less three per cent. for interest and insurance"—Loss of vessel before requirement of advanced freight.*—Where a charter-party contained the clause, "One-third freight, if required, to be advanced, less three per cent. for interest and insurance," and the demand for payment of the advanced freight was not made until after the vessel and cargo had been totally lost,

Held, that the demand had been made too late, and that the charterers were not liable for the advanced freight.

Decision of Charles, J. (39 W. R. 318, [1891] 1 Q. B. 42), reversed.—*Smith, Hill, & Co.* v. *Pyman, Bell, & Co.*, C.A. 466—[1891] 1 Q. B. 742; 60 L. J. Q. B. 621; 64 L. T. 436.

7. *Cesser clause, construction of—Demurrage—Detention at port of loading.*—In an action brought by shipowners against charterers for damages for detention at the port of loading, the defendants relied on the cesser and lien clauses as freeing them from responsiblity.

Held, that the word "demurrage" in the lien clause did not cover undue detention at the port of loading, and, therefore, that the charterers were not exempted from liability.

Where it is possible, the cesser and lien clauses should be construed as co-extensive.—*Clink* v. *Radford & Co.*, C.A. 355—[1891] 1 Q. B. 625; 60 L. J. Q. B. 388; 64 L. T. 491.

8. *Cesser clause, construction of—Bill of lading—Demurrage — Delay caused by strikes — Liability of consignee of cargo.*—A charter-party provided that a vessel therein named should proceed to a port in the Sea of Azoff, and having there loaded a cargo of wheat should proceed to a port in the United Kingdom to discharge; that the charterers' liability should cease when the cargo was shipped, the owner or his agent having an absolute lien on the cargo for freight, dead freight, demurrage, and lighterage at the port of discharge; that the 1885 bill of lading should be used under the charter, and its conditions form part thereof.

The master signed bills of lading in the form prescribed by the charter, but they contained no reference to the charter nor any clause which would relieve the consignees of the cargo from loss to the ship occasioned by strikes; but it was provided that the goods were to be applied for within twenty-four hours of the ship's arrival, otherwise the master was to be at liberty to put into lighters and land the same at the risk and expense of the owners.

The vessel arrived in London on August 14, and the discharge of the cargo proceeded from the 15th to the 20th of August, when the dock labourers employed by the consignee of the cargo to discharge the vessel struck. In consequence of the strike the discharge of the vessel was not completed until the 18th of September.

Held, that, under the clause of the charter above set out, the liability of the charterers ceased upon the arrival of the vessel at the port of discharge, but that the consignees of the cargo were liable for the loss occasioned by the detention of the vessel, as they had not discharged the vessel within a reasonable time.—*Hick* v. *Rodocanachi, Sons, & Co.*, Q.B.D.—64 L. T. 138.

9. *Demurrage—Bill of lading—Fixed number of lay days—Strike causing delay—Liability of charterer.*—A cargo of grain in bulk was shipped under a bill of lading which incorporated the conditions of a charter-party. By the charter-party a fixed number of days were allowed for unloading the cargo, demurrage to be payable over and above the lay days. Neither the bill of lading nor the charter-party contained any reference to strikes. According to the custom of the port where the ship was ordered to discharge in the case of grain cargoes in bulk, the unloading was effected by the shipowner and consignee jointly. The shipowner and the consignee each contracted with a separate firm of master stevedores to do their respective parts of the work. During the lay days the dock labourers employed by the master stevedores struck work and remained out on strike until after the expiration of the lay days, during which time the unloading ceased, and no work could be done. In a claim by the shipowner for demurrage,

Held (affirming the judgment of the Queen's Bench Division, 39 W. R. 13, 25 Q. B. D. 320), that, as the delay in unloading was not caused by the default of the shipowner, or of those for whom he was responsible, demurrage was payable in respect of the time occupied in unloading beyond the fixed number of lay days.—*Budgett & Co.* v. *Binnington & Co.*, C.A. 131—[1891] 1 Q. B. 35; 60 L. J. Q. B. 1; 63 L. T. 742.

10. *Demurrage — Construction of charter-party — "Vessel to load always afloat" — "Lighterage, if any, to complete loading at" specified dock, "to be at merchant's risk and expense."*—Stipulations in a charter-party of a vessel chartered to load in a specified dock, that the vessel should load always afloat, and that lighterage, if any, necessary to enable her to complete her loading at the dock in question, was to be at merchant's risk and expense, do not entitle the merchant to recover from the shipowner lighterage paid in respect of cargo which could, in ordinary course, have been loaded from the quay inside the dock whilst the vessel remained afloat, but was in fact loaded outside the dock from lighters merely because the vessel, if fully loaded inside the dock, must have waited a week before she would have had sufficient water to have passed over the dock sill.—*The Curfew*, P.D. & A.D. 367—[1891] P. 131; 60 L. J. P. D. & A. 53; 64 L. T. 330.

11. *Demurrage—Persons signing agreement—Liability as principals—"Ready to receive cargo"—Meaning of—Claim for loss of freight and for demurrage.*—In an action for damages for loss of freight and for demurrage, it was proved that the defendants, who carried on business at O., made a contract with the agent of the plaintiff in L., in the form of a letter signed by the defendants and containing these clauses:—"Steamer to load end of November or early December. Charterers having the option of cancelling if she is not ready to receive cargo by the 12th of December next. Steamer to be loaded on usual berth terms, 2 per cent. commission to us." The defendants had made contracts with merchants at O. for loading the vessel, the merchants having the power of cancelling if the vessel was not ready to load on the 12th of December, and the vessel was not to be considered ready to load until moored alongside the quay. The plaintiff had no notice of these contracts. The vessel arrived at O. on the 10th of December, and her stern having been fastened to the breakwater, the captain gave the defendants notice that he was ready to receive cargo, but the merchants refused to take the notice that the vessel was "ready to receive cargo" until she was moored alongside the quay, which could not be done before the 18th of December. Meantime the merchants cancelled their contracts with the defendants, and the vessel was loaded at a lower rate of freight than that specified in the contract.

Held, (1) that the defendants were liable as principals, as they had contracted in their own names without any qualification, and (2), that the plaintiff was entitled to recover damages for the loss of freight, as the vessel was "ready to receive cargo" within the meaning of the contract, although not moored alongside the quay, and that the matter was not affected by an alleged custom at the port of O. that a vessel was not to be considered "ready to receive cargo" until moored alongside the quay; but (3), that the plaintiff was not entitled to damages for demurrage or detention of the vessel after the 12th of December, as the contract came to an end on that date.—*Hick* v. *Tweedy & Co.*, Q.B.D. —63 L. T. 765.

12. *Exceptions—Exception of negligence in the navigation of the ship in the ordinary course of the voyage.*—By an exception in a charter-party shipowners were exempted from liability for damage to the cargo resulting from "any act, negligence, or default whatsoever of pilots, master, or crew in the navigation of the ship and in the ordinary course of the voyage." After the arrival of the vessel at the port of discharge the cargo, while still undischarged, was injured in consequence of the negligence of the chief engineer of the ship.

Held, that this was not within the exception, as it had not occurred "in the navigation of the ship," and that the defendants were liable.—*The Acromac*, C.A. 133—15 P. D. 208; 59 L. J. P. D. & A. 91; 63 L. T. 737.

13. *Exceptions — "Neglect or default" of crew during the voyage — Effect on claims for general average contribution of clause exempting shipowner from negligence.*—The owners of a ship entered into a charter-party whereby they agreed that the ship should proceed to a specified loading port and there load a cargo, and, being so loaded, should therewith proceed to her port of discharge and there deliver the same, the act of God or any act, neglect, or default whatsoever of the pilot, master, crew, or other servants of the shipowners during the said voyage always excepted. The ship duly arrived in a seaworthy condition at her loading port and commenced taking her cargo on board, but, before the loading was completed, a portion of it already shipped was, whilst the ship was lying at her mooring berth, damaged by water which accumulated in her hold, in consequence of one of her engineers having negligently left open a valve in her engine room. To recover for the damage so occasioned, the cargo owners brought an action for breach of contract against the shipowners, and the shipowners counter-claimed therein for expenses incurred by them in respect of discharging and warehousing the damaged cargo belonging to the plaintiffs and pumping the water out of the ship.

Held, that the damage proceeded for had arisen from the neglect or default of one of the crew during the said voyage within the meaning of the exemption contained in the charter-party, and that, consequently, the plaintiffs' claim must be dismissed.

Held, also, that the defendants were entitled to recover the amounts claimed by them in their counter-claim as general average on the cargo.—*The Carron Park*, P.D. & A.D. 191—15 P. D. 203; 59 L. J. P. D. & A. 74; 63 L. T. 356.

14. *Payment of hire to cease until ship in an efficient state to resume service—Payment during discharge of cargo—Costs.*—By charter-party between the appellants and the respondents it was agreed that the respondents should hire the appellants' steamship for the purpose of a voyage or voyages within certain limits at "8s. per gross registered ton per calendar month"—hire to continue until her redelivery to the appellants (unless lost) at a safe port in the United Kingdom or on the Continent, &c. By the charter-party it was stipulated that the appellants should provide and pay for the provisions and wages of the captain and crew, and maintain the ship in a thoroughly efficient state in hull and machinery for the service; and that "in the event of loss of time from deficiency of men or stores, break down of machinery, want of repairs, or damage, whereby the working of the vessel was stopped for more than forty-eight consecutive hours, the payment of hire should cease until she should be again in an efficient state to resume her service." While the vessel was on a voyage to Harburg, under the charter-party, her high pressure engine broke down, and it was found necessary to put back to the Port of Las Palmas. As repairs could not be effected in that port, the appellants and respondents agreed that a tug should be employed to tow the ship to Harburg, and that the expense, £1,100, should be treated as general average on cargo, ship, and freight. As their proportion of this expense the respondents eventually paid £867. The ship left Las Palmas on the

18th of October, 1887, towed by the tug and assisted by her own low pressure engine, and arrived at Harburg on the 31st of October. By the 10th of November the cargo intended for that port was discharged, the ship's steam winches being available. On the same day the repairs to the ship's navigating machinery were completed, and the voyage continued.

Held (affirming the decision of the Court of Session, 16 Court Sess. Cas., 4th series (Rettie), 599) (Lord Bramwell dissenting), that the appellants had no claim for hire for the voyage from Las Palmas to Harburg, the ship not being independently efficient for that purpose.

But held, varying the decision of the Court of Session (Lord Morris dissenting), that the appellants were entitled to payment of hire for the full time actually occupied in discharging the cargo at Harburg, the ship being in an efficient state for that particular employment.—*Hogarth* v. *Miller, Brother, & Co.*, H.L. (SC.)—[1891] A. C. 48; 60 L. J. P. C. 1; 64 L. T. 205.

COLLISION—

15. *Crossing ship—Rules and Bye-laws for the Navigation of the Thames, art.* 24.—By article 24 of the Rules and Bye-laws for the Navigation of the River Thames, "Steam vessels crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up and down the river," and by article 25 such other vessels shall keep their course.

Held, that a ship which has not completely accomplished the manœuvre of crossing is still under the obligation of the rule, although her stem may have got as near to the opposite shore as she can safely get, if she is still athwart the stream.

Judgment of the court below affirmed on the facts and evidence.—*The River Derwent*, H.L. (E.)—64 L. T. 509.

16. *Damages — Consequential loss — Demurrage — Practice.*—Where, as the result of a collision, a vessel was detained in port, while a substituted vessel, belonging to the same owners, was doing her work at the defendants' expense, claim for demurrage was disallowed.

There must be actual loss, and reasonable proof thereof, to support a claim for indemnity for consequential loss.

The Black Prince, 1 Lush. 568, distinguished.

Where a reference was directed to ascertain the actual expenses incurred for the detained vessel, as distinguished from loss of profits,

Held, that it should, in the circumstances, be made to the Registrar of her Majesty in Ecclesiastical and Marine Appeals.—*The City of Peking* v. *Compagnie des Messageries Maritimes and Others*, P.C. 177—15 App. Cas. 438; 59 L. J. P. C. 88; 63 L. T. 722.

17. *Fishing smacks—Regulations for Preventing Collisions at Sea, arts.* 14, 22—*Both ships to blame—Costs.*—It is the duty of a sailing smack during the day to have more than one hand on deck, and where a collision occurs between her and another smack, the primary cause of which is the wrongful manœuvre of the other smack, she will also be held to blame if it appears that had she had two hands on deck they might have taken means to have obviated the other's wrongful manœuvre.

In a collision case where both ships are to blame, the plaintiff is entitled to his costs if in his statement of claim he admits that he is to blame.—*The General Gordon*, P.D. & A.D.—63 L. T. 117.

18. *Fog—Alteration of helm.*—There is no hard and fast rule of practice in the Admiralty Court that where two steamships in a fog are approaching one another so as to involve risk of collision, neither ship ought to alter her helm until the signals of the other give a clear indication of her direction: each case must depend on its own circumstances. and these may afford reasonable ground for believing what the direction must be.

The decision of the Court of Appeal (14 P. D. 172) affirmed. — *Owners of The Vindomora* v. *Owners of The Haswell*, H.L. (E.)—[1891] A. C. 1; 60 L. J. P. D. & A. 1; 63 L. T. 749.

19. *Foreign river—Steam vessels proceeding one up and the other down river—Navigation.*—In an action for collision between two vessels under steam in the River Scheldt, it appeared that the vessels were proceeding in opposite directions, the one up and the other down the river, and that the vessel going up the river had the tide against her. The collision took place at a strong bend of the river. It did not appear that any positive rule had been printed and circulated with regard to the navigation of the river; but by the practice of navigation there, it was the duty of a vessel navigating against the tide to wait until a vessel coming in the opposite direction had cleared her at the bend.

Held, upon proof that the vessel navigating against the tide had disregarded this practice, that she must be taken to have been to blame for the collision.—*The Talabot*, P.D. & A.D.—15 P. D. 194; 63 L. T. 812.

20. *Lights — Fairway of navigation — Whistle— Firth of Clyde.*—Where a steamship under way at night in the Firth of Clyde stops her way and puts herself across the line of navigation for the purpose of coming to an anchor, she is to blame for not warning vessels coming up behind her of her manœuvres, even though she is carrying a fixed stern light.—*The Queen Victoria*, C.A.—64 L. T. 520.

21. *Lights—Mersey River Rules, art.* 4—*Vessel carrying misleading light—Infringement by possibility contributing to collision—Merchant Shipping Act,* 1873 (36 & 37 *Vict. c.* 85), *s.* 17.—By article 4 of the rules as to lights to be carried by vessels in the River Mersey contained in the schedule to the Order in Council of May 17, 1890, and made in pursuance of section 32 of the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63), a vessel, having two or more masts, when at anchor in that river, shall carry two white lights, of the prescribed size and power, one on the forestay, at a height not exceeding twenty feet above the hull, and the other near the stern at double the height of the bow light.

By section 17 of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), a vessel infringing any of the regulations contained in, or made under, the Merchant Shipping Acts, is, in case of collision, to be deemed in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary.

The T., a steamship under way in the Mersey, came into collision with another vessel whilst carrying, in addition to the ordinary coloured side lights, white stern light, and white masthead light, another white light on the mizen truck, alleged to be a custom's signal light.

No regulation or practice to carry such last mentioned light was proved, and it being doubtful on the evidence whether the two white lights of *The T.* which were first seen—viz., that at the masthead and that at the mizen truck—might not have misled those in charge of the other vessel into thinking that these lights indicated that *The T.* was a vessel at anchor.

Held, that *The T.* must be deemed in fault under section 17 of the Merchant Shipping Act, 1873.—*The Talbot*, P.D. & A.D.—[1891] P. 184; 64 L. T. 542.

22. *Lights—Overtaking ship—Regulations for Preventing Collisions at Sea, art.* 11—*Fixed stern light.*—Article 11 of the Regulations for Preventing Collisions at Sea provides that "a ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light." This article is not necessarily infringed where it is proved, in an action of damage, that a vessel required to show a white stern light under its provisions has shown from her stern to a vessel overtaking her a fixed white light.—*The Stakesby*, P.D. & A.D. 80—15 P. D. 166; 59 L. J. P. D. & A. 72; 63 L. T. 115.

23. *Lights—Trawler—Regulations for Preventing Collisions at Sea, art.* 10 (d)—*Mutual collision club—Arbitration.*—By article 10 (*d*) of the Regulations for Preventing Collisions at Sea, "if a vessel when fishing becomes stationary, in consequence of her gear getting fast to a rock or other obstruction, she shall show the light and make the fog signal for a vessel at anchor."

Held, that the rule is applicable although the weather, when the vessel becomes stationary, is clear.

In an action for collision, it appeared that the plaintiff's vessel and the defendant's vessel were insured in a mutual insurance company, by the rules of which it was provided that, in the event of a collision occurring between two vessels insured in the company, &c., the owners of such vessels should immediately submit a statement of the whole circumstances of the collision, and the directors, after receiving such statement, should have power to arbitrate on the matter, and their decision should be final.

The plaintiff gave notice of the collision to the secretary of the company. The secretary obtained statements as to the collision from the master of the plaintiff's vessel, and from the master of the defendant's vessel. A meeting of directors was held, at which the defendant's master was present, but no one on behalf of the plaintiff, and a resolution was passed that the defendant's vessel had not been in collision with that of the plaintiff.

Held, that there had never been a proper hearing of the case by the directors; that the resolution passed by them was therefore not an arbitration within the meaning of the rule; and that the plaintiff was not estopped by it from bringing an action for damages.

Semble, that the rule must be taken to mean that it should be a condition precedent to an arbitration that both parties had agreed as to the fact of a collision having taken place.—*The Warwick*, P.D. & A.D.—15 P. D. 189; 63 L. T. 561.

24. *Practice—Issue as to contributory fault must be first raised in the lower court.*—Where in a case of collision no suggestion has been made in the pleadings and evidence by either party that, in the event of their vessel being found to be in the wrong, there was contributory fault on the part of the other vessel,

Held, that the vessel shown to have been at fault by reason of her failure to keep out of the way could not be allowed to raise the question for the first time in the final court of appeal whether the other vessel was not also in fault from failure to comply with article 18 of the Regulations.

The Tasmania, 15 App. Cas. 223, followed.—*Owners of The Pleiades* v. *Owners of The Jane*, P.C.—[1891] A. C. 259; 65 L. T. 169.

25. *Practice—Tug and tow both to blame—Form of decree—No contribution amongst tort feasors.*—Where, in an action of damage against two vessels and their owners, defendants intervening, the court absolves the plaintiffs' vessel from blame, and finds both the vessels proceeded against to blame for the collision, the proper practice is for the court, except in the case where one or both of the vessels are exonerated from liability on the ground of compulsory pilotage or other defence of the like nature, to pronounce a decree in the action condemning the owners of each vessel and their bail in the damage proceeded for and in costs, and under this decree the plaintiffs are entitled to recover the whole of their damages and costs from the owners of either vessel or their bail, without regard to any question of contribution between the defendants.—*The Avon and The Thomas Jolliffe*, P.D. & A.D. 176—[1891] P. 7.

26. *Steamship and barge—Both to blame—Consequential loss.*—Whilst a barge was by night lying astern of a steamship in a dock the latter moved her propeller and cut a hole in the barge. It appeared that there was no one on board the barge at the time of the accident. In a collision action,

Held, that, although the steamer was to blame, the barge was also to blame for not having anyone on board of her, as, had there been, the collision might have been avoided, and in any event the barge might have been beached before she sank, and, therefore, the plaintiffs could only recover half their damages.—*The Scotia*, P.D. & A.D.—63 L. T. 324.

27. *Tug and vessel in tow—Collision with third vessel through negligence of tug—Liability of vessel in tow.*—No general rule can be laid down as to the liability of a vessel in tow for a collision between it and a third vessel occasioned by the negligence of those on board the tug.

Whether the relation of master and servant exists between the owners of the vessel in tow and the crew of the tug, so as to make the former liable, depends upon the circumstances of each case.—*The Quickstep*, P.D. & A.D.—15 P. D. 196; 59 L. J. P. D. & A. 65; 63 L. T. 713.

CO-OWNERS—

28. *Accounts—Managing owner.*—It is the duty of a managing owner to account to his co-owners for the ship's earnings and disbursements within a reasonable time, but what is a reasonable time must depend upon the circumstances of each case. There is no fixed rule that a ship's accounts are to be ready before she sails on her next voyage.—*The Mount Vernon*, P.D. & A.D.—64 L. T. 148.

29. *Managing owner—Principal and agent—Secret profits—Brokerage—Commission.*—It is the duty of a managing owner of a ship to procure charters and freights, and therefore, in the absence of any special bargain, a managing owner who is also a shipbroker is not entitled to make a profit for himself by commission or brokerage for procuring charters and freights.—*Williamson* v. *Hine Brothers*, CH.D. KEK., J. 239—[1891] 1 Ch. 390; 60 L. J. Ch. 123; 63 L. T. 682.

MASTER—

30. *Thames navigation—Steamboat towing barges into dock—"Navigating"—Watermen's and Lightermen's Amendment Act*, 1859 (22 & 23 *Vict. c. cxxxiii.*) *ss.* 8, 10—*Bye-law* 59.—The towing of barges into a dock by a steamboat is not "navigating a steamboat on the river" so as to render the master of the steamboat liable to a penalty under bye-law 59 made under the Watermen's and Lightermen's Amendment Act, 1859, which prohibits "a person

in charge of and navigating any steamboat on the River Thames" within certain limits from towing at the same time more than six barges exceeding ten tons each.—*Rolles* v. *Newell*, Q.B.D. 96—25 Q. B. D. 335; 59 L. J. Q. B. 423; 63 L. T. 384.

MERCHANT SHIPPING ACTS—

31. *Limitation of liability—Deductions—Calculation of amount of plaintiff's liability in the case of steamships measured for purpose of registry since December* 31, 1889—*Merchant Shipping (Tonnage) Act*, 1889 (52 & 53 *Vict. c.* 43), *s.* 3.—In a case where the owners of a British steamship, built since March, 1889, and measured for the purposes of registry since December 31 in that year, sought to limit their liability under the Merchant Shipping Acts for the consequences of improper navigation, the court, it appearing on the certificate of registry that the gross tonnage of the steamship was stated to be 1,922·82 tons, refused, no other evidence as to the gross tonnage of the steamship having been given, to allow the plaintiffs, in calculating the amount of the tonnage of their ship for the purpose of the suit, to deduct from such 1,922·82 tons any of the deductions ordered to be made from the measurement of tonnage by the 3rd section of the Merchant Shipping (Tonnage) Act, 1889, or any other deductions other than certain deductions which the defendants admitted ought to be made from such amount of 1,922·82 tons.—*The Umbilo*, P.D. & A.D. 336—[1891] P. 118; 60 L. J. P. D. & A. 7; 64 L. T. 328.

32. *Mortgage of fishing boat—"Ship and appurtenances"—Articles included in mortgage—Articles put on board subsequently to mortgage—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 66, 70, 469, 484.—Under the word "ship" in the mortgage of "a ship with its appurtenances," in the statutory form under the provisions of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), all articles and materials, whether stored or in use, necessary for the accomplishment of its voyage, and on board at the date of the mortgage, will pass to the mortgagee; and all articles and materials substituted for such articles and materials subsequently to the date of the mortgage will also pass.

The construction of the word "ship" in section 1 of 53 Geo. 3, c. 159, as laid down in *Gale* v. *Laurie*, 5 B. & C. 156, is applicable to the same word in the present statutory form of mortgage.—*Coltman* v. *Chamberlain*, Q.B.D. 12—25 Q. B. D. 328; 59 L. J. Q. B. 563.

33. *Necessaries—Broker's commission—Charter-party*—3 & 4 *Vict. c.* 65, *s.* 6.—Shipbroker's commission for effecting a charter for a ship (then upon a voyage) for a future voyage does not come within the meaning of the term "necessaries," so as to entitle the shipbrokers to proceed in an action *in rem*.—*The Marianne*, P.D. & A.D.—[1891] P. 180; 60 L. J. P. D. & A. 39; 64 L. T. 539.

PILOT—

34. *Compulsory pilotage—Dues—Bye-laws—Port of Chester Act* (16 *Geo.* 3, *c. lxi.*)—*Merchant Shipping Acts*, 1854 *and* 1889 (17 & 18 *Vict. c.* 104; 52 & 53 *Vict. c.* 68).—A public local Act, in force before the Merchant Shipping Act, 1854, imposed a penalty on unlicensed persons conducting a ship into the port of Chester.

Held, that pilotage was compulsory.

Pilotage rates, fixed by bye-laws made under statutory authority to be paid to pilots, may be sued for and recovered by a pilot.

Section 1 of the Merchant Shipping Act, 1889, is retrospective, which declares that "ship" in Part V. of the Merchant Shipping Act, 1854, shall include a foreign ship.—*Jones* v. *Bennett*, Q.B.D.—63 L. T. 705.

35. *Compulsory pilotage—Llanelly Pilotage District—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 353, 388—6 & 7 *Vict. c. lxxxviii.*, *s.* 158).—Subject to the provisions in the Merchant Shipping Acts exempting from compulsory pilotage certain vessels there referred to, pilotage is compulsory within the limits of the Llanelly Pilotage District for all vessels not exempted from compulsory pilotage by the terms of the pilotage bye-laws made by the Burry Navigation and Llanelly Harbour Commissioners.—*The Ruby*, C.A. 42—15 P. D. 164; 59 L. J. P. D. & A. 68; 63 L. T. 735.

SALVAGE—

36. *Amount—Exorbitant agreement — Costs.*—The plaintiffs, in an action of salvage brought to recover salvage remuneration for salvage services rendered in the Atlantic Ocean in towing for 350 miles to a port of safety a steamship disabled in her machinery and valued, with her cargo and freight, at above £23,000, but less than £25,000, pleaded an agreement made between the masters of the plaintiffs' and defendants' vessel before the commencement of the services, whereby it had been agreed that the master of the plaintiffs' vessel would make the attempt to tow the disabled vessel to the port where she was placed in safety for the sum of £5,000, and that, in case of failing in the attempt, the plaintiff's vessel should be paid for the service rendered, and claimed (1) the said agreed sum of £5,000 as and for salvage for the services rendered by them, and (2) alternatively, such an amount of salvage as to the court should seem right. At the hearing of the action the court, considering that £5,000 was an exorbitant sum for the salvage services rendered, awarded to the salvors £3,000 salvage remuneration, with costs, and apportioned the amount so awarded as follows:—£2,500 to the owners of the salving vessel, £150 to her master, and £350 to her officers and crew according to their rating.—*The Mark Lane*, P.D. & A.D. 47—15 P.D. 135; 63 L. T. 468.

37. *Amount — Derelict boiler — Award—Costs.*—Where five men having found a derelict marine boiler floating in the sea, pulled it ashore and hauled it beyond high water, the court, in a default salvage action, out of £58, the net proceeds of the said boiler, awarded £50 and costs.—*The Boiler ex Elephant*, P.D. & A.D.—64 L. T. 543.

38. *Towage contract—Conversion of towage into salvage—Owners* pro hac vice—*Personal liability for salvage.*—Barge-owners built at Chepstow a number of barges for her Majesty's service under a contract, whereby the full price of the barges was not to be paid until after delivery at Portland, and despatched them on their voyage to that port in charge of two men on board each barge and in tow of a steam tug. During the voyage four of the barges broke adrift from the steam tug, and her master and crew rendered salvage services to all the barges beyond what could reasonably be supposed to have been included in the towage contract. After some difficulty two of the barges were towed by the steam tug to Portland, and there delivered up to the proper Admiralty officials; the remaining barges being placed in safety by the exertions of other salvors. Subsequently the owners, master, and crew of the steam tug brought an action of salvage against the three barges so salved by other salvors, and by the writ in such action claimed to recover against the barge builders for salvage services rendered to the barges delivered up at Portland. The writ in the action was never served.

but the solicitors for the barge builders undertook to appear thereto, and, in pursuance of such undertaking, the barge builders appeared absolutely as defendants in the suit.

Held, that the defendants were liable to pay salvage remuneration, both in respect of the salvage rendered to the two barges delivered up at Portland, and also in respect of the services rendered by the plaintiffs to the remaining three barges.

Observations as to the right of instituting actions of salvage *in personam.*—*The Steel Barges*, P.D. & A.D. 127—15 P. D. 142; 59 L. J. P. D. & A. 77.

See also BANKRUPTCY, 1; CONFLICT OF LAWS, 4; NEGLIGENCE, 2, 9; SHERIFF; THAMES CONSERVANCY.

SHIPBROKER.—See SHIP, 29, 33.

SOLICITOR:—

1. *Charging order — Property recovered or preserved — Money paid into court by a defendant — Counter-claim—Set-off—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Ord.* 22—*Ord.* 19, *r.* 3.—The defendants in an action paid a sum of money into court, and put in a defence denying liability and a counter-claim arising out of the same matters as the claim. The plaintiff's solicitor obtained a charging order upon the fund in court. The action proceeded, and, in the result, judgment went for the plaintiff on the claim, and for the defendants on the counter-claim.

Held, that the sum recovered on the counter-claim must be set off against the sum recovered on the claim, and the solicitor's charging order limited to the balance due to the plaintiff, that being the only sum "recovered or preserved" within the 28th section of the Solicitors Act, 1860.—*Westacott* v. *Bevan*, Q.B.D. 363—[1891] 1 Q. B. 774; 60 L. J. Q. B. 536.

2. *Charging order—Property recovered or preserved*—39 & 40 *Vict. c.* 44, *s.* 3.—The plaintiff having obtained judgment declaring the validity of two mortgages, and ordering accounts to be taken, and a receiver to be appointed, the plaintiff's solicitor applied for a charging order for his costs upon the plaintiff's interest in the lands and on the amounts found due to the plaintiff.

Held, that the solicitor was entitled to the charging order.—*Keenan* v. *Armstrong*, V.C. (Ir.)—27 L. R. Ir. 371.

3. *Costs—Action of contract begun in High Court and afterwards remitted to county court—Judgment for less than £50—Change of solicitors—Right of solicitor who had acted in High Court to High Court costs against client—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 118.—An action for some £30 for work done was commenced in the High Court, and was afterwards remitted to a county court, where judgment was given for the plaintiff for £30 and costs. Before the order to remit was made the plaintiff changed his solicitor, and the solicitor who had acted for him in the High Court ceased to act for him in the action. The registrar of the county court taxed the costs of the proceedings in the county court on the county court scale, but he refused to tax the costs of the solicitor who had acted for the plaintiff in the High Court on the High Court scale. In an action brought in a county court by this solicitor to recover from his client the costs incurred by him in the High Court on the High Court scale,

Held, that the solicitor was entitled to recover these costs from his client, as such costs did not come within section 118 of the County Courts Act, 1888, not being costs for work done in any county court.—*Boydell* v. *Millar*, Q.B.D. 335—60 L. J. Q. B. 251; 64 L. T. 299.

4. *Costs—Order for delivery and taxation of bill—Petition of course—District Registrar of Liverpool—Jurisdiction—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 62-66—*R. S. C.*, 1883, *ord.* 35, *r.* 6*a*, *sub-rules* (1), (2); *ord.* 62, *r.* 18.—A registrar of the Liverpool District Registry has no jurisdiction on a petition of course to make an order on a solicitor for delivery and taxation of his bill of costs.

Decision of Kekewich, J. (39 W. R. 333), reversed.—*In re Porrett*, C.A. 531—[1891] 2 Ch. 433; 60 L. J. Ch. 396; 64 L. T. 194.

5. *Costs—Order to tax—Suppression of material facts—Right to obtain second order of course—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.—A client is not entitled to obtain a second common order to tax as of course where he has allowed the first to lapse by effluxion of time, nor may he suppress material facts in obtaining the order.—*In re Webster*, CH.D. NOR., J. 535—[1891] 2 Ch. 102; 60 L. J. Ch. 338; 64 L. T. 250.

6. *Costs—Profit costs—Taxation—Solicitor-mortgagee acting in person—Redemption action.*—A mortgagee-solicitor who acts for himself in a redemption action is only entitled to costs out of pocket not to profit costs—*i.e.*, remuneration for personal trouble.

An objection to the allowance of such costs need not necessarily be taken at the hearing of the action.

Price v. *M'Beth*, 12 W. R. 818, not followed.—*Stone* v. *Lickorish & Bellord*, CH.D. STI., J. 331—[1891] 2 Ch. 363; 60 L. J. Ch. 289; 64 L. T. 79.

7. *Costs—Solicitors' Remuneration Act*, 1881—*Taxation—Negotiating sale subject to sanction of court—Fees paid to estate agents to obtain evidence as to value in order to procure sanction—"Commission"—Scale fee for negotiating sale by private contract—General Order under Solicitors' Remuneration Act*, 1881, *Schedule I., Part I., r.* 11.—Where real estate is being sold by private contract under the order and direction of the court in an administration action, a solicitor who does everything that a solicitor can do in arranging the sale and the price and terms and conditions thereof, which only further require the sanction of the court to become binding, "arranges the sale," &c., within the meaning of rule 11 of the General Order (under the Solicitors' Remuneration Act, 1881), Schedule I., Part I., and is, therefore, not disentitled to the scale fee "for negotiating a sale of property by private contract" under the scale of charges in Schedule I., Part I., aforesaid, by the mere fact that the contract for sale does not become a binding one till sanctioned by the court, provided that it is ultimately so sanctioned and an actual sale is consequently effected.

Fees paid or payable by the client in such a case to valuers (though they may be auctioneers or estate agents), not for assisting to negotiate the sale, but in order to obtain their evidence to satisfy the court that the price offered is a fair and proper one, and thus obtain its necessary sanction, are not "commission paid by the client to an auctioneer or estate or other agent" within the meaning of the said rule, so as to disentitle the solicitor to the aforesaid scale fee.

Decision of Kay, J. (39 W. R. 90), reversed.—*In re MacGowan, MacGowan* v. *Murray*, C.A. 227—[1891] 1 Ch. 105; 60 L. J. Ch. 118; 63 L. T. 793.

8. *Costs—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *s.* 7—*Mortgage—Investigating title—Separate mortgage transactions—Solicitors' Remunera-*

tion Order, 1882, *Schedule I., Part I., r.* 10.—The life interest of a tenant for life in the whole of the real estates comprised in a settlement made in 1871 was subject to a mortgage of £192,000 created by the tenant for life. In 1882 the trustees of the settled estates were empowered by a private Act to raise a larger sum, on mortgage of the fee of the settled estates, for the purpose of paying off the charge on the life estate and the other debts of the tenant for life. In August, 1883, the trustees accordingly executed a mortgage in fee of part of the settled estates, to the same mortgagees, for a sum of £232,000, out of which the sum of £192,000 was retained by the mortgagees in repayment of their charge on the life estate, and only the balance—viz., £40,000—paid in cash to the trustees. The mortgagees employed the same solicitors in respect of both mortgage transactions.

Held, that the mortgage of 1883 was not a further charge for £40,000, but an entirely new mortgage for £232,000, and, therefore, that the solicitors of the mortgagees were entitled to be remunerated on that footing, according to the scale fee prescribed in Schedule I., Part I., of the Solicitors' Remuneration General Order, 1882.

Decision of North, J. (reported 39 W. R. 106), reversed.—*Aylesford (Earl)* v. *Poulett (Earl)*, C.A. 241—[1891] 1 Ch. 248; 60 L. J. Ch. 204; 64 L. T. 336.

9. *Costs—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*Taxation—Negotiation fee—Commission paid by client to estate agent—General Order, Schedule I., r.* 11.—In 1874 the owner of an estate in Devonshire appointed a local surveyor as the estate agent, with a view to its development as a building estate, and agreed that his remuneration should be two and a half per cent. on the purchase-money of all the land sold during his agency. In 1884 an offer to purchase a small part of the estate was made direct to the owner, and, the local agent being then ill, the negotiation for the sale was conducted, at the owner's request, by the owner's London solicitor, who went to Devonshire for the purpose. The local agent, however, assisted to some extent in the transaction by preparing plans and advising as to the price and as to the restrictive covenants to be imposed on the purchaser. On completion of the purchase, a sum of £360 (being two and a half per cent. on the purchase-money) was paid to the local agent by the vendor, on its being represented to the vendor that it was also remuneration for work done during the preceding ten years.

Held, by the Court of Appeal (Lindley, Bowen, and Fry, L.JJ.), affirming North, J., that this was "a commission paid by the client to an estate agent" within the meaning of rule 11 of the General Order under the Solicitors' Remuneration Act, 1881, and that the vendor's solicitor was not entitled to the scale fee for negotiating the sale under Schedule I., Part I.—*In re Withall*, C.A. 529—[1891] 3 Ch. 8; 64 L. T. 704.

10. *Costs—Solicitors' Remuneration Act*, 1881, *s.* 2—*General Order*, 1884, *r.* (*c*), *Schedule II.—Taxation—"Other documents."*—The words "other documents" in the heading to Schedule II. of the General Order, 1884, made under the Solicitors' Remuneration Act, 1881, mean other documents *ejusdem generis* with deeds and wills.

An agreement between a contractor and town commissioners for the execution of sewage works comes within the term "conveyancing business" in section 2 of the Solicitors' Remuneration Act of 1881, and is taxable as such.

Ex parte O'Hagan, 19 L. R. Ir. 99, followed.

In re Atkinson and Lurgan Commissioners, 24 L. R. Ir. 182, considered.—*Ex parte Caruth*, M.R. (Ir.)—25 L. R. Ir. 478.

11. *Costs—Solicitors' Remuneration Act*, 1881—*General Order, Schedule I., Part I.—Vendor's solicitor—Costs of release of incumbrance.*—The costs of obtaining the release of an outstanding incumbrance on property sold are not covered by the scale charge allowed to the solicitor for a vendor by Schedule I., Part I., of the General Order made under the Solicitors' Remuneration Act, 1881.

In re Emanuel & Simmonds, 33 Ch. D. 40, considered.—*Ex parte Bonass*, M.R. (Ir.)—27 L. R. Ir. 375.

12. *Costs—Taxation after payment—Special circumstances—Pressure—Payment "under protest"—Client abroad—Discretion of judge—Attorneys and Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *ss.* 37, 38, 41.—In October, 1890, house property which was subject to a mortgage was sold by the mortgagor, the 8th of November being, as the mortgagee's solicitor was aware, the date fixed for completion. On the 24th of November, when the purchaser was pressing for completion of the contract, and threatening an action for specific performance, the mortgagee's solicitor delivered a bill of costs for £45, and three weeks afterwards a small supplementary bill for £3 16s. The mortgagor himself was in Australia, but on the 23rd of December his solicitor, acting as his agent, in order to get the purchase completed, paid "under protest" the sum of £42, which the mortgagee's solicitor had offered to accept in full discharge of the bills, and a receipt was given which stated that the amount was "paid under protest."

The mortgagor's solicitor having taken out a summons for taxation after payment, alleging as "special circumstances" within sections 38 and 41 of 6 & 7 Vict. c. 73—(1) the mortgagor's absence, (2) the payment having been made "under protest," and (3) the "pressure" arising from the necessity under which he lay of obtaining the mortgagee's concurrence in order to complete the contract for sale, Kekewich, J., acceded to the application.

Held, on appeal, that, though there might be some doubt whether the grounds alleged were sufficient to constitute a clear case of "special circumstances" within the meaning of the Act, yet, as some grounds for holding such special circumstances had been shown, and the judge had exercised his discretion, his decision ought not, under the circumstances of this case, to be interfered with, and that appeals in cases of this kind ought not to be encouraged where the amount in question was so trifling.

Decision of Kekewich, J., affirmed.—*In re Cheesman (a Solicitor)*, C.A. 497—[1891] 2 Ch. 289; 64 L. T. 602.

13. *Lien for costs—Charge by plaintiff to third person on money to be recovered in two actions—One action only successful—Lien of solicitor on money recovered for costs of both actions in priority to charge.*—A difference exists between the lien of a solicitor on a fund recovered for his client in an action and on deeds coming into his possession, inasmuch as in the former case he has no lien for all costs due to him from his client, but only for the costs of recovering that particular fund; and even where the solicitor actually gets the fund into his possession he obtains no greater lien than if it had remained in court.

A. having threatened to sue B. on a dishonoured bill of exchange, B. agreed to give him a charge on certain money which B.'s solicitors were taking

proceedings to recover from two insurance companies, on two separate policies of insurance on a ship. The charge was prepared by B.'s solicitors, after an interview at which A. and B. were also present, and the solicitors sent it to A. in a letter, in which, "in pursuance of the enclosed written charge," they undertook out of any moneys received by them from either the S. Association or the M. Association under the policies to hand over to A., "after payment of the legal charges," so much of the amount recovered from the said association (*sic*) as might be sufficient to repay him the amount secured by the charge.

The proceedings against the M. Association were compromised on the association agreeing to pay a certain sum. Some time afterwards the S. Association obtained judgment in their favour.

Held, that the undertaking given by B.'s solicitors could not be construed as entitling them to payment of their legal charges in respect of the proceedings relating to both policies; so that the undertaking was not inconsistent with the general principle as to a solicitor's right of lien.

Decision of Kekewich, J., 64 L. T. N. S. 318, reversed.—*Mackenzie* v. *Mackintosh*, C.A.—64 L. T. 706.

14. *Lien for costs—Extent of lien—Taxable costs, charges, and expenses—Advances—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Taking security for costs—Interest—Waiver of lien.*—A solicitor can only have a lien on his client's documents for taxable costs, charges, and expenses incurred by him as solicitor of the client, which will include all advances, made by the solicitor in the course of his business as a solicitor, which are liable to be moderated by the taxing master; but the lien does not extend to ordinary loans or advances by the solicitor not so made as aforesaid, and not liable to be so taxed or moderated.

As to whether the taking of a security from the client operates as a waiver of the lien where one exists, no fixed rule can be laid down; but it depends on the position of the parties and the circumstances of the particular case, as affording an inference of the intention of the parties. If that position and the circumstances of the case, or the nature of the security, are such that the taking of the security is inconsistent with the continuance of the lien, a sufficient indication is afforded of an intention to abandon the lien and rely on the security so taken.

A solicitor took as security from his client (a married woman) a promissory note (in which her husband joined as surety), with a provision for payment of interest at five per cent., and also a charge on a life policy; and nothing was said about the lien continuing, notwithstanding the taking of the security.

Held, that, inasmuch as a solicitor owes a duty to his client to explain clearly the effect of every transaction between them, and as the security in question gave more than the lien, the taking of it was inconsistent with the continuance of the lien, and afforded an inference of an intention to abandon the lien and rely on the security.

Robarts v. *Jefferys*, 8 L. J. Ch. (O. S.) 137, approved.

Decision of Stirling, J., reversed.—*In re Taylor, Stileman, & Underwood, Ex parte Payne-Collier*, C.A. 417—[1891] 1 Ch. 590; 60 L. J. Ch. 525; 64 L. T. 605.

15. *Lien for costs—Proceeds of execution in hands of sheriff*—40 & 41 *Vict. c.* 56, *s.* 62.—A. having recovered judgment against M. issued execution for the costs. M. paid the amount due to the sheriff, in whose hands it was seized under a *fi. fa.* at the suit of a third person who had obtained judgment against A. A.'s solicitor applied to the court for a declaration that the money in the hands of the sheriff was subject to their lien.

Held, that, in the absence of evidence that the solicitor could not otherwise recover the costs, the court in its discretion would not make the order.—*Croghan* v. *Maffett*, EX.D. (Ir.)—28 L. R. Ir. 97.

15a. *Lien for costs—Title deeds held for mortgagee—Payment off of mortgage — Costs of mortgagee's solicitor—Right of mortgagor to return of deeds.*—Where a mortgagor has paid his mortgagee his principal, interest, and costs, and taken a release from him, the mortgagee's solicitor has no right to retain the deeds as against the mortgagor, even for costs due by the mortgagee for work done relating to the mortgaged property pending the mortgage, the equitable right of the mortgagor to have his deeds back from the mortgagee on such payment prevailing against the solicitor's lien claimed in right of the mortgagee.

Ogle v. *Story*, 4 B. & Ad. 735, distinguished.—*In re Llewellyn* (*a Solicitor*), CH.D. CHI., J. 713.

16. *Misconduct—Solicitor struck off roll on conviction for criminal charge—Conviction still standing—Application to restore to roll—Previous refusals by court to restore—Jurisdiction of court to restore—Special circumstances.*—The court has power to restore to the roll of solicitors a gentleman who has been struck off the rolls as a consequence of his conviction on a criminal charge, although such conviction stands, and although applications to restore have been previously refused by the court; but such power will not be exercised by the court unless under the most special circumstances. — *In re Brandreth*, Q.B.D. 687—60 L. J. Q. B. 501; 64 L. T. 739.

17. *Trust money passing into hands of firm with notice of trust—Investment by partner on improper security—Negligence—Liability of partners—Notice—Implied retainer — Liability of deceased partner's estate—Contribution—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 4 (1).—Trust funds were deposited in 1883 at a bank in the name of a firm of solicitors (consisting of three partners, of whom S. was one) who acted for the trustees. The last surviving trustee died in 1883, and in 1884 the trust funds were invested in a mortgage of house property of a hazardous nature. The mortgage was taken in the names of S. and two other persons, all of whom had then agreed to become new trustees of the trust funds, but who were not actually appointed trustees until after the execution of the mortgage.

S. acted for his firm throughout the whole transaction as to the investment, and the costs of his firm in relation to the transaction were retained out of the trust fund. S. had full knowledge of the nature of the property taken as security, but the other members of his firm had no actual knowledge on the matter. The security proved insufficient, and in 1888, in an action brought by the beneficiaries against S. and the two other trustees of the fund, it was held that they were jointly and severally liable to make good the loss sustained by the trust fund. This not having been done, the present actions were brought.

Held (1), that the trust funds having come into the hands of the firm of solicitors with notice of the trusts, all the partners were affected with knowledge of the nature of the security through S., who acted throughout within the scope of his authority as partner, and were therefore implicated

in the breach of trust; that the liability, being joint and several, was not discharged by the judgment, obtained in 1888, against S.; that the Trustee Act, 1888, s. 4, afforded no defence, as the security was one of a class attended with hazard; and that the estate of a deceased partner of S. and the surviving partner personally, were liable to make good the loss.

Lechmere v. *Fletcher*, 1 Cr. & M. 623, 3 Tyr. 450, and *King* v. *Hoare*, 13 M. & W. 494, followed.

Held (2), that the relation of solicitor and client existed between the firm of S. and each of the two new trustees, although no express retainer had been given, and that S., and through him the firm, having failed in the duty of calling the attention of the trustees to the rules as to investment of trust money, the firm was liable for negligence, and that such liability extended to the estate of the deceased partner.

The law as to implied retainer, as laid down in *Bean* v. *Wade*, 1 Times L. R. 404, 2 Ibid. 157, followed.

As to an action for indemnity where no claim had actually been made, *Hughes-Hallett* v. *Indian Mammoth Gold Mining Co.*, 31 W. R. 285, 22 Ch. D. 561, distinguished.—*Blyth* v. *Fladgate*, *Morgan* v. *Blyth*, *Smith* v. *Blyth*, CH.D. STI., J. 422—[1891] 1 Ch. 337; 60 L. J. Ch. 66; 63 L. T. 546.

18. *Unqualified person—Acting as solicitor—Affidavit prepared by process-server—Contempt of court—6 & 7 Vict. c. 73, s. 2—23 & 24 Vict. c. 127, s. 26.*—A person who was employed by a firm of solicitors as a process-server prepared the usual affidavit with reference to a failure to effect service, whereupon an application was made to attach him for contempt of court in having acted as a solicitor contrary to section 2 of 6 & 7 Vict. c. 73.

Held, that he had not acted as a solicitor, and that no contempt of court had been committed.—*In re Louis, Ex parte Incorporated Law Society*, Q.B.D. 511—[1891] 1 Q. B. 649; 60 L. J. Q. B. 500; 64 L. T. 565.

19. *Unqualified person—Debt collector—Solicitor acting as agent for debt collector—Sharing costs—Discretion of court to inflict minor punishment—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 32.—A solicitor agreed to act for a debt collector, who had started a trade protection society, to act as his solicitor in the county court, upon the terms that when the solicitor recovered costs he would share the costs with the debt collector, but when no costs were recovered the solicitor received no costs.

Held, that the solicitor was acting as agent for an unqualified person within section 32 of the Solicitors Act, 1843; but that the court had jurisdiction under that section to inflict a lesser punishment than striking the solicitor off the rolls.—*In re a Solicitor, Ex parte Incorporated Law Society*, Q.B.D—63 L. T. 350.

See also ADMIRALTY, 8; BANKRUPTCY (COSTS), 14, 15; BANKRUPTCY (IRELAND), 2; COUNTY COURT, 3, 6, 8; MORTGAGE, 10; PARTNERSHIP, 3.

SOLICITORS' REMUNERATION ACT, 1881.—See SOLICITOR, 7—11.

SPECIFIC PERFORMANCE.—See VENDOR AND PURCHASER, 5, 6.

STAMP DUTY.—See REVENUE, 11.

See also EVIDENCE, 3.

STATUTE, REPEAL of.—See WATERCOURSE.

STATUTES:—

1 Edw 6, c 14—See WILL, 30

5 Eliz c 4—See APPRENTICE, 1

13 Eliz c 5, s 6—See FRAUDULENT CONVEYANCE

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4 Geo 4, c 60, s 41—See GAMING

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3 & 4 Will 4, c 74 (Fines and Recoveries Act), ss 1, 15, 19, 40, 77—See MARRIED WOMAN, 12

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1 Vict c 26 (Wills Act), s 11—See PROBATE, 28: s 27, POWER OF APPOINTMENT, 2

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3 & 4 Vict c 56, s 6—See SHIP, 33

3 & 4 Vict c 82, s 1—See LUNATIC, 2

3 & 4 Vict c 88 (Police Act, 1840), ss 3, 27—See LOCAL GOVERNMENT, 6

4 & 5 Vict c 25—See PARLIAMENT, 6

5 & 6 Vict c 35 (Income Tax Act, 1842), s 100—See REVENUE, 4: s 146, REVENUE, 6

5 & 6 Vict c 45 (Copyright Act, 1842)—See COPYRIGHT, 5: ss 2, 11, COPYRIGHT, 1: ss 20, 21, 24, COPYRIGHT, 2, 3: s 26, PRACTICE, 16

5 & 6 Vict c 97, s 2—See PRACTICE, 15

6 & 7 Vict c 18 (Registration Act, 1843), s 38—See PARLIAMENT, 4: s 51, CRIMINAL LAW, 5: s 74, PARLIAMENT, 6

6 & 7 Vict c 73 (Solicitors Act, 1843), s 2—See SOLICITOR, 18: s 32, SOLICITOR, 19: s 37, SOLICITOR, 5, 12: ss 38, 41, SOLICITOR, 12

6 & 7 Vict c 82, s 5—See PRACTICE, 59

6 & 7 Vict c 88, s 158—See SHIP, 35

7 & 8 Vict c 12 (International Copyright Act, 1844)—See COPYRIGHT, 5

7 & 8 Vict c 90—See JUDGMENT, 3

8 & 9 Vict c 16 (Companies Clauses Act, 1845), s 36—See RAILWAY, 8: s 45, BILL OF SALE, 4

8 & 9 Vict c 18 (Lands Clauses Consolidation Act, 1845), ss 7, 9—See LANDS CLAUSES ACT, 1: s 69, LANDS CLAUSES ACT, 1; UNIVERSITY, 2: s 70, LANDS CLAUSES ACT, 1: s 79, LANDS CLAUSES ACT, 2: s 133, POOR RATE, 3

8 & 9 Vict c 70 (Church Building Act), s 13—See METROPOLIS MANAGEMENT ACTS, 3

8 & 9 Vict c 76 (Legacy Duty Act, 1845), s 4—See REVENUE, 9

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10 & 11 Vict c 96 (Trustee Relief Act, 1847)—See TRUSTEE, 13

11 & 12 Vict c 43 (Jervis's Act)—See MASTER AND SERVANT, 3

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14 & 15 Vict c 99 (Petty Sessions, Ireland, Act, 1851), s 10, sub-section 4—See CRIMINAL LAW (IRELAND), 2

15 & 16 Vict c lxxvii. (London, City, Small Debts Extension Act, 1852), s 39—See CITY OF LONDON COURT

15 & 16 Vict c 83 (Patent Law Amendment Act, 1852), s 25—See PATENT, 1: s 41, PRACTICE, 32

16 & 17 Vict c 34 (Income Tax Act, 1853), s 2—See REVENUE, 8: s 51, REVENUE, 5

16 & 17 Vict c 51 (Succession Duty Act, 1853), s 42—See REVENUE, 12

16 & 17 Vict c 65, s 1—See POOR LAW, 1

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17 & 18 Vict c 31 (Railway and Canal Traffic Act, 1854), s 2—See RAILWAY, 11

17 & 18 Vict c 36 (Bills of Sale Act, 1854)—See BILL OF SALE, 4

17 & 18 Vict c 103 (Towns Improvement, Ireland, Act, 1854)—See LOCAL GOVERNMENT (IRELAND), 1

17 & 18 Vict c 104 (Merchant Shipping Act, 1854), ss 66, 70, 469, 484—See SHIP, 32: ss 353, 358, SHIP, 35

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18 & 19 Vict c 122 (Metropolitan Building Act, 1855), s 3—See METROPOLIS MANAGEMENT ACTS, 1: s 26, METROPOLIS MANAGEMENT ACTS, 2: ss 82, 85, METROPOLIS MANAGEMENT ACTS, 1

18 & 19 Vict c 124 (Charitable Trusts Amendment Act, 1855), s 29—See CHARITY, 5

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20 & 21 Vict c 57 (Malins' Act)—See MARRIED WOMAN, 8, 9

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20 & 21 Vict c 77, s 70—See PROBATE, 9

20 & 21 Vict c 85 (Matrimonial Causes Act, 1857), s 35—See DIVORCE, 1: s 45, DIVORCE, 22a, 26

20 & 21 Vict c 93 (Legitimacy Declaration Act)—See LEGITIMACY DECLARATION ACT

20 & 21 Vict c 147 (Thames Conservancy Act, 1857)—See THAMES CONSERVANCY

21 & 22 Vict c 44 (Universities and College Estates Act, 1858), ss 27, 28—See UNIVERSITY, 1

21 & 22 Vict c 72 (Landed Estates Court, Ireland, Act), s 64—See CONVERSION

22 & 23 Vict c 61 (Matrimonial Causes Act, 1859), s 4—See DIVORCE, 1: s 5, DIVORCE, 24, 26

22 & 23 Vict c 133 (Watermen's and Lightermen's Amendment Act, 1859), ss 8, 10—See SHIP, 30: s 66, THAMES CONSERVANCY

23 & 24 Vict c 97 (Railways, Ireland, Act, 1860), s 2—See RAILWAY, 5

23 & 24 Vict c 116 (County Coroners Act, 1860), s 4—See CORONER

23 & 24 Vict c 127 (Solicitors Act, 1860), s 26—See SOLICITOR, 18: s 28, SOLICITOR, 1

23 & 24 Vict c 144, s 7—See DIVORCE, 16

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24 & 25 Vict c 96 (Larceny Act), s 75—See

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25 & 26 Vict c 102 (Metropolis Local Management Act, 1862)—See METROPOLIS MANAGEMENT ACTS, 3: s 75, RAILWAY, 10: s 96, LANDLORD AND TENANT, 5: s 106, NEGLIGENCE, 3

25 & 26 Vict c 108 (Confirmation of Sales Act, 1862)—See TRUSTEE, 5

26 & 27 Vict c 41 (Innkeepers Act), s 1—See INNKEEPER, 2

26 & 27 Vict c 117 (Nuisances Removal Act, 1863), s 2—See LOCAL GOVERNMENT, 15

27 & 28 Vict c 73 (Liverpool Sanitary Amendment Act, 1864), ss 5, 13—See LOCAL GOVERNMENT, 7

29 & 30 Vict c 32, s 1—See DIVORCE, 4

29 & 30 Vict c 109 (Naval Discipline Act, 1866), ss 19, 87—See NAVY

30 & 31 Vict c 44 (Chancery, Ireland, Act, 1867), s 170—See PRACTICE (IRELAND), 18

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30 & 31 Vict c 118, s 6—See POOR LAW (IRELAND), 2

30 & 31 Vict c 127 (Railway Companies Act, 1867), s 4—See RAILWAY, 8, 9: s 23, RAILWAY, 9

30 & 31 Vict c 131 (Companies Act, 1867), ss 9, 11—See COMPANY, 16, 17: s 25, COMPANY, 31: s 27, NEGOTIABLE INSTRUMENT

30 & 31 Vict c 134 (Traffic Regulation, Metropolis, Act, 1867), s 15—See METROPOLIS MANAGEMENT ACTS, 5

30 & 31 Vict c 144—See BANKRUPTCY (IRELAND), 4

31 & 32 Vict c 40 (Partition Act, 1868), s 10—See PARTITION ACTION, 2

31 & 32 Vict c 71 (County Courts Admiralty Jurisdiction Act, 1868), s 3—See ADMIRALTY, 2, 3, 4: s 9, ADMIRALTY, 2, 3; PRACTICE, 18: s 21, COUNTY COURT, 1, 2

32 & 33 Vict c 27 (Wine and Beerhouse Act, 1869), s 8—See LICENSING ACTS, 1

32 & 33 Vict c 51 (County Courts Admiralty Jurisdiction Act, 1869), s 2—See COUNTY COURT, 1: s 4, ADMIRALTY, 4

32 & 33 Vict c 62 (Debtors Act, 1869), s 4, sub-section 4—See DEBTORS ACT, 2: s 5, DEBTORS ACT, 1: s 11, sub-sections 13, 14, CRIMINAL LAW, 2

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32 & 33 Vict c 79 (Local Officers' Superannuation Act, Ireland, 1869), s 7—See PRACTICE (IRELAND), 2

32 & 33 Vict c 92—See FISHERY ACTS

33 & 34 Vict c 46, s 69—See LANDLORD AND TENANT (IRELAND), 8

33 & 34 Vict c 52 (Extradition Act, 1870)—See EXTRADITION, 2

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33 & 34 Vict c 75 (Elementary Education Act, 1870)—See SCHOOL BOARD

33 & 34 Vict c 78 (Tramways Act, 1870), ss 28, 29, 55—See TRAMWAY

33 & 34 Vict c 97 (Stamp Act, 1870), s 3—See REVENUE, 11: s 54, sub-section 1, EVIDENCE, 3

33 & 34 Vict c 104 (Joint-Stock Companies Arrangement Act, 1870), s 2—See COMPANY, 27

33 & 34 Vict c 109 (Common Law Procedure Amendment Act, 1870), s 6—See PRACTICE (IRELAND), 14

34 & 35 Vict c 31 (Trade Union Act, 1871), s 7—See TRADE UNION

34 & 35 Vict c 45 (Sequestration Act, 1871), ss 1, 5, 6—See ECCLESIASTICAL LAW, 3

35 & 36 Vict c xxxi (Manchester Waterworks and Improvements Act, 1872), s 34—See CHARITY, 7

35 & 36 Vict c 58 (Bankruptcy, Ireland, Act, 1872), s 49—See BANKRUPTCY (IRELAND), 5: ss 97, 98, BANKRUPTCY (IRELAND), 1

35 & 36 Vict c 60 (Corrupt Practices, Municipal Elections, Act, 1872), s 15, sub-section 6—See PRACTICE, 2

35 & 36 Vict c 76 (Coal Mines Regulation Act, 1872), s 17—See MINE, 3

35 & 36 Vict c 77 (Metalliferous Mines Regulation Act, 1872), s 23, sub-section 10—See MINES, 2

35 & 36 Vict c 93 (Pawnbrokers Act, 1872), s 39—See PAWNBROKER

35 & 36 Vict c 94 (Licensing Act, 1872), s 8—See LICENSING ACTS, 5: s 37, LICENSING ACTS, 3: s 42, LICENSING ACTS, 4

36 & 37 Vict c 48 (Regulation of Railways Act, 1873), s 14—See RAILWAY, 6

36 & 37 Vict c 66 (Judicature Act, 1873), s 19—See PRACTICE, 8: s 24, sub-section 5, COMPANY, 46; CONFLICT OF LAWS, 2: s 25, sub-section 6, ASSIGNMENT OF DEBT: s 39, CONFLICT OF LAWS, 2: s 47, PRACTICE, 4: s 58, PRACTICE, 52: ss 62, 66, SOLICITOR, 4

36 & 37 Vict c 85 (Merchant Shipping Act, 1873), s 17—See SHIP, 21

37 & 38 Vict c 15 (Betting Act, 1874), s 3, sub-section 3—See GAMING

37 & 38 Vict c 42 (Building Societies Act, 1874), s 13—See BUILDING SOCIETY, 2: s 15, BUILDING SOCIETY, 2, 3: s 36, BUILDING SOCIETY, 1

37 & 38 Vict c 49 (Licensing Act, 1874), s 22—See LICENSING ACTS, 3: s 26, LICENSING ACTS, 4

37 & 38 Vict c 57 (Real Property Limitation Act, 1874), ss 2, 8—See LIMITATIONS, STATUTE OF, 4

37 & 38 Vict c 62 (Infants' Relief Act, 1874)—See BANKRUPTCY, 28: s 2, INFANT, 4

37 & 38 Vict c 78 (Vendor and Purchaser Act, 1874), s 5—See TRUSTEE, 11

37 & 38 Vict c 85 (Public Worship Regulation Act, 1874), ss 8, 9—See ECCLESIASTICAL LAW, 6

38 & 39 Vict c 55 (Public Health Act, 1875), s 4—See WATER COMPANY, 2; LOCAL GOVERNMENT, 10, 11, 13: ss 51, 52, WATER COMPANY, 2: ss 91, 96, PRACTICE, 4: ss 116, 117, LOCAL GOVERNMENT, 14: s 150, LOCAL GOVERNMENT, 10, 11: s 151, LOCAL GOVERNMENT, 10: s 156, LOCAL GOVERNMENT, 8: s 157, LOCAL GOVERNMENT, 1, 13: s 161, LOCAL GOVERNMENT, 12: s 175, CHARITY, 6: ss 211, 229, LOCAL GOVERNMENT, 12: s 257, LOCAL GOVERNMENT, 10: s 276, LOCAL GOVERNMENT, 11, 12: s 334, LOCAL GOVERNMENT, 9

38 & 39 Vict c 60 (Friendly Societies Act, 1875), s 16, sub-section 9—See FRIENDLY SOCIETY, 2: s 22, FRIENDLY SOCIETY, 1

38 & 39 Vict c 63 (Sale of Food and Drugs Act, 1875), s 6—See ADULTERATION, 1, 3: s 9, ADULTERATION, 2: s 25, ADULTERATION, 1, 3

38 & 39 Vict c 76 (Land Transfer Act, 1875), s 48—See TRUSTEE, 11

38 & 39 Vict c 86 (Conspiracy and Protection of Property Act, 1875), s 16—See MASTER AND SERVANT, 2

38 & 39 Vict c 90 (Employers and Workmen Act, 1875), s 4—See MASTER AND SERVANT, 3: s 10, MASTER AND SERVANT, 6

38 & 39 Vict c 91 (Registration of Trade-Marks Act, 1875), ss 5, 10—See TRADE-MARK, 8

39 & 40 Vict c 37—See LANDLORD AND TENANT (IRELAND), 5b

39 & 40 Vict c 45 (Industrial and Provident Societies Act, 1876), s 11, sub-section 12—See APPRENTICE, 1

39 & 40 Vict c 57 (Winter Assizes, Ireland, Act)—See CRIMINAL LAW (IRELAND), 1

39 & 40 Vict c 59, s 3—See PRACTICE, 5

39 & 40 Vict c 61 (Poor Law Amendment Act, 1876), ss 34, 36—See POOR LAW, 5

39 & 40 Vict c 63 (Notices to Quit, Ireland, Act, 1876)—See LANDLORD AND TENANT (IRELAND), 8

40 & 41 Vict c 26 (Companies Act, 1877), s 3—See COMPANY, 17: s 4, COMPANY, 18

40 & 41 Vict c 33 (Contingent Remainders Act, 1877)—See WILL, 11a

40 & 41 Vict c 56 (County Officers and Courts, Ireland, Act, 1877), s 37—See COUNTY COURT (IRELAND): s 51, PRACTICE (IRELAND), 15: s 62, SOLICITOR, 15

40 & 41 Vict c 57 (Judicature, Ireland, Act, 1877)—See PRACTICE (IRELAND), 17: s 28, sub-section 1, ADMINISTRATION, 7

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41 & 42 Vict c 19 (Matrimonial Causes Act, 1878), s 2—See DIVORCE, 16: s 4, DIVORCE, 14

41 & 42 Vict c 26 (Parliamentary and Municipal Registration Act, 1878), s 5—See POOR RATE, 5: ss 24, 28, sub-sections 1, 12, 13, PARLIAMENT, 5

41 & 42 Vict c 31 (Bills of Sale Act, 1878)—See BILL OF SALE, 2, 4: s 3, BILL OF SALE, 11: s 4, BILL OF SALE, 1, 4, 9, 11, 13: s 10, sub-section 3, BILL OF SALE, 15: s 11, BILL OF SALE, 12

41 & 42 Vict c 52 (Public Health, Ireland, Act, 1878), ss 108, 109, 110, 111, 112, 118, 119, 121—See LOCAL GOVERNMENT (IRELAND), 4

41 & 42 Vict c 77 (Highway and Locomotive Act, 1878), ss 13, 14, 15—See HIGHWAY, 2

42 & 43 Vict c 30 (Sale of Food and Drugs Act, 1879), s 3—See ADULTERATION, 2

42 & 43 Vict c 49 (Summary Jurisdiction Act, 1879), s 33—See JUSTICES, 2

42 & 43 Vict c 104 (Local Government Board Provisional Orders Confirmation Act, 1879)—See LOCAL GOVERNMENT, 7

43 & 44 Vict c 42 (Employers' Liability Act, 1880)—See MASTER AND SERVANT, 4

43 & 44 Vict c 46 (Universities and College Estates Amendment Act, 1880), ss 2, 4—See UNIVERSITY, 1

44 & 45 Vict c 41 (Conveyancing Act, 1881), s 14—See LANDLORD AND TENANT, 2: s 39, MARRIED WOMAN, 7: s 43, INFANT, 3

44 & 45 Vict c 44 (Solicitors' Remuneration Act, 1881), s 2—See SOLICITOR, 10: s 7, SOLICITOR, 8

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49 & 50 Vict c 33 (International Copyright Act, 1886)—See COPYRIGHT, 5: ss 6, 11, COPYRIGHT, 4

50 & 51 Vict c 20 (Criminal Law and Procedure, Ireland, Act, 1887)—See CRIMINAL LAW (IRELAND), 1; SCHOOL BOARD

50 & 51 Vict c 28 (Merchandise Marks Act, 1887), s 2, sub-section 1 (*a*), s 5, sub-section 1 (*d*)—See TRADE-MARK, 2

50 & 51 Vict c 33 (Land Law, Ireland, Act, 1887) —See LANDLORD AND TENANT (IRELAND), 9: s 1, LANDLORD AND TENANT (IRELAND), 5c, 6, 10: s 7, LANDLORD AND TENANT (IRELAND), 5: s 8, LANDLORD AND TENANT (IRELAND), 15

50 & 51 Vict c 46 (Truck Amendment Act, 1887) —See MASTER AND SERVANT, 5

50 & 51 Vict c 55 (Sheriffs Act, 1887), s 20—See SHERIFF

51 & 52 Vict c 25 (Railway and Canal Traffic Act, 1888), ss 7, 27—See RAILWAY, 11: s 29, RAILWAY, 12

51 & 52 Vict c 41 (Local Government Act, 1888) —See LOCAL GOVERNMENT, 5: s 3, LOCAL GOVERNMENT, 6; POOR RATE, 6: s 9, LOCAL GOVERNMENT, 6: s 11, sub-sections 1, 6, LOCAL GOVERNMENT, 3: s 28, LOCAL GOVERNMENT, 6: s 29, PRACTICE, 10: s 30, LOCAL GOVERNMENT, 6: ss 35, 38, LOCAL GOVERNMENT, 2: s 62, POOR LAW, 3: s 81, LOCAL GOVERNMENT, 6: s 86, POOR LAW, 3: s 100, LOCAL GOVERNMENT, 2

51 & 52 Vict c 43 (County Courts Act, 1888), ss 53, 54—See BANKRUPTCY, 25: s 56, COUNTY COURT, 9: s 65, COUNTY COURT, 10: s 74, CITY OF LONDON COURT; COUNTY COURT, 2: s 116, COUNTY COURT, 5; PRACTICE, 15: s 118, COUNTY COURT, 8; SOLICITOR, 3: s 119, COUNTY COURT, 8: s 126, COUNTY COURT, 11: s 185, CITY OF LONDON COURT: s 186, BANKRUPTCY, 25

51 & 52 Vict c 50 (Patents, Designs, and Trade-Marks Act, 1888), ss 10, 16—See TRADE-MARK, 3: s 64, TRADE-MARK, 4

51 & 52 Vict c 52 (Public Health, Buildings in Streets, Act, 1888), s 3—See LOCAL GOVERNMENT, 8

51 & 52 Vict c 59 (Trustee Act, 1888), s 4—See SOLICITOR, 17: s 6, TRUSTEE, 4: s 8, PARTNERSHIP, 3; TRUSTEE, 3

52 & 53 Vict c 30 (Board of Agriculture Act, 1889), s 2, sub-section 1 (b)—See UNIVERSITY, 1

52 & 53 Vict c 32 (Trust Investment Act, 1889), ss 3, 6—See TRUST

52 & 53 Vict c 43 (Merchant Shipping, Tonnage, Act, 1889), s 3—See SHIP, 31

52 & 53 Vict c 49 (Arbitration Act, 1889)—See ARBITRATION, 7: s 2, ARBITRATION, 1: s 4, ARBITRATION, 5: s 11, sub-section 2, ARBITRATION, 4: FRIENDLY SOCIETY, 1: s 13, PRACTICE, 51, 52: s 14, ARBITRATION, 3; PRACTICE, 52: s 15, ARBITRATION, 3; PRACTICE, 51, 52: ss 19, 24, BUILDING SOCIETY, 1: s 25, ARBITRATION, 1

52 & 53 Vict c 57 (Regulation of Railway Act, 1889), s 5, sub-section 3—See RAILWAY, 4

52 & 53 Vict c 63 (Interpretation Act, 1889), s 38—See BANKRUPTCY, 18

52 & 53 Vict c 68 (Merchant Shipping Act, 1889) —See SHIP, 34

53 & 54 Vict c 35 (Boiler Explosions Act, 1890), s 2—See BOILER

53 & 54 Vict c 44 (Judicature Act, 1890)—See PRACTICE, 45, 54: s 1, PRACTICE, 43: s 2, BILL OF SALE, 13

53 & 54 Vict c 62 (Companies, Memorandum of Association, Act, 1890)—See COMPANY, 10: s 1, COMPANY, 8, 9

53 & 54 Vict c 63 (Companies, Winding-up, Act, 1890—See COMPANY, 28, 43, 46: s 5, COMPANY, 41: ss 6, 9, COMPANY, 40: s 12, Company, 40, 41

53 & 54 Vict c 69 (Settled Land Act, 1890), s 10—See SETTLED LAND ACTS, 5

53 & 55 Vict c 70 (Housing of Working Classes Act, 1890)—See LOCAL GOVERNMENT, 8a

53 & 54 Vict c 71 (Bankruptcy Act, 1890), s 8—See BANKRUPTCY, 18: s 11, sub-section 2, BANKRUPTCY, 37: s 26, CRIMINAL LAW, 2

STATUTORY POWERS:—

1. *Liability of a statutory body—Construction of statutes—Nonfeasance—Claim for damages.*—The liability of a body created by statute is governed by the statutes which create it. The powers conferred when exercised at all must be executed with due care. In the absence of a contrary intention, its duties and liabilities are the same as those imposed by the general law on a private person doing the same thing. But for mere nonfeasance no action lies except in regard to a duty towards the plaintiff imposed by the statute and negligently omitted.

Mersey Docks v. *Gibbs*, L. R. 1 H. L. 93, approved.

In an action to recover damages for injury to the respondent's property arising from the fall of an overhanging road, consequent upon the giving way

of its retaining wall, which the appellant corporation was under a statutory duty to maintain for the purpose merely of road conservancy, it appeared that the result was due to original defects in the structure of the wall, and that the appellant was not negligently ignorant thereof, and not guilty of misfeasance.

Held, that, according to the true construction of the Orders in Council constituting the appellant corporation, it was vested with administrative powers, subject to the control of the Government, and there was no intention to render it responsible to the respondents in respect of such injury.—*Sanitary Commissioners of Gibraltar* v. *Orfila*, P.C.—15 App. Cas. 400; 59 L. J. P. C. 95; 63 L. T. 58.

2. *Waterworks—Reservoir—Lateral deviation—Unauthorized structure—Acquiescence.*—Case in which certain works, constructed under the powers of an Act, were held to be authorized by the Act. The meaning of lateral and vertical deviation explained.

To constitute acquiescence in the unlawful exercise of statutory powers, even when public works have been completed and their construction has extended over several years, there must be either actual knowledge by the parties injured of the fact that the works were not in accordance with the statute, or fraudulent abstention from acquiring such knowledge.—*Herron* v. *Rathmines and Rathgar Commissioners*, C.A. (Ir.)—27 L. R. Ir. 179.

STOCKBROKER.—See COMPANY (SHARES), 23, 24; NEGOTIABLE INSTRUMENT.

STOCK EXCHANGE.—See BANKRUPTCY, 21.

STOPPAGE *IN TRANSITU*.—See SALE OF GOODS.

"STREET."—See LOCAL GOVERNMENT, 11, 13.

STRIKE.—See SHIP, 8, 9.

SUCCESSION DUTY.—See REVENUE, 12.

TENANT for LIFE.—See APPORTIONMENT; LANDS CLAUSES ACT, 1; SETTLED LAND ACTS; TENANT FOR LIFE AND REMAINDERMAN; WASTE.

TENANT for LIFE and REMAINDERMAN:—

1. Bonus—*Dividend—Reserve fund—Company—Capital or income.*—A testator possessed of shares in a company gave his property upon trust as to one moiety of the income for his daughter, and as to the other moiety for his wife during widowhood, and after her decease or second marriage upon trust to divide the *corpus* among his children. He died in 1884 having had one child only.

The company had power by resolution to increase its capital, but no such resolution was ever passed. The directors were empowered to create a reserve fund out of the profits, to declare dividends with the sanction of the company in general meeting, and to declare *interim* dividends in the interval between general meetings, but no dividend was to be declared except out of profits. In 1884 the reserve fund amounted to £3,000. In 1888 it had risen to £9,000. In 1889 a special bonus or *interim* dividend amounting to £15,000 was paid to the shareholders, extraordinary expenses amounting to about £5,000 were incurred, and the reserve fund was reduced to £2,000; but there was no evidence to show that £7,000 of the *interim* dividend came out of the reserve fund.

Held, that the whole of the *interim* dividend was income, and not capital, and as such belonged to the tenants for life.—*In re Alsbury, Sugden* v. *Alsbury*, CH.D. NOR., J. 136—45 Ch. D. 237; 60 L. J. Ch. 29; 63 L. T. 576.

2. Bonus—*Dividend—New shares—Capital or income—Tenant for life and remainderman.*—Directors of a company resolved to distribute accumulated profits as a bonus dividend of fifty per cent. on the capital paid, the dividend to be payable on the 6th of September, 1890. New £10 shares were to be issued to the shareholders on the terms that £10 per share should be paid up on the 6th of December, 1890. The dividend was, at the option of the shareholders, payable in cash or applicable to the payment of the amount then due in respect of new shares or of calls. The old shares were £10 shares, some fully paid up, others with £7 10s. or £5 paid up. The new shares were to be offered at par to the shareholders holding shares fully paid up or with £7 10s. paid up, in the proportion of one new share for every two old shares paid up, and one new share for every eight old shares with £7 10s. paid up. A call of £2 10s. per share was to be made at the same time on such of the shares as were not fully paid up. The trustees of a will, who held 150 old shares fully paid up (the tenant for life consenting, without prejudice to his rights, to treat the dividend as income), accepted seventy-five new shares in lieu of the £750 bonus dividend on the 150 shares. The shares were sold for £1,363. The tenant for life claimed £750 out of the purchase-money, on the ground that it was income; he did not dispute that the balance was capital.

Held, that the £750 was income, on the ground that the declaration of the bonus dividend and the issue of the new shares were two distinct transactions, and not one transaction, as in *Bouch* v. *Sproule*, 12 App. Cas. 385, 56 L. J. Ch. 1037, the shareholders having the option of taking the dividend in cash without taking up the new shares. —*In re Northage, Ellis* v. *Barfield*, CH.D. NOR., J.—60 L. J. Ch. 488; 64 L. T. 625.

See also APPORTIONMENT; LANDS CLAUSES ACT, 1; WASTE.

TENANT in COMMON.—See SETTLEMENT, 1; WILL, 18.

TENANT in TAIL.—See MARRIED WOMAN, 12; SETTLEMENT, 1.

THAMES CONSERVANCY:—

Barge over fifty tons burthen—Navigation of same—"One competent man on board and one man in addition"—One competent man and boy on board—Thames Conservancy Act, 1857 (20 & 21 *Vict. c. cxlvii.*)—*Bye-law* 16 *of the Thames Conservators—Watermen's and Lightermen's Amendment Act*, 1859 (22 & 23 *Vict. c. cxxxiii.*), *s.* 66—*Bye-law* 35 *made under this Act.*—Bye-law 16 of the Thames Conservators, made under the powers of the Thames Conservancy Act, 1857, provides that all barges, boats, lighters, and other navigating the River Thames shall when under craft way have at least one competent man constantly on board for the navigation and management thereof, and all such craft of above fifty tons burthen shall when under way have one man in addition on board to assist in the navigation of the same.

Held, that "one man in addition" in this bye-law means one competent and skilful man in addition, and that where the craft is above fifty tons burthen the bye-law requires two competent men on board, and is not satisfied by having on board one competent man, being a licensed lighterman, and a boy about sixteen years of age.

Perkins v. *Gingell*, 50 J. P. 277, followed.—*Goldsmith* v. *Slattery*, Q.B.D.—63 L. T. 273.

THAMES NAVIGATION.—See SHIP, 15.

TIMBER.—See WASTE.

TIME, COMPUTATION of. — See INSURANCE (ACCIDENT), 1.

TITHES :—

1. *Tithe rent-charge—Application to vary—Average price of wheat*—4 *Geo.* 4, *c.* 99, *s.* 43; 1 *&* 2 *Vict. c.* 109, *s.* 32.—In October, 1889, notices were served by persons paying more than £3 per annum each of tithe rent-charge on the titheowners of applications to justices at quarter sessions to reduce the amount of the tithe rent-charge. The tithe rent-charges had been originally fixed in 1833, and had been raised in 1875 on the application of the tithe owners. The quarter sessions held that it was necessary that the average price of wheat should decrease one-tenth from that ascertained in original certificate, and dismissed the applications.

Held (affirming the judgment of the Queen's Bench Division), that the order of quarter sessions must be quashed, and a writ of *mandamus* should issue requiring the justices to ascertain the average price of wheat for the past seven years, and if it varied by more than one-tenth since the date of the order of 1875 that the tithe rent-charge should be varied accordingly.—*Reg.* v. *Justices of Cork*, C.A. (Ir.)—28 L. R. Ir. 185.

2. *Tithe rent-charge—Septennial variation of certificate according to price of corn—Petition for—Tithe Rent-charge Act* (1 *&* 2 *Vict. c.* 109), *s.* 32—*Jurisdiction of justices at quarter sessions—Objection to jurisdiction—Waiver of*—Certiorari—*Costs.*—Where a certificate of tithe composition made pursuant to 2 & 3 Will. 4, c. 119 was dated the 21st of January, 1834, and a petition was presented upon the 23rd of June, 1890, to vary the tithe rent-charge which had been substituted for the said composition,

Held, that the composition thereby fixed commenced on the 1st of May, 1834, and that inasmuch as such composition was only liable to variation between the 1st of May and 1st of November in any seventh year of its currency (and the impropriate rent-charge in lieu thereof to a like variation), the justices at quarter sessions had no jurisdiction to vary such rent-charge on a petition instituted between the 1st of May and 1st of November, 1890, a new septennial period having then commenced to run.—*The Queen* v. *Justices of Cork*, Q.B.D. (Ir.)—28 L. R. Ir. 369.

TOWN COMMISSIONERS (IRELAND). — See LOCAL GOVERNMENT (IRELAND), 1.

TRADE-MARK :—

1. *Injunction—Fraudulent use of names—Intention to deceive the public*—"*Stone ale*"—The perpetual injunction granted by the Court of Appeal (41 Ch. D. 35) affirmed.—*Montgomery* v. *Thompson*, H.L. (E.) —[1891] A. C. 217; 64 L. T. 748.

2. *Merchandise Marks Act*, 1887 (50 *&* 51 *Vict. c.* 28), *s.* 2, *sub-section* (1) (d); *s.* 5, *sub-section* (1) (d)—*False trade description—Invoice of goods.*—A false trade description contained in an invoice delivered with goods may be an application of a false trade description within the meaning of section 5, sub-section (1), of the Merchandise Marks Act, 1887, although such invoice may not be physically attached to the goods.—*Budd* v. *Lucas*, Q.B.D. 350—[1891] 1 Q. B. 408; 60 L. J. M. C. 95; 64 L. T. 292.

3. *Registration—Alteration of registered trade-mark—Essential particulars—Terms—Patents, Designs, and Trade-Marks Act*, 1883 (46 *&* 47 *Vict. c.* 57), *s.* 64, *sub-section* (c); *s.* 74, *sub-section* 2; *s.* 92—*Patents, Designs, and Trade-Marks Act*, 1888 (51 *&* 52 *Vict. c.* 50), *ss.* 10, 16.—On motion for leave to alter the registration of certain trade-marks registered under the Act of 1883, by striking out of each of them as registered the words "trade-mark,"

Held, that this ought only to be allowed on the terms that the applicants should undertake to indorse on their application and enter on the register a statement of the essential particulars of their marks, and a disclaimer of the exclusive right to the added matter (if any) to the satisfaction of the comptroller.—*In re Colman's Trade-Marks*, CH.D. KEK., J. 487—[1891] 2 Ch. 402; 60 L. J. Ch. 550; 64 L. T. 507.

4. *Registration—Essential particulars—Claim in application—Prize medal—Distinctive device—Distinctive label—Patents, Designs, and Trade-Marks Acts*, 1883 *and* 1888, *s.* 64.—On an application for the registration of a trade-mark it must be shown that the trade-mark consists of or contains an essential particular as defined by section 64 of the Patents, &c., Acts, 1883 and 1888, and that such essential particular has been claimed in the application.

A representation of an exhibition prize medal is not a "distinctive device" within section 64, even though no other similar medal was granted for the same class of goods at the same exhibition.—*In re Bryant & May's Trade-Mark*, CH.D. NOR., J.—59 L. J. Ch. 763; 63 L. T. 676.

5. *Registration—New mark—Previous fraudulent user—Omission of misleading words—Refusal of registration — Patents, Designs, and Trade-Marks Act*, 1883 (46 *&* 47 *Vict. c.* 57), *s.* 74 (11).—In 1887 F. applied to register as a new mark certain labels to be applied as trade-marks to cigars. Previous to 1887 he had used the mark on cigar-boxes in combination with the word "Habana," though the cigars contained in the boxes were in fact of Mexican growth and manufacture. There were words in the labels used by F. previously to 1887 implying that he was the successor in business of a certain firm of M. & Co., which he was not. The marks, for the registration of which as new marks application was made in 1887, omitted the word "Habana," and stated the true place of the applicant's manufactory, and gave the applicant's own name, without any false addition as to previous businesses.

Held, that the former fraudulent user of the marks disentitled the applicant to have them registered as new marks, even though the dishonest portions were omitted, since to permit registration would, in effect, be allowing the applicant to benefit by his former fraudulent conduct.—*In re Fuente's Trade-Marks*, CH.D. ROM., J. 489—[1891] 2 Ch. 166; 60 L. J. Ch. 308; 64 L. T. 196.

6. *Registration—"Old mark"—User of part—Amendment of application — Disclaimer — User in British port—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 69, 71, 72, 74, *sub-section* (2).—An applicant seeking to register a trade-mark as an "old mark" must prove that the entire mark proposed (with the exception of immaterial differences) was used as a whole before the 13th of August, 1875. Proof that some part of such mark was used before that date will not entitle him to register that part as an old mark.

In re Palmer's Trade-Mark, 32 W. R. 306, 24 Ch. D. 504, discussed.

The court has no power judicially to amend an application, but can merely determine whether or not the comptroller shall proceed with such application as it stands.

Orr-Ewing v. *The Registrar of Trade-Marks*, 28 W. R. 17, 4 App. Cas. 479, explained.

Section 74, sub-section (2), of the Patents,

Designs, and Trade-Marks Act, 1883, must be strictly construed, so that disclaimer of part of the mark proposed can only be made in the application, and only of devices, words, &c., that are common to the trade.

Semble, user of a distinctive mark on goods lying in the holds of ships which are merely touching at British ports is not sufficient user to acquire a trade-mark here.—*In re Meeus's Application*, CH.D. CHI., J. 216—[1891] 1 Ch. 41; 60 L. J. Ch. 96; 63 L. T. 610.

7. *Registration—Old mark—"Special and distinctive word" — "User" — Combination with other marks—Separation of marks—Composite mark—Registration—Trade-Marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *s.* 10—*Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57)—*Patents, Designs, and Trade-Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10.—In 1882 Heidsieck & Co., a French firm of champagne growers, registered under the Trade-Marks Registration Act, 1875, the words "Monopole" and "Dry Monopole" as separate trade-marks for separate kinds of champagne, on the ground of user of those marks before the Act; but they never had, in fact, used those words alone as marks; for upon the labels, wrappers, and corks, and cases for their bottles they had always used them in conjunction with the name of the firm, "Heidsieck & Co.," which they also registered by itself in 1882 as a trade-mark under the Act; and upon the corks and cases there were besides various devices which had been registered as trade-marks under the Act. On the cases "Monopole" or "Dry Monopole" appeared on one side alone, while on another side was "Heidsieck & Co." alone, and on one of the ends was one of the firm's registered devices alone. The firm sold other brands of champagne under distinctive registered labels, bearing the name of the particular brand, and always the names of the firm underneath.

Upon a motion under the Act of 1875 and the Patents, Designs, and Trade-Marks Acts, 1883 and 1888, to expunge "Monopole" and "Dry Monopole" from the register of trade-marks,

Held, by Kay, J., and by the Court of Appeal, that those words had not been so "used as trade-marks before the passing of the Act" within the meaning of section 10 of the Act of 1875 as to entitle Heidsieck & Co. to have them registered; and they were acccordingly ordered to be expunged from the register.

What is "user as a trade-mark" under section 10 of the Act of 1875 explained.

In re Spencer's Trade-Marks, 3 Rep. Pat. Cas. 73, discussed.—*Richards* v. *Butcher*, C.A.—[1891] 2 Ch. 522; 60 L. J. Ch. 530.

8. *Registration—"Person aggrieved"—Importer—Foreign producer—Natural products—"Distinctive trade-mark"—Part of label pointed out as "trade-mark"—Disclaimer of words in label—"Fancy words"—"Geographical name"—Name of mineral spring—"Place of business—"Common to the trade"—Time for disclaimer — Trade-Marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *ss.* 5, 10—*Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 90—*Amendment of Act while application pending.*—The intention of the Trade-Marks Registration Act, 1875, s. 5, and the Patents, Designs, and Trade-Marks Act, 1883, s. 90, in requiring an applicant for rectification of the register of trade-marks to be a "person aggrieved" is only to prevent the interference of common informers, or of persons actuated by merely sentimental notions, and not to require evidence of serious damage.

Any person who is in the same trade as the person who has wrongfully registered a trade-mark, and who desires to deal in goods covered by the wrongful registration, is *primâ facie* a person aggrieved.

Whenever one trader, by the wrongful registration of a trade-mark, narrows the area of business open to his rivals, and thereby either immediately excludes, or with reasonable probability will in the future exclude, a rival from a portion of the trade into which he desires to enter, that rival is a "person aggrieved."

Although the effect produced, or likely to be produced, by the wrongful registration is not the exclusion, but only the hampering of the rival trader, the rival trader is a "person aggrieved."

Whenever one trader uses the fact of his having a trade-mark already on the register as any part of his case against another trader in any legal proceedings, *e.g.*, for the purpose of supporting an application for the registration of another trade-mark, which the second trader is opposing, the second trader is a "person aggrieved" and none the less because he may have other means of defending himself. A trade-mark must at the date of registration distinguish the goods of the trader registering it from all others.

An importer of foreign goods cannot register as his own the trade-mark of the foreign producer, whether the goods are produced by a course of manufacture or by a process of nature; nor whether the importer has or has not an exclusive contract for this country; nor whether the producer does or does not consent to the registration.

Whether an importer can or cannot register as his own the producer's trade-marks after the importer has acquired the control of the producer's entire output (as to which, *quære*), the registration by the importer in his own name, while only having a lesser right, of trade-marks belonging to the producer cannot be rendered valid by the subsequent acquisition by the importer of the right to the whole output.

Although in the case of a new trade-mark it will ordinarily be presumed that a mark tendered for registration is intended to be used, yet, if it is proved that a mark which it is sought to register, without prior user, is not intended to be used by the applicant, but that he is an importer of foreign goods, and is only seeking to register the mark for the purpose of excluding from the English market similar goods intended for foreign consumption, and having the mark affixed to them by the foreign producer, whose mark it is, registration ought not to be allowed.

Where a label tendered for registration contains, with other matter, a device to which special attention is directed as being the "trade-mark," registration ought to be refused, on the ground that the effect of the label is likely to be to mislead the public into the belief that the device alone is protected or claimed.

Words contained in a distinctive label registered as a whole under the Patents, Designs, and Trade-Marks Act, 1883, need not be disclaimed under section 74 of that Act, inasmuch as they form a part of the label, and are not additions to it.

Where a trade-mark has been wrongfully registered, and an application to remove it from the register is made by a person aggrieved, the mark will not be allowed to remain on the register, on the ground that if it were removed it could (by reason of some intervening events) be immediately re-registered on a new application, inasmuch as an opportunity must be given to the public by the insertion of the usual advertisements to come in and oppose the new application.

The names of well-known mineral water springs, such as "Apollinaris," "Hunyadi Janos," and "Friedrichshall," are geographical, and are not "fancy words not in common use" within section 64 of the Act of 1883, nor "invented words," or "words having no reference to the character or quality of the goods, and not being a geographical name," within the same section as amended by the Act of 1888, whether sought to be registered in respect of the waters of the springs or of products of those waters.

Per Kekewich, J.: The names of foreign springs, when added to a trade-mark tendered for registration under the Act of 1888 by a limited company with a registered office in England, are not protected against the requirement of a disclaimer under sections 64 and 74 of that Act by the exception contained in those sections in favour of a "place of business."

Per Kekewich, J.: Where an application for the registration of a trade-mark was made while the Act of 1883 was in force, but being opposed was not heard until after the amending Act of 1888 had come into force, the applicants were held to be entitled to avail themselves of whichever of the two Acts was the more favourable to their application.

Per Kekewich, J.: "Common to the trade" in section 74 of the Acts of 1883-8 means "open to the trade," and not "in common use in the trade."

Per Kekewich, J.: When a disclaimer is required by section 64 of the Act of 1888, or by section 74 of the Acts of 1883-8, such disclaimer must be made in the application for registration, and cannot be made afterwards.—*In re Apollinaris Co.'s Trade-Marks*, C.A.—[1891] 2 Ch. 186; 65 L. T. 6.

9. *Registration—Similarity—Mode of comparison—Patents, Designs, and Trade-Marks Act*, 1883, *s.* 72.—Where an application for the registration of a trade-mark is opposed by the proprietor of an earlier trade-mark already on the register, on the ground that the new mark has too great a resemblance to the old one, regard must be had to the way in which the new mark will be fairly used in the ordinary course of trade; and if, when so used, the mark will be likely to produce deception, registration will be refused.

An application by F. for the registration of a device of a charging bison, which he used with many other details on wrappers on tins of mustard, being opposed by Messrs. C., the proprietors of a registered device of a "bull's head," which they used with other details on wrappers on tins of mustard very similar to those used by F. and the general style and colouring of the wrappers and some of the details being in common use in the trade,

Held, that F.'s mark, as it would be used, would be calculated to deceive, and that registration must be refused.—*In re Farrow's Application*, CH.D. STI., J.—63 L. T. 233.

10. *Registration—Special and distinctive words used as a trade-mark before the passing of the Act of* 1875—*Words descriptive of article—Words used in conjunction with other words—Trade-Marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *s.* 10.—To entitle "any special and distinctive word or words" to be registered as a trade-mark under the Trade-Marks Registration Act, 1875, s. 10, they must have been used alone as a trade-mark before the passing of the Act, and not merely in combination with other words. Before the passing of the Trade-Marks Registration Act, 1875, the appellants used the words "Perry Davis' Vegetable Pain Killer" as their trade-mark for a medicine manufactured and sold by them. After the passing of the Act they registered the words "Pain Killer" as their trade-mark under section 10. Upon a motion to amend the register,

Held, affirming the decision of the Court of Appeal, that the entry must be removed from the register, the words "Pain Killer" not having been used alone before the passing of the Act.

Held, also, by Lord Halsbury, L.C., and Lord Morris, that the words "Pain Killer" were not special and distinctive words within the meaning of section 10, there being nothing to distinguish goods manufactured by the appellants from goods manufactured by other persons.—*Perry Davis & Son* v. *Harboard*, H.L. (E.)—15 App. Cas. 316; 60 L. J. Ch. 16; 63 L. T. 389.

11. *Registration — Words calculated to deceive — "Fruit Salt"—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 73.—The respondent applied to register a trade-mark, of which the words "Dunn's Fruit Salt Baking Powder" formed a conspicuous part. The appellant had for many years used the words "Fruit Salt" as his trade-mark for a powder for an effervescing drink, and opposed the application.

Held (Lords Halsbury and Morris dissenting), that the proposed words were calculated to deceive the public, that the registrar had a discretion whether to register or not under section 73 of the Patents, Designs, and Trade-Marks Act, 1883, and should refuse where it is not clear that the public would not be misled.

Decision of the Court of Appeal reversed.—*Eno* v. *Dunn*, H.L. (E.) 161—15 App. Cas. 252; 63 L. T. 6.

TRADE NAME:—

Imitation—Name calculated to deceive—Joint-stock company—Injunction.—W. Edgcumbe Rendle, the patentee of an invention of glass-roofing, carried on business as W. Edgcumbe Rendle & Co. He took his son, J. Edgcumbe Rendle, into the business, and the son agreed not to carry on any opposition business. The father died, giving by his will an interest in the business to his son. The son then started a similar business on his own account, under the name of J. Edgcumbe Rendle & Co., and having got into financial difficulties he assigned his business to his creditors. The son then promoted a company, styled "J. Edgcumbe Rendle & Co. (Limited)," to carry on the business of glass-roofing. The trustees of the father's will having applied for an injunction,

Held, that an injunction must be granted to restrain the company and the son from carrying on the business of glass-roofing under that name, as the son, who was not at the time carrying on his business of glass-roofing, had no right to lend his name to a company, which name was calculated to deceive.—*Rendle* v. *J. Edgcumbe Rendle & Co. (Limited)*, CH.D. KAY, J.—63 L. T. 94.

See PARTNERSHIP, 4.

TRADE UNION:—

Devise to—Mortmain—"Benevolent Fund"—Perpetuity—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *s.* 7—*Meaning of "purchase" in.*—A testator devised and bequeathed certain freehold and leasehold properties for lives, with a condition that each devisee and legatee should keep the property held by him in repair and pay an annual sum to go to the Benevolent Fund of a registered trade union, for the benefit of distressed members of the society and widows and children of deceased members.

Held, that, the annual sum being a charge con-

nected with land and the nature of the Benevolent Fund being charitable, the gift to it was void as offending against the Statutes of Mortmain.

The word "purchase" in section 7 of the Trade Union Act, 1871, has not the technical meaning of "take otherwise than by descent," and does not include taking by devise.

There is nothing repugnant to the law in an estate being given to a man for the combined periods of his own life and the life of the person who may be his heir.—*In re Amos, Carrier* v. *Price*, CH.D. NOR., J. 550—60 L. J. Ch. 570; 65 L. T. 69.

TRAMWAY:—

Repair of road—Contract with road authority to repair—Liability of tramway company—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *ss.* 28, 29, 55.—Where a tramway company has entered into an agreement with the road authority under section 29 of the Tramways Act, 1870, whereby the road authority undertakes to maintain and keep in repair the roadway between and adjoining the tramway lines, the tramway company is not liable for injuries to a person caused by the road where the tramway is laid not being maintained in proper repair.

Howitt v. *Nottingham Tramway Co.*, 32 W. R. 248, 12 Q. B. D. 16, followed.—*Alldred* v. *West Metropolitan Tramway Co.*, C.A. 609—[1891] 2 Q. B. 398; 60 L. J. Q. B. 631; 65 L. T. 138.

See CONTRACT, 4; LOCAL GOVERNMENT, 4.

TRESPASS:—

Accidental injury—Shooting—Negligence.—In the absence of negligence a man who accidentally shoots another is not liable in an action of trespass.—*Stanley* v. *Powell*, Q.B.D. 76—[1891] 1 Q. B. 86; 60 L. J. Q. B. 52; 63 L. T. 809.

See LANDLORD AND TENANT, 7.

TROVER:—

Title of plaintiff to sue—Trustee—Possession by cestui que trust*—Auctioneers, under what circumstances liable—Practice—Calling opposite party as a witness when permitted.*—Trustees can maintain an action for wrongful conversion of chattels which were in possession of their *cestui que trust* under the provisions of a trust instrument, his possession being in law their possession for this purpose. In such a case a defendant cannot set up, by way of defence, the title of a third person, who has not asserted or who has waived his claim to the chattels.

A broker or auctioneer who only settles the price as between vendor and purchaser, receiving commission for so doing, is not liable as for wrongful conversion if the vendor is not entitled to sell the goods. *Secus*, if the broker or auctioneer receives the goods into his own custody, and, on selling them, delivers them to the purchaser with the intention of passing the property in them.

Turner v. *Hockey*, 56 L. J. Q. B. 301, 35 W. R. Dig. 209, commented on.

After a defendant's case was closed, the defendant himself not having been called as a witness in support of it, an application by plaintiff's counsel to call him as a witness refused, it being admitted that plaintiff's counsel had not been led by any misrepresentation to suppose that the defendant would be called.—*Barker* v. *Furlong*, CH.D. ROM., J. 621—[1891] 2 Ch. 172; 60 L. J. Ch. 368; 64 L. T. 411.

TRUCK ACTS.—See MASTER AND SERVANT, 5, 7.

TRUST.—See ASSIGNMENT OF DEBT; CHARITY, 2; INFANT, 6.

TRUST INVESTMENT ACT, 1889.—See TRUSTEE, 10.

TRUSTEE:—

1. *Breach of trust—Contributory mortgage—Sale of trust funds—Liability of trustees to replace stock sold—Consent of tenant for life to investment.*—The trustees of a settlement had power to invest the trust funds "in their names" in Government or real securities, and to vary investments with the consent in writing of the tenant for life. In 1875 they sold a sum of Consols and other stock forming part of the trust fund, and with the consent of the tenant for life invested the proceeds of sale in a contributory mortgage of real estate, which was effected in the names of themselves and the persons advancing the remainder of the money. In 1879 a mortgage in the names of the trustees only was substituted for the contributory mortgage, but the consent in writing of the tenant for life was not previously obtained, although upon hearing of the change of investment he did not make any objection thereto. Upon the death of the tenant for life the money on mortgage was called in. The whole of the principal invested was forthcoming, but the remaindermen, who were entitled to the capital, claimed that the trustees ought to replace the sums of stock sold in 1875, which at that time stood at a lower price than in 1887, when the proceedings were commenced.

Held, that the sale in 1875 was improper, as having been made for the purpose of effecting another investment which was a breach of trust as not being in the names of the trustees solely, and that the investment of 1879 was also a breach of trust, as the previous consent of the tenant for life after the facts were fully laid before him was not obtained, and that consequently the trustees were liable either to replace the stock sold, or to pay the difference in price of the stock sold in 1875, and of the same amount of stock at the time of the commencement of the proceedings.

Decision of Kay, J. (60 L. T. N. S. 620), affirmed.—*In re Massingberd's Settlement, Clark* v. *Trelawney*, C.A.—63 L. T. 296.

2. *Breach of trust—Enforcement of payment of trust funds—Default.*—A testator by will gave his son in succession the option of purchasing his leasehold mill at a valuation, the purchase-money being payable by half-yearly instalments. The son purchasing was to execute a mortgage. The sale moneys were to be invested, the trustees having discretion to invest in certain securities, or, in case either of the sons elected to carry on the testator's business, upon the security of the mill. The eldest bought the mill, which was valued at £50,000, the trustees agreeing to take payment in half-yearly instalments of £2,000, and the son executed a mortgage of the mill for £50,000. Further capital being wanted for the business a company was formed which purchased the property comprised in the mortgage, at a slight advance in price, and the equity of redemption was assigned to it. The company having failed,

Held, that the trustees were authorized to take the mortgage for £50,000; and that under the circumstances of the case they acted honestly and to the best of their ability, and were not, therefore, liable to make good the loss.—*In re Hurst, Addison* v. *Topp*, CH.D. CHI., J.—63 L. T. 665.

3. *Breach of trust—Following assets—Statute of Limitations—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8 (1) a, b, (3)—*Parties—R. S. C.*, 1883, *ord.* 16, *r.* 8.—An action for breach of trust was brought by a newly-appointed trustee against the survivor of the former trustees and the representatives of two deceased former trustees to make them replace trust

money, lost through investments made (more than six years before the action) without proper valuations and on insufficient securities. The executor of G., one of the deceased trustees, had, after duly issuing the statutory advertisements, administered his testator's estate, and then retained the balance as trustee of certain trust legacies, which it was insufficient to pay in full. The court gave leave at the trial to amend the statement of claim so as to make the action one against G.'s executor as a trustee, and not merely as an executor, and so that the amount retained for the legacies might be followed in his hands; but such amendment was allowed only upon the terms that the action was to be treated as commenced on the day of the trial, and that the defence was to be treated as amended so as to allow G.'s executor to claim the benefit of any statutes of limitation.

Held, that the Trustee Act, 1888, s. 8, sub-section (1) (*b*), did apply to the case, though sub-section (1) (*a*) did not.

Held, also, that, in view of R. S. C., 1883, ord. 16, r. 8, the beneficiaries entitled to the legacies were not necessary parties to an action to follow the legacies in the hands of a trustee.—*In re Bowden, Andrew* v. *Cooper*, CH.D. FRY, L.J. 219—45 Ch. D. 444; 59 L. J. Ch. 815.

4. *Breach of trust — Indemnity — Instigation of* cestui que trust—*Married woman—Reversionary interest—Impounding interest—"Beneficiary in the trust estate"—Trustee Act*, 1888, *s.* 6.—R. was entitled absolutely in remainder to the trust funds of his mother's marriage settlement, which she had appointed to him by deed, subject to her own life interest. By his own marriage settlement R. covenanted to pay £10,000 to his trustees within six months after his mother's death, and, in case of his death in his mother's lifetime, that his executors should pay his trustees, during his mother's life, £400 per annum, to be applied as if it were income of the £10,000. R. took the first life interest under his settlement, with remainder to his wife for life. R. assigned to his trustees, as security, the trust funds of his mother's settlement. The trustees of the mother's settlement had notice of the assignment. R. having become embarrassed, the trustees of the mother's settlement were induced, on the entreaty of R., his mother, and his wife, to apply a large portion of the trust funds in discharge of R.'s debts. The trustees of R.'s settlement brought an action against the trustees of the mother's settlement for breach of trust, claiming that they might replace the funds. The defendants counter-claimed (*inter alia*) that the interest of R. and his wife in the funds might be impounded and declared liable to indemnify them.

Held, (1) that there was no right of imdemnity to the defendants out of the interest of either R. or his wife under R.'s settlement, such interest not being an interest of a "beneficiary in the trust estate" of which the defendants were trustees, so as to come within the Trustee Act, 1888, s. 6; (2) that, even if the interest of R.'s wife had been such an interest, the court would not in its discretion under the Act have impounded it, there having been no misrepresentation on the part of R.'s wife, and as the defendants must be taken to know that she could not validly deal with her reversionary interest.—*Ricketts* v. *Ricketts*, CH.D. ROM., J.—64 L. T. 263.

5. *Confirmation of Sales Act*, 1862 (25 & 26 *Vict. c.* 108)—*Petition—Power of sale—Minerals apart from surface — Beneficiaries — Service.* — Petition under the Confirmation of Sales Act by trustees with an absolute power of sale for the sanction of the court to the sale of minerals apart from the surface. The beneficiaries, who were all infants, were not made parties to the petition.

The court made the order without directing service on the beneficiaries.—*In re Wadsworth's Trust*, CH.D. KAY, J.—63 L. T. 217.

6. *Discretion—Gift of income to A.—Cesser on assignment or bankruptcy—Discretionary trust to apply income for the benefit of A. only*—A discretionary trust to apply income for the benefit of a *cestui que trust*, arising upon cesser of his life interest by assignment or bankruptcy, may be exercised by the trustees, notwithstanding that the *cestui que trust* is the only object of the discretionary trust.

A testatrix directed trustees to stand possessed of a fund upon trust to pay the income to T. W. B. during his life, or until he should become a bankrupt or liquidating debtor, or should cease to be entitled to receive such income for his own benefit: and, in case any of those events happened, then "to pay to him or apply for his benefit during the remainder of his life" either the whole or so much only of the said income as the trustees should, in their uncontrolled discretion, think fit, and, "subject to the aforesaid interest," upon trust for other beneficiaries. T. W. B. assigned his interest, and subsequently became bankrupt.

Held, that the trustees might, in the exercise of their discretion, expend the whole or any part of the income for the maintenance of T. W. B., and that any part not so applied by them went to the persons entitled under the gift over.

Semble, that payment of the debts of T. W. B. might be an application of the income for his maintenance.—*In re Bullock, Good* v. *Lickorish*, CH.D. KEK., J. 472—60 L. J. Ch. 341; 64 L. T. 736.

7. *Investment—"Company incorporated by Act of Parliament"—Charter granted in pursuance of a statute.*—By an Act of Parliament the Crown was empowered to grant a charter of incorporation to a marine insurance company, with certain special privileges and limitations. In pursuance of this Act the Crown granted a charter to the London Assurance. By a subsequent Act the capital stocks of the London Assurance and another corporation were amalgamated, and the name and seal of the London Assurance were to be used for both corporations, and the London Assurance was to exercise the powers of both corporations.

A trustee of a will, who had power to invest in shares of "any company incorporated by Act of Parliament," invested in shares of the London Assurance.

Held, that the London Assurance was a company incorporated by Act of Parliament within the meaning of the investmet clause.

Semble, that if the London Assurance had not been originally within the terms of the investment clause, it would not have come within the terms by virtue of the subsequent Act amalgamating its stock with that of another corporation and enlarging its powers.—*Elve* v. *Boyton*, C.A.—[1891] 1 Ch. 501; 60 L. J. Ch. 383; 64 L. T. 482.

8. *Investment—"Railway or other public company"*—Ejusdem generis.—A testator directed his trustees to invest the residue of his estate (*inter alia*) "upon the debentures or securities of any railway or other public company carrying on business in any part of the United Kingdom." The trustees proposed to invest in the securities of certain companies incorporated under the Companies Acts.

Held, that the companies having been incorporated by public statute, the instruments forming

their constitution being accessible to the public, and their shares being transferable to the public, they were public companies within the investment clause; and that the reference to railway companies in the same clause did not restrict the meaning of the words "public companies."

The decision of Stirling, J., affirmed.—*In re Sharp, Rickett* v. *Sharp*, C.A.—45 Ch. D. 286; 60 L. J. Ch. 38; 62 L. T. 677.

9. *Investment—Power to trustees to continue money in business—Pressure by trustees for money due to trust estate—Postponement of investment—Discretion.*—A testator, who died in 1872, had by his will bequeathed a legacy of £1,000 in trust for G. R. J., and by a codicil, which recited that he desired his widow after his death to enter into the business then carried on by him in partnership with D., and that the bulk of his property was invested as capital in the said business, the testator had empowered his trustees to invest or continue invested moneys in their hands as trustees in the aforesaid business, or any other business in which they, in their uncontrolled discretion, might think fit, without being liable for loss. D. and M. J. were appointed executors and trustees. The widow entered into partnership with D. in the business for ten years from the 1st of January, 1873. The £1,000 was left in the business during and after the said term of ten years. In June, 1883, the widow having then left the business, D. filed a petition for liquidation of his affairs, and a composition of 10s. in the pound was agreed to, payable by three instalments—on the 2nd of January, 1884, the 2nd of April, 1884, and the 2nd of October, 1884. Only one instalment was received by the trustee, M. J., and it was not invested, but placed on deposit at a bank. No pressure was made for payment of the unpaid instalments. G. R. J., having come of age, brought an action against the trustee M. J. and others seeking relief on the ground of breaches of trust.

Held, as regards M. J., (1) that the not calling in the £1,000 on the widow's retirement from the partnership was not a breach of trust, but that, on the true construction of the codicil, the power was not restricted to lending to any particular partners in the business; (2) that the not calling in or pressing for payment of the two instalments unpaid was not a breach of trust, the trustee, M. J., not having been guilty of negligence, but having acted honestly in the belief that pressure would not have resulted in benefit to the estate, and with a reasonable ground for acting as he did; (3) that having regard to the fact that the loss of income, if any, through non-investment of the first instalment was very small, coupled with the probability, then existing, of another instalment being shortly received, when both might be invested together, it would be going too far to make an order on that head against the trustee M. J., who acted on his solicitor's advice in placing the money on deposit at a bank instead of investing it.—*In re Earl, Johnson* v. *Davies*, CH.D. ROM., J. 107.

10. *Investment—Power to vary existing investments—Trust Investment Act*, 1889 (52 & 53 *Vict.* c. 32), *ss.* 3, 6.—In the absence of any express prohibition in the instrument creating the trust, the power to vary investments given by section 3 of the Trust Investment Act, 1889, applies as well to investments—of the classes specified in sub-sections (*a*) to (*o*) of that section—existing prior to, or not made under, the Act of 1889, as to investments made under the powers given by that Act.

In re Manchester Royal Infirmary, 38 W. R. 460, 43 Ch. D. 420, disapproved on this point.—*In re Dick, Lopes* v. *Hume-Dick*, C.A. 225—[1891] 1 Ch. 423; 60 L. J. Ch. 177; 64 L. T. 32.

11. *New trustees—Power of appointing new trustees—Exercise of power by co-heiress of last surviving trustee—"Acting" trustee—"Bare" trustee—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict.* c. 78), *s.* 5—*Land Transfer Act*, 1875 (38 & 39 *Vict.* c. 76), *s.* 48.—A power of appointing new trustees was given by deed in 1836 to "the acting trustee for the time being" of the indenture. The last acting trustee, T. P., died intestate, leaving his son T. H. P. his heir-at-law, who subsequently died intestate, leaving his son T. H. S. P. his heir-at-law. He died intestate in 1876, leaving his three daughters his co-heiresses. The three co-heiresses executed the power of appointing new trustees contained in the deed of 1836.

Held, that this was a valid execution of the power, the trust estate having devolved on the three daughters as co-heiresses of the last surviving trustee; these having shown themselves "acting" trustees by exercising this power, and the legal estate having descended to them from their father, who, as a trustee with active duties to perform, was more than a "bare trustee" within the Vendor and Purchaser Act, 1874, and the Land Transfer Act, 1875.

Christie v. *Ovington*, 24 W. R. 204, 1 Ch. D. 279, followed, in preference to *Morgan* v. *Swansea Urban Sanitary Authority*, 27 W. R. 283, 9 Ch. D. 582.—*In re Cunningham and Frayling's Contract*, CH.D. STI., J. 469—[1891] 2 Ch. 567; 60 L. J. Ch. 591; 64 L. T. 558.

12. *Remuneration—Administration action—Trustees appointed by the court to receive rents and to manage estate with commission upon rental—Commission to rent collector.*—Trustees who have been appointed by the court to receive the rents of, and to manage a trust estate, receiving a commission upon the rental, will not be allowed to charge additional payments made by them to a collector of rents.—*Cox* v. *Bennett* (*No.* 1), C.A. 308.

13. *Trustee Relief Act—Payment into court—Affidavit—Notice to persons interested—Trustee Relief Act*, 1847 (10 & 11 *Vict.* c. 96)—*Chancery Funds Consolidated Rules*, 1874, *r.* 34—*Chancery Funds Amended Orders*, 1874, *ord.* 5—*Supreme Court Funds Rules*, 1884, *rr.* 2, 41—*Supreme Court Funds Rules*, 1886, *rr.* 2, 41.—Under the present practice (dating in this respect from the 1st of March, 1884) a trustee who pays money into court under the Trustee Relief Act, being no longer required to state in his affidavit the names of the persons interested, need not serve them with notice of such payment in, the Chancery Funds Amended Orders, 1874, ord. 5, which directed such notice, being, as from such date, rendered nugatory owing to the repeal of the Chancery Funds Consolidated Rules, 1874, by the Supreme Court Funds Rules, 1884, r. 2.

In re Stening, 50 L. T. N. S. 586, 32 W. R. Dig. 217, explained and distinguished.

Quære, whether the Chancery Funds Amended Orders, 1874, ord. 5, is repealed by the Supreme Court Funds Rules, 1886, r. 2.—*In re Graham's Trust*, CH.D. CHI., J. 157—[1891] 1 Ch. 151; 60 L. J. Ch. 98; 63 L. T. 664.

See also ADMINISTRATION, 1, 6, 8; LANDLORD AND TENANT, 11; PRACTICE (PARTIES), 48; SETTLED LAND ACT, 1; SOLICITOR, 17; TROVER; VENDOR AND PURCHASER, 2; WILL, 11, 24, 25.

TRUSTEE ACT, 1888.—See PARTNERSHIP, 3; SOLICITOR, 17; TRUSTEE, 3, 4.

TRUSTEE RELIEF ACT.—See TRUSTEE, 13.

ULTRA VIRES.—See COMPANY (SHARES), 26; PRINCIPAL AND AGENT, 4.

UNDUE INFLUENCE:—

Execution of deed—Married woman—Threat to prosecute husband.—The plaintiff's husband, who was the secretary of a land society, misappropriated the moneys of the society. The plaintiff brought an action to set aside a mortgage of her own property to the trustees of the society to secure the moneys so misappropriated, on the ground that the mortgage was obtained under threats of a criminal prosecution against the husband.

The court ordered the deed to be cancelled, on the ground that, though there might have been no threat, it was present to the mind of the plaintiff and of the trustees that the husband would be liable to a prosecution unless something was done; that this knowledge came to her either directly or indirectly from the trustees; and that the deed was executed by her to free the husband from a prosecution.—*M'Clatchie* v. *Haslam*, CH.D. KEK., J.—63 L. T. 376.

UNIVERSITY:—

1. *College—Lands Clauses Consolidation Act*, 1845—*Application of purchase-money—Universities and College Estates Act*, 1858 (21 & 22 *Vict. c.* 44), *ss.* 27, 28—*Universities and College Estates Amendment Act*, 1880 (43 & 44 *Vict. c.* 46), *ss.* 2, 4—*Board of Agriculture Act*, 1889 (52 & 53 *Vict. c.* 30), *s.* 2, *sub-section* 1 (b).—The consent of the Board of Agriculture must be obtained to the application of money in court representing college lands taken by a company under the Lands Clauses Consolidation Act, in pursuance of the Universities and College Estates Amendment Act, 1880, ss. 2, 4.—*Ex parte King's College, Cambridge*, CH.D. NOR., J. 331—[1891] 1 Ch. 333; 60 L. J. Ch. 508; 64 L. T. 623.

2. *College—Erection of new buildings—Application of purchase-money of land paid into court under Lands Clauses Consolidation Act—Repayment by instalments—Universities and College Estates Act*, 1858 (21 & 22 *Vict. c.* 44), *ss.* 27, 28—*Universities and College Estates Amendment Act*, 1880 (43 & 44 *Vict. c.* 46), *ss.* 2, 4—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 69.—The effects of sections 27 and 28 of the Universities and College Estates Act, 1858, in conjunction with sections 2 and 4 of the Universities and College Estates Amendment Act, 1880, is to provide, in the case of land belonging to a university or a college which is taken compulsorily under the provisions of the Lands Clauses Consolidation Act, 1845, another mode of investment of the purchase-money in addition to those mentioned in section 69 of the Lands Clauses Consolidation Act.—*Ex parte King's College, Cambridge* (*No.* 2), CH.D. NOR., J.—[1891] 1 Ch. 677; 60 L. J. Ch. 508; 64 L. T. 623.

UNREGISTERED COMPANY. — See BUILDING SOCIETY, 4.

VALUATION (METROPOLIS) ACT, 1869.—See POOR RATE, 1.

VALUERS.—See MORTGAGE, 14.

VENDOR and PURCHASER:—

1. *Conditions of sale—Misleading condition—Condition requiring purchaser to assume facts believed to be true — Non-disclosure of dependence of title on facts to be assumed.*—The title of persons, claiming under a trustee of real property, to the beneficial ownership (under the doctrine of *Burgess* v. *Wheate*, 1 Eden. 177) of the same property (the trusts affecting it having become exhausted in 1876) depended on the death intestate without heirs before 1870 of the original settlor, who was believed (though legal proof was wanting) to have so died in 1851; and no claim had in fact ever been made by anyone as his heir. The property was sold in 1890 under conditions of sale one of which required the purchaser to assume that the settlor did in fact die before 1870 intestate and without an heir; but the condition contained nothing to show that the title depended entirely on the facts which the purchaser was required to assume, or to explain how or why it so depended. A vendor and purchaser summons having been taken out, the vendor and his solicitor deposed to their belief that the facts were as the purchaser was required to assume.

Held (affirming the decision of Bristowe, V.C.), that, under the circumstances, the condition was not a misleading one, but was aptly and properly framed to prevent the purchaser from insisting on proof of what was then, and was still, believed to be the fact (though the vendor was not in a position to furnish legal proof of it), and that the condition was accordingly binding on the purchaser.—*In re Sandbach and Edmondson's Contract*, C.A. 193—[1891] 1 Ch. 99; 60 L. J. Ch. 60; 63 L. T. 797.

2. *Conditions of sale—Right to rescind—Costs of investigating title—"Notwithstanding previous litigation"—Will—Devise to trustee "if and when he shall return to England."*—The words "notwithstanding any previous negotiation or litigation" in a condition of sale stipulating that the vendor should be at liberty to annul the sale if unable to satisfy any objection insisted on by the purchaser, cannot be construed as including litigation in which a judicial decision adverse to the vendor has been actually given. Consequently, when, on a vendor and purchaser summons, an order had been made declaring that the vendor had not shown a good title, and directing him to pay the purchaser the costs of investigating the title,

Held, that it was then no longer open to the vendor to avail himself of the above condition.

A testator who died in 1877 appointed B., "now residing at Adelaide, Australia, if and when he shall return to England," and C., executors and trustees of his will, and devised real estate to his said trustees on trust for sale. The will was proved by C., with power reserved to grant probate to B. if and when he returned to England. B., at the time of the testator's death, and down to and at the present time, was domiciled in Australia, but in 1885 he came on a visit to England for the benefit of his health, and stayed there six months, after which he returned to his home in Australia. B. never proved the will, and although in 1879 he had indicated an intention to act as trustee, he had not, during his visit to England or since, assented to the devise or taken any part in the administration of the trusts of the will, but he had not actually disclaimed.

Held, that, under the above circumstances, the condition "if and when he shall return to England" had been satisfied by B.; and, consequently, that the trusteeship had become vested in him in 1885.—*In re Arbib's and Glass's Contract*, C.A. 305—[1891] 1 Ch. 601; 60 L. J. Ch. 263; 64 L. T. 217.

3. *Conditions of sale—Prior voluntary settlement.*—A purchaser may be precluded by a condition of sale from making any objection or requisition to the vendors' title in respect of a voluntary settlement previously executed by the vendor.

A purchaser for value, though precluded as above, is entitled to proof that the settlement, though voluntary in its inception, has not been set up by an *ex post facto* consideration.—*Small* v. *Torley*, M.R. (Ir.)—25 L. R. Ir. 388.

4. *Conditions of sale—Time of essence of contract—Subsequent negotiations—Waiver—Defect in title.*—A vendor offered for sale his interest in a farm, one of the conditions of sale providing that, if the title were approved, possession should be given on or before May 10, 1889, and if, through the default of the vendor, the sale was not closed by May 20, the agreement should be void. The lands were pasture lands, and unless the purchaser could get possession so as to stock the lands by the end of May, they would be valueless to him for the season, and the vendor was aware of this. Negotiations were proceeding between the parties after May 24 for the completion of the purchase, when a deed was discovered by the purchaser on searching the Registry of Deeds affecting the title not disclosed on the abstract. The vendor explained the omission and proposed to remedy the defect in the title, which, however, would necessitate the adoption of a new root of title and further investigation; but the purchaser refused to complete.

Held (affirming the decision of the Vice-Chancellor, 25 L. R. Ir. 342), that the continuance of the negotiations after the time fixed for completion did not amount to a waiver of the condition; that under the circumstances time was of the essence of the contract; and that the purchaser ought not to be compelled to complete.—*Dyas* v. *Rooney*, C.A. (Ir.)—27 L. R. Ir. 4.

5. *Contract—Specific performance—Contract contained in letters—Subsequent negotiation—Contract to sell freehold—Minerals found not to belong to vendor—Right of purchaser to rescind before time for completion—Rights of vendor to specific performance or damages on acquisition of minerals prior to time for completion—Damages.*—D. offered by letter to purchase from B. (assuming the title to be satisfactory) the freehold of a house, with about a quarter of an acre of land, with possession at a fixed date (beyond which nothing was said about the time for completion), and B. accepted that offer by letter. B.'s solicitor subsequently attempted to introduce into the contract some additional terms, which, however, he ultimately abandoned. In the meantime, D.'s solicitor, having discovered that the minerals under the property, which was enfranchised copyhold, belonged to the lord of the manor, and not to the vendor, wrote that he could not advise his client to go on with the matter. D. adopted this advice of his solicitor, and neither of them ever receded from that position. Before the day fixed for delivery of possession the lord had agreed to convey the minerals to the vendor, but they were not actually conveyed till more than two months after that day. The vendor had in the meantime commenced an action for specific performance and (alternatively) for damages for breach of contract.

Held, first, that, assuming (without deciding the question) that there was a concluded agreement, the purchaser was not bound to wait till the day fixed for delivery of possession, which, in the circumstances of this case, was the end of a reasonable time, for the completion of the contract, but was entitled to rescind the contract as soon as he found that the vendor had not got what he had contracted to sell; and held, that the contract was in fact so rescinded by the conduct of the defendant and his solicitor.

Held, secondly, that, as the plaintiff was not in a position to carry out his contract on the said day fixed for delivery of possession, he could not maintain an action for damages for breach of contract.

Whether he could have done so if he had been in a position to carry out his contract on that day, *quære.*

Hoggart v. *Scott*, 1 Russ. & My. 293; *Forrer* v. *Nash*, 14 W. R. 8, 35 Beav. 167; *In re Head's Trustees*, 38 W. R. 657, 45 Ch. D. 310; and *Weston* v. *Savage*, 27 W. R. 654, 10 Ch. D. 736, followed.

Decision of North, J. (45 Ch. D. 481, 34 S. J. 638), affirmed.—*Bellamy* v. *Debenham*, C.A. 257—[1891] 1 Ch. 412; 60 L. J. Ch. 166; 64 L. T. 478.

6. *Contract—Specific performance—Purchaser in possession—Title accepted—Purchaser's option to pay purchase-money into court or give up possession—Interest.*—The underlessee of some property contracted to purchase it, paid a deposit, and accepted the title. By the contract the day fixed for completion was the date of the expiration of the lease, and the purchaser was to pay interest on the purchase-money in default of completion. The purchaser remained in possession, but refused to complete or pay the purchase-money; he claimed to be in possession under the sub-lease, not under the contract, and now offered to pay rent. On motion for an order on the purchaser to pay the purchase-money into court,

Held, that the purchaser had an option, and must elect to pay the purchase-money into court within a month or to give up possession; and, if he should give up possession, that he must pay interest on the purchase-money at four per cent. from the day fixed for completion.

There is no rule that a purchaser in possession loses this option by accepting the title.—*Greenwood* v. *Turner*, CH.D. KEK., J. 315—[1891] 1 Ch. 144; 60 L. J. Ch. 351; 64 L. T. 261.

7. *Sale under order of court—Conditions as to possession—Conditions of tenancy—Non-payment of rent by outgoing tenant—Distress by receiver—Statute of 8 Anne, c. 18, s. 7.*—P. was yearly tenant of a farm under a written agreement, which provided (*inter alia*) that, in the last year of his tenancy, he should consume on the farm all the hay, &c., produced thereon; that he should stack in the barns and rick yards all the corn, grain, and hay produced, and the hay, straw, &c., were to be consumed by cattle, and the dung, &c., to be left on the premises, for which purpose he was to have the use of the barns and yards necessary until the 25th of March next after the end of the tenancy; that the landlord or the incoming tenant should be at liberty to enter upon the lands and prepare them for seeds, &c.; that the tenant should also leave for the landlord or incoming tenant "all the hay, straw, and roots remaining unconsumed, being paid or allowed for the same"; and that, at the end of the tenancy, the landlord or the incoming tenant should allow to him for the manure and other things done, and "for the unconsumed hay, straw, and roots."

The farm was sold under the order of the court to A., subject to "such tenant right as the occupier might be entitled to on quitting"; and by one of the conditions the purchaser was to pay the balance of his purchase-money on or before the 29th of September, 1890; and upon payment he was to be entitled to possession of the farm as from the 29th of September, from which day he was to pay all outgoings.

P.'s tenancy expired at Michaelmas, 1890. A. paid his purchase-money into court on the 13th of October, 1890, and he was let into possession, but only on the terms of the above contract of tenancy, and no conveyance had been executed. The rent

payable by P. at Michaelmas, 1890, had not been paid; and on the 24th of October a distress was put in by H., the receiver appointed in the action, and under it certain stacks of hay and straw produced during the last year of the tenancy were seized.

A. moved for an injunction to restrain the receiver from remaining in possession of, or from removing or selling any of, the distrained goods.

Held, that the legal reversioners were entitled to distrain on the goods of the tenant, but were in equity trustees for the purchaser, and could not exercise their rights so as to prevent his enjoying every benefit of his ownership.

Held, also, that the statute of 8 Anne, c. 18, did not apply to such a case.—*In re Powers, Manisty* v. *Archdale*, CH.D. STI., J. 185—63 L. T. 626.

8. *Title—Defect not disclosed by abstract—Restrictive covenant—Discovery of restriction by purchaser after expiration of time for delivering requisitions upon abstract.*—A purchaser at a sale by auction discovered that a deed immediately preceding the deed which, by the conditions of sale, was made the root of title, and which gave a title of thirty-eight years only, contained a restrictive covenant affecting the right of building upon part of the property purchased by him, which covenant was not disclosed by the abstract. The discovery was made after the expiration of the time fixed for delivering requisitions upon the abstract. The purchaser did not immediately acquaint the vendor with his objection to the restrictive covenant, but, the vendor's replies to the requisitions sent in not being satisfactory, the purchaser took out a summons under the Vendor and Purchaser Act, 1874, for a declaration that the requisitions had not been sufficiently answered, and that a good title had not been shown to the property, and in his affidavit in support of the summons stated his objection with respect to the restrictive covenant.

Held, that the objection was not taken too late, and that it was a good objection to the title.—*In re Cox and Neve's Contract*, CH.D. NOR., J. 412—[1891] 2 Ch. 109; 64 L. T. 733.

9. *Title—Power of executrix to apply proceeds of property for her own benefit—Agreement that she should sell part for her own benefit and settle remainder—All the property vested in executrix and another person as trustees—Power to mortgage the part which the executrix had power to sell under the agreement.*—R. by his will appointed his wife sole executrix, with power to appoint another person to assist her in carrying out the trusts of the will, and gave her certain leasehold houses during her widowhood, with power to sell, mortgage, or lease any part thereof, and to apply the money to her own use, and subject thereto he gave the same on certain trusts in favour of his children. R. died in 1883. By indenture of the 31st of October, 1887, between the widow and other beneficiaries under the will, it was agreed that the widow should appoint another person to act with her in the trusts of the will, and that she should, prior to such appointment, sell the leaseholds and apply the money as therein mentioned. The leaseholds were not sold according to this agreement, but the widow, by indenture of the 8th of December, 1887, appointed W. to act with her as co-trustee, and vested the leaseholds in themselves jointly, and by indenture dated the 19th of May, 1888, they mortgaged the leaseholds to the defendant. He afterwards contracted as mortgagee to sell a part of the leaseholds to the plaintiff, who refused to complete the purchase, and sued the defendant for the return of his deposit. Romer, J., held that the title was one which the court would not force on a purchaser.

Held, that the widow and W. had power to mortgage the leaseholds, and that the defendant could make a good title to them.

Decision of Romer, J. (63 L. T. N. S. 695), reversed.—*Saxby* v. *Thomas*, C.A.—64 L. T. 65.

See also REVENUE, 12; TRUSTEE, 11.

VESTRY.—See METROPOLIS MANAGEMENT ACTS, 4, 7; NEGLIGENCE, 3.

VICTORIA, LAW of:—

1. *Chinese Act*, 1881, *s.* 3—*Aliens—Collector of customs.*—By section 3 of the Victorian Chinese Act, 1881, a Chinese immigrant has no legal right to land in the colony until a sum of £10 has been paid for him.

Where the master of a vessel had committed an offence under the Act by bringing a greater number of Chinese immigrants into a port of the Colony than the Act allowed,

Held, that the collector of customs was under no legal obligation to accept payment tendered by the master on behalf of any such immigrants, nor when tendered either by or for any individual immigrant.

Held, further, that, apart from the Act, an alien has not a legal right enforceable by action to enter British territory.—*Musgrove* v. *Chun Teeong Toy*, P.C.—[1891] A. C. 272; 60 L. J. P. C. 28; 64 L. T. 378.

2. *Public Service Act*, 1883, *s.* 49—*Powers of classifiers—Construction—Junior assistant.*—Where, under Victorian Public Service Act, 1883, s. 49, every school teacher employed in a State school at the date of the Act was directed to be classified as in the Act provided, and the classifiers thereunder assigned to the respondent the *status* of a junior assistant,

Held, that, according to the true construction of the Act, the respondent not being in point of fact at the date of the Act a junior assistant, could not legally be classified as such; but that, having had at that time a definite *status* as assistant teacher, she was entitled to be classified accordingly.

The term "junior assistant" was not interpreted by the Act, and did not denote any denomination of teacher existing at its date, and there was no power under the Act to apply the term to the respondent so as to alter her position.—*Main* v. *Stark*, P.C.—15 App. Cas. 384; 59 L. J. P. C. 68; 63 L. T. 10.

3. *Transfer of Land Statute—Forged transfer—Fictitious transferee—Forged mortgage—Effect of registration.*—The Victorian "Transfer of Land Statute" protects those who derive a registered title *bonâ fide* and for value from a registered owner. Accordingly they need not investigate the title of such owner, for they are not affected by its infirmities. But they must ascertain at their own peril his existence and identity, the authority of any agent to act for him, and the validity of the deed under which they claim.

The name of a registered owner having been removed in favour of a fictitious and non-existing transferee as the result of a forged transfer, a mortgage purporting to have been executed by such transferee was subsequently put upon the register by a *bonâ fide* mortgagee.

In a suit by the true owner against the registrar, the mortgagees, and the perpetrator of the fraud.

Held, (*a*) that the plaintiff's name must be restored to the register; (*b*) that the mortgage was invalid, and did not, in favour of the mortgagee,

constitute an incumbrance on the plaintiff's title, though under the Act it would have that effect in favour of a *bonâ fide* registered assignee thereof.—*Gibbs* v. *Messer*, P.C.—[1891] A. C. 248; 60 L. J. P. C. 20; 64 L. T. 237.

VIVISECTION.—See CHARITY, 1.

VOLUNTARY SETTLEMENT.—See BANKRUPTCY, 39; SETTLEMENT, 6; VENDOR AND PURCHASER, 3.

VOTERS.—See PARLIAMENT, 1-13.

WAIVER. — See COMPANY, 7; SOLICITOR, 14; VENDOR AND PURCHASER, 4.

WARRANTY.—See ADULTERATION, 3.

WASTE :—

Timber—Timber estate—Custom—Tenant for life and remainderman.—The owners of an estate had for years periodically cut beech trees (beech being by local custom timber), cutting the older trees to make room for the younger ones, so as to maintain a continual succession of trees, which were sold for the purposes of a local industry.

Held, that a tenant for life impeachable for waste did not commit waste by continuing the periodical cuttings, and that the proceeds thereof belonged to the tenant for life.—*Dashwood* v. *Magniac*, CH.D. CHI., J.—60 L. J. Ch. 210; 64 L. T. 99.

WATERCOURSE :—

Nuisance—Pollution of steam—Prescription—Act unlawful by statute—Repeal of statute—Previous user.—The Irish statute, 11 Eliz. sess. 3, c. 5, prohibiting the steeping of flax in any stream was repealed in 1878. In 1888 a lower riparian proprietor brought an action against a higher riparian proprietor to restrain him from permitting water in which flax had been steeped to flow into the stream, and the defendant pleaded a right by user.

Held, that the acts done during the operation of the statute could not confer rights, and that the period of enjoyment commenced to run when the statute was repealed.

The general rule that a man cannot prescribe against a statute means that prescription cannot be proved by acts prohibited by statute.

The prescription must be one which could have had a legal origin, and the right must be such that it could have been lawfully granted by the owner of the servient tenement to the owner of the dominant tenement; and if such a grant would have been unlawful either at common law or by statute, it cannot be presumed, and the claim of right cannot be supported by the continuance of acts, thus unlawful, for any length of time.—*Traill* v. *M'Allister*, V.C. (Ir.)—25 L. R. Ir. 524.

See also NUISANCE, 3.

WATERWORKS :—

1. *Minerals—Reservoir—Compensation for minerals not workable—Prospective injury to mine—Apprehended injury—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 6, 22, 25, 27.—A special Act incorporating the Waterworks Clauses Act, 1847, empowered the making of a reservoir in lands containing coal mines. The waterworks undertakers having given the mine owners notice to treat for part of the coal, the mine owners claimed compensation (to be settled by arbitration) not only for the value of the land to be taken (as to which no question arose) but also for injurious affection and prospective damage. The arbitrator found that the workings of the mine owners had not as yet approached the reservoir so as to cause any present risk to the mines from the existence of the reservoir; that if the mine owners were free to work their mines without risk of interruption from the undertakers' work, they could and would have got the whole of a certain seam of coal under the reservoir and within forty yards of the boundary, and that if the undertakers purchased and retained *in situ* the coal which they had given notice to take and no other coal, the mine owners, by reason of the undertakers' works and of apprehension of injury therefrom to one seam, could not get more than fifty per cent. of the coal under the reservoir or within twenty yards of its boundary; that a prudent lessee working without right to compensation would be compelled by reason of such apprehension of injury to abstain from working more than fifty per cent. of the coal within the defined area; and that there was no reason to apprehend injury present or future from the undertakers' works to any part of the mines if fifty per cent. of the coal in the defined area were retained *in situ*.

Held, affirming the decision of the Court of Appeal (20 Q. B. D. 699), that the mine owners were not entitled to claim or to recover compensation for the prospective prevention of the working of more than fifty per cent. of the coal within the defined area; inasmuch as, though the word "land" in section 6 of the Waterworks Clauses Act, 1847, includes "mines," the mine owners were not injuriously affected within the meaning of section 6, neither could they at present claim or recover under the mines clauses of that Act, sections 18—27.—*Holliday* v. *The Mayor, &c., of Wakefield*, H.L. (E.)—[1891] A. C. 81; 60 L. J. Q. B. 361; 64 L. T. 1.

2. *Water supply—Profits from supplying water—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 51, 52.—The commissioners of a township entered into an agreement with a water company to take the water supply for the township from the company. The undertaking of the company was afterwards transferred to the corporation of a borough by a private Act of Parliament, which confirmed and made perpetual the agreement respecting the water supply of the township; and, by subsequent private Acts of Parliament, provision was made for the application of the profits or revenue obtained by the corporation from supplying the water for the benefit of the borough and of the water consumers therein.

Held, that the agreement continued to bind the commissioners to take the water supply for the township from the corporation, and that the commissioners might be restrained by injunction from obtaining the supply elsewhere, and also that the corporation supplied water for their own profit, and were a "water company" within section 52 of the Public Health Act, 1875.—*Corporation of Wolverhampton* v. *Bilston Commissioners*, CH.D. NOR., J. 394—[1891] 1 Ch. 315.

See NUISANCE, 2; POOR RATE, 9; STATUTORY POWERS, 2.

WAY.—See EASEMENT, 2.

WILL :—

ADEMPTION—

1. *Double portions — Presumption — Legacy to testator's three sons of all testator's shares in a partnership—Gift* inter vivos *to one son, of two out of the testator's twenty-one shares—Difference in character of gifts—Gift* inter vivos *in lieu of salary for services rendered — How presumption may be rebutted.* — A testator by his will gave to his three sons equally as tenants in common all his shares and interest in a brewery business in which he was the principal partner, being at the date of the will the owner of

twenty-one out of twenty-four shares in the business. Between that date and his death he made E. (one of the three sons), a partner, and assigned him two of his twenty-one shares, which were to be in lieu of a salary as manager. The two shares thus given carried with them certain powers which did not attach to those devolving under the will. E., at the time he was so made a partner, had had many years' experience in the business, and was at the time in fact a paid manager of an important branch of the business, and had been pressing for an increase of his salary as such.

Held (reversing the decision of Romer, J., 39 W. R. 299), that, even assuming that the gift *inter vivos* to E. came within the definition of a "portion," which was doubtful, there was amply sufficient in the circumstances of the case to rebut the presumption that such gift was intended as an advancement *pro tanto* of the shares given him by the will, and accordingly there was no ademption.

Whether the gift *inter vivos* to E. was a gift in the way of a "portion," *quære.*—*In re Lacon, Lacon* v. *Lacon*, C.A. 514—[1891] 2 Ch. 482; 60 L. J. Ch. 403; 64 L. T. 429.

CONSTRUCTION—

2. *Accumulations — Trust—Settled land—Annuitant — Tenant for life — Surplus income — Capital money — "Improvements" — Improvement of landed estate—Maintaining houses in good habitable repair—Building houses—Thellusson Act* (39 & 40 *Geo.* 3, *c.* 98)—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 (*sub-sections* 5, 8), 25, 26, 58 (*sub-section* 5.)—A testator directed his trustees to invest his residuary moneys, together with all accumulations, in the purchase of a landed estate, and that out of the income thereof an annuity should be paid to his nephew for life, and that the surplus income should from time to time during the life of the nephew be expended on the purchase of additional land, "or in the improvement of the landed estate, and in maintaining in good habitable repair houses and tenements on the property," and that on the death of the nephew, his son (if any) should have a life interest in the whole of the landed property, subject to one-third of the yearly rental being expended year by year in improving, keeping up, or extending the estate; with remainder to the male heir of his nephew in succession for ever.

The testator died in 1865. His nephew survived him and had a son, an infant. Shortly after the testator's death an action was commenced for the administration of his estate, and a receiver was appointed. Subsequently the trustees purchased, out of money in court representing the testator's residuary estate, a freehold estate, which was conveyed to them upon the trusts of the will. Under an order made in the action the income of the testator's estate, after keeping down the annuity to the nephew and providing for repairs, was during twenty-one years from the testator's death invested and accumulated. Upon the expiration of the twenty-one years a further order was made directing the receiver, after keeping down the annuity "and maintaining in good habitable repair the houses and tenements on the property," to divide the residue of the income, as from the expiration of the twenty-one years, among the testator's next of kin; whereupon the receiver applied part of the income of the landed estate, after keeping down the nephew's annuity, in repairs and "improvements" on the estate. The question was then raised, on a summons by the next of kin, whether the trust or direction in the will to expend surplus income in improvements was not, though indirectly, a trust or direction for "accumulation" and therefore void, under the Thellusson Act, after the expiration of twenty-one years from the testator's death; and thus, whether the expenditure by the receiver for such purposes was valid.

Held, by Chitty, J., that the trust or direction being in the nature of a discretionary trust to apply, in due course of administration, a portion of the income for the purpose of improving the property, did not fall within the Thellusson Act, and was therefore good; and accordingly the order made on the summons declared "that the trust for improvement and maintenance contained in the will was valid, notwithstanding the expiration of twenty-one years from the testator's death." On appeal, that order was affirmed, but with an addition that the declaration "was not to authorize the application of income to purposes the expense of which ought to be defrayed out of capital"; the trustees thus having power to apply to the court for direction in case of difficulty.

Per Chitty, J.: The distinction between a trust to improve land and to purchase land is well settled: under the former you cannot buy land; under the latter you cannot improve land, although you may build a new house, which is regarded as acquiring land (*Drake* v. *Trefusis*, L. R. 10 Ch. 364).

Per the Court of Appeal: All improvements in substance which could in any fair sense be regarded as coming under the words, "maintaining in good habitable repair houses and tenements on the property," are outside the Thellusson Act altogether. Money laid out in building houses on the land would be within the Act.—*Vine* v. *Raleigh*, C.A.—[1891] 2 Ch. 13.

3. *Annuity—Charge upon* corpus—*Trustees—Power to mortgage.*—A testator bequeathed a pecuniary legacy and a life annuity to his widow, and gave all his real and personal estate to trustees, upon trust, subject to the payment of the legacy and annuity, to pay the rents and income to his daughter for life, and he directed that, after her death, the estate should be held in trust for his grandchild. He empowered his trustees to continue his business of a brick manufacturer, and to increase or diminish the real or personal estate employed therein at his death.

Held, that the annuity was a first charge upon the *corpus* of the real and personal estate; and further, that the trustees could not create a paramount charge by mortgaging the real estate to raise moneys for the discharge of debts incurred by them in carrying on the testator's business.—*In re Webb, Leedham* v. *Patchett*, CH.D. NOR., J.—63 L. T. 545.

4. *Annuity—Gift over on death without "leaving" child.*— A testator gave to L. an annuity during her life, payable out of the rents of leaseholds, and directed that after L's death the annuity should be payable to and among such of L's children as, being sons, should attain twenty-one, or, being daughters, should attain that age or marry; and, in the event of the death of L. "without leaving" any such child, then over. L. survived the testator, and had one child only, who attained twenty-one and died in L.'s lifetime.

Held, that the gift over took effect, the annuity being a personal provision for the annuitant and her children.—*In re Hemingway, James* v. *Dawson*, CH.D. KAY, J. 4—45 Ch. D. 453; 60 L. J. Ch. 85; 63 L. T. 218.

5. *Annuity—Life annuity charged on land—Power of trustees to sell land and purchase Government annuity—Death of annuitant before completion of sale—Right of representatives to value of annuity.*—

A testatrix bequeathed life annuities charged on land, and, subject to the annuities, devised the land to trustees on trust for sale. By codicil she empowered the trustees to purchase Government annuities, to be in place of the annuities given by her will, and directed that the purchase-money should be a first charge on the proceeds of sale of the land, and that, upon purchase of the Government annuities, the land should be discharged. The trustees sold the land, and, pursuant to the conditions of sale, a sufficient sum was deposited in a bank for the purchase of the Government annuities, but such annuities were not actually purchased. One of the annuitants died after the date of the contract of sale, but before completion or payment of the purchase-money. Another annuitant died subsequently to completion.

Held, that the representative of the annuitant who died before completion was not entitled to the value of her annuity, but that the representative of the other annuitant was so entitled.—*In re Mabbett, Pitman* v. *Holborrow*, CH.D. KEK., J. 537—[1891] 1 Ch. 707; 60 L. J. Ch. 279; 64 L. T. 447.

6. "*Children*"—*Bequest to illegitimate children.*—A testatrix by her will dated in 1867 gave to her executors a sum of stock upon trust to pay the income to her niece Martha M. (wife of Walter John M.) during her life, and after her death to pay the same income to the said Walter John M. during his life, and after the death of the survivor to divide the stock between the children of her said niece, the same to be vested interests at twenty-one.

At the date of the will Martha M. had eight children. She had for many years prior to the date of the will lived with Walter John M. as his wife, and all the children were born before her marriage with him, which took place shortly before the date of the will. The testatrix always believed that her niece and her husband were married before they commenced living together, and that the children were legitimate. She always took great interest in the children, and paid their school and other expenses. At the date of the will Martha M. was fifty years of age, and she had not had a child for six years.

Held, that the children were not entitled to the fund.—*In re Brown, Penrose* v. *Manning*, CH.D. NOR., J.—63 L. T. 159.

7. "*Contents of desk*"—Choses in action—*Key of strong box—Intention of testator.*—A testator gave his desk "with the contents thereof" to his nephew J., he also gave him a legacy of £200, and made him one of his executors and residuary legatees. The desk contained bank notes and coin, a banker's deposit receipt, a cheque to the order of the testator, but unindorsed, divers promissory notes, payable to the testator or order, also unindorsed, a promissory note payable on demand, and the key of a tin box in which some securities were kept. It was admitted that the bank notes and coin passed to the nephew, J., but the residuary legatees contended that the *choses in action* did not pass.

Held, that by the desk and its "contents" the testator intended to pass all that was found therein at the time of his death, and that the words used were sufficient to pass all the *choses in action*, including those which were negotiable only after indorsement by the executors.

Held, also, that the key of the security box gave no title to the contents of that box.

Robert v. *Kuffin*, 2 Atk. 112, discussed and distinguished.

Effect of *In re Prater*, 37 Ch. D. 481, on the older authorities stated.—*In re Robson, Robson* v. *Hamilton*, CH.D. CHI., J.—[1891] 2 Ch. 559; 65 L. T. 173.

8. *Conversion—Election.*—A testator devised and bequeathed to his trustees all his real and personal estate upon trust to convert such part thereof as should not consist of investments producing interest and invest the proceeds and receive the income of all property, and thereout to pay to his wife an annuity of £104 for her life, and to pay out of the remaining income to his son George such a sum as, in the discretion of his trustees, should be proper and sufficient for his maintenance, but so that he should not have power to mortgage or anticipate the same. After the son's marriage, in the event of there being any issue, the trustees were to apply such part of the income as they might think reasonable in the maintenance and bringing up of such issue. After the death of the wife and son the trustees were to pay and divide the capital of the trust estate unto and amongst such issue equally. The testator's wife died in his lifetime. His son George survived him, and died in 1884, leaving an only child, a son, R. W. S. The testator left real estate. In 1882 an order was made for the administration of the testator's estate. In 1885 an order was made directing an inquiry whether it would be fit and proper and for the benefit of R. W. S. (who was an infant) that any, and what, part of the testator's estate should be retained in the condition in which the same was at the testator's death. R. W. S. died an infant in 1888, before any certificate had been made in answer to the inquiry. After the infant's death the question was raised whether, in the events that had happened, the real estate remaining unsold passed to the infant's heir-at-law or to his legal personal representative.

Held, that the real estate passed to the legal personal representative of the infant as personalty.—*In re Wragg, Wragg* v. *Small*, CH.D. NOR., J.—63 L. T. 219.

9. "*Death without leaving children*"—*Life estate—Gift over—Implied gift to children—Residuary gift.*—Where in a will there is a gift to A. for life, with a gift over "on the death of A. without leaving children," those words are not, by themselves, without assistance from other parts of the will, sufficient to create a gift by implication to the children.

A testator gave his real and residuary personal estate to his wife and his nephews S. and W. upon trust for his wife during her life; and after her death he gave his real estate to his brother during his life, with remainder, as to three freehold houses, to his (the testator's) nephews S. and W., upon trust to pay the rents and interest to his niece during her life for her separate use; and after the decease of his said niece, "she leaving no child or children," the testator gave one of the three freehold houses to his nephew S., and the other two to his nephew W. And after bequeathing certain legacies, which he directed should be paid out of any residue there might be left, or, if none, then out of the rents of the real estate, the testator gave the residue of his real and personal estate to his nephews S. and W. equally. The testator's niece survived his wife and brother, and died leaving two children.

Held, by Kay, J., that the niece took an absolute interest in fee simple in the three houses; but held, on appeal, that she took a life interest only; and that on her death the houses passed under the ultimate residuary gift to the two nephews equally, there being no implied gift to the children of the niece.

The rules of construction laid down in *Kinsella* v. *Caffrey*, 11 Ir. Ch. Rep. 154, 162, as to implied gifts to children, approved.—*In re Rawlin's Trusts*, C.A.—45 Ch. D. 299; 59 L. J. Ch. 599; 63 L. T. 655.

10. *Description of subject-matter of bequest—Leasehold house and premises—Alteration of, between execution of will and death of testator.*—A testator, who died on the 28th of December, 1869, by his will dated the 3rd of August, 1868, made the following bequest: "I give my leasehold house and premises called the Anchor Inn, where I now reside . . . unto my son." The testator made a codicil to his will, dated the 25th of December, 1869, which did not mention this legacy. At the date of the will the Anchor Inn was in course of reconstruction, with the view of separating two rooms from the inn to be let to a tenant who was to occupy them as a shop. The alterations were completed between the date of the will and the death of the testator, and at the latter date were occupied as a shop by a tenant of the testator. Prior to and during the alterations the premises were occupied solely by the testator, who continued up to the date of his death to reside in the inn which had been separated from the shop.

Held, that as the shop was not leased by the testator until after the date of his will, it was included in the terms of the bequest, and so passed to the testator's son.—*In re Edwards, Rowland* v. *Edwards*, CH.D. CHI., J.—63 L. T. 481.

11. *Discretionary trust—Residue—All or any portion—Maintenance or benefit of legatee—Non-exercise of discretion—Interest of legatee in fund.*—A testator devised a share of his residue, subject to a life interest therein, to trustees upon trust "to pay or apply all or any portion of the income or *corpus* of the same in or towards the support or maintenance, or otherwise for the benefit, of their brother, R. T., in such manner and proportions in every respect, and at such times, as they shall deem most conducive to his welfare." R. T. died during the continuance of the life interest. On the fund subsequently falling into possession, the legal personal representative of R. T. claimed it as part of R. T.'s estate. The trustees had not attempted to deal with the fund while reversionary.

Held, (1) that the trustees had not waived their discretion, or been guilty of default or refusal to exercise it; (2) that no trust could be implied making it their duty to apply the whole fund for R. T.'s benefit, but that they were only bound to apply so much of it as, in their discretion, they thought fit for his personal benefit and welfare; and (3) that, under the circumstances, no transmissible interest in the fund ever vested in R. T. so as to pass to his legal personal representative.

In re Sanderson's Trusts, 5 W. R. 864, 3 K. & J. 497, followed.

Gough v. *Bult*, 16 Sim. 45, and *Gude* v. *Worthington*, 3 De G. & Sm. 389, distinguished.—*In re Stanger, Moorsom* v. *Tate*, CH.D. CHI., J. 455—60 L. J. Ch. 326; 64 L. T. 693.

11a. *Equitable contingent remainder—Legal estate in mortgagees—Contingent Remainders Act*, 1877—*Acquisition of legal estate—Intermediate rents—Heir-at-law—Next of kin.*—A testator devised freeholds, the legal estate in some of which was outstanding in mortgages, to his son for life, with remainder to such of the children of the son as, being sons, should attain the age of twenty-one, or, being daughters, should attain that age or marry under it; he gave his residuary real and personal estate to his son absolutely. The will was executed before the passing of the Act 40 & 41 Vict. c. 33. The testator died in 1878. In 1888 the son, as tenant for life, sold part of the unincumbered freeholds, and out of the proceeds of sale paid off the mortgages on the incumbered freeholds, which were reconveyed to the uses of the will. Shortly afterwards the son died intestate, leaving three infant sons only surviving him.

Held, that the reconveyance of the mortgaged real estate did not defeat the contingent remainder created by the will.

Held, that the intermediate rents of the freeholds during the suspense of vesting of the remainder went to the estate of the son under the residuary devise as real property.—*In re Freme, Freme* v. *Logan*, CH.D. NOR., J. 696—60 L. J. Ch. 562; 65 L. T. 183.

12. *Executory devise—Life estate—Contingent remainder—Children who attain twenty-one "before or after the death of the tenant for life"—Powers of maintenance and advancement—No estate in trustees.*—Devise, subject to a life estate in E. D., to the use of such child or children of the said E. D. "as, either before or after the death of the said E. D.," should attain the age of twenty-one.

Held, an executory devise.

In re Lechmere and Lloyd, 18 Ch. D. 524, 30 W. R. Dig. 225, and *Miles* v. *Jarvis*, 24 Ch. D. 633, 32 W. R. Dig. 231, followed.

Brackenbury v. *Gibbons*, 2 Ch. D. 417, 24 W. R. Dig. 315, not followed.

The legal effect of powers of maintenance and advancement in cases where the trustees take no estate, explained.—*Dean* v. *Dean*, CH.D. CHI., J. 568—60 L. J. Ch. 553; 65 L. T. 65.

13. *Forfeiture clause—Annuity—Interfering with management—Frivolous action against trustees.*—A testator gave his freehold estate at R. to two trustees in trust to pay certain annuities to the plaintiff during his life, and after his death for the plaintiff's unborn sons in fee; provided always that if the plaintiff should in any way intermeddle or interfere with or attempt to meddle or interfere with the management of the testator's real or personal estate the said annuities should immediately cease. And the testator gave the residue of his real and personal estate to his daughter E. A., who was one of the trustees. E. A. entered into possession of the estate at R., and paid the annuities regularly to the plaintiff; but the plaintiff brought an action against the two trustees, alleging that his annuities had not been paid, that E. A. had wasted the estate, and that the buildings were out of repair, and claiming an account, an injunction, and receiver. The court held on the evidence that none of the charges against the trustees were established.

Held, that the action was groundless and frivolous, and was an attempt to interfere with the management of the estate, and that the plaintiff, by bringing the action, had forfeited his annuities.—*Adams* v. *Adams*, CH.D. FRY, L.J.—45 Ch. D. 426; 63 L. T. 442.

14. *Forfeiture clause — Life estate — "Taken in execution by any process of law"—Receiver—Equitable execution — Contingent remainder — Executory devise.*—The testator by his will of the 28th of November, 1870, devised real estate to his son for life, and after his death to all the children of his said son, whether then or thereafter to be born, who should attain twenty-one, or, being a daughter, should marry under that age, as tenants in common. He declared that his said son should not have any power to sell or dispose of his life estate, and, in case his said son should attempt to sell or dispose of the same, or become bankrupt, or the estate

should be taken in execution by any process of law for the benefit of any creditor, then he declared that the devise to such son should immediately become void as if such son were then actually dead, and that the estate so devised to him should thenceforth vest in the persons who, under the devises thereinbefore contained, would be next entitled thereto. The testator died in February, 1879; the son took possession; and on the 9th of December, 1887, a receiver was appointed of the rents of the son's estate. At that date one of the son's children had attained twenty-one, two had not attained that age or married, and one was not yet born.

Held, that by the receivership order the son's estate had been taken in execution within the intention of the testator, and that it had ceased.

Held, further, that, in order to carry out the testator's intention, the gift over must be construed, not as a contingent remainder, but as an executory devise, so as to enable all the son's children in existence at the date of the order, or born or to be born thereafter, to share in the property on their attaining twenty-one or marrying.—*Blackman* v. *Fysh*, CH.D. KEK., J. 520—64 L. T. 590.

15. *Forfeiture clause—Life estate—Determinable life interest—"Payable to or voted in"—Receiving order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 70.—Testator directed his trustees to pay the income of his residuary estate to his son A. for life, or until he should assign, charge, or otherwise dispose of the said income, or some part thereof, or become bankrupt, "or do or suffer something whereby the said income, if belonging absolutely to him, or some part thereof, would become payable to or vested in some other person," and if such trust should determine, then upon certain trusts in favour of A., his wife and children.

On the 28th of November, 1890, a receiving order was made against A., but no further bankruptcy proceedings, except a meeting of creditors, had been taken. The trustees had retained the income accrued due since the receiving order, on the ground that the gift over had come into operation.

Held, that, since the receiving order, the income was no longer "payable to" A., and that his life interest had consequently determined.—*In re Sartoris, Sartoris* v. *Sartoris*, CH.D. CHI., J.—60 L. J. Ch. 634; 64 L. T. 730.

16. *Forfeiture clause—Life estate determinable on alienation—Gift over to children—Time for ascertaining class—Right to* interim *income between cesser and vesting.*—A testator left a leasehold interest to his son M. for life, and after his death to his children living at his death, if more than one, share and share alike; and if M. should die without any child him surviving, to the testator's son J. for life, with remainder to J.'s children living at his death. There was a proviso in the will whereby, if either of the sons parted with or mortgaged the interest bequeathed to him, the bequest was revoked and directed to go as provided after his death. The testator appointed his son A. his residuary legatee. After the death of the testator M. executed a mortgage. At the date of the mortgage M. was a bachelor, but he subsequently married and had two children.

Held, (1) that there was a cesser of the estate of M.; (2) that the property devolved as in the event of his death, *i.e.*, to a class consisting of children living at his death; and (3) that there was no disposition of the *interim* income of the property, which accordingly passed to the residuary legatee. —*Donohoe* v. *Mooney*, M.R. (Ir.)—27 L. R. Ir. 26.

17. *Forfeiture clause—Life estate to widow determinable in several events—Gift over on those events alone—Practice—Special case—R. S. C.*, 1883, *ord.* 34.—A testator gave to trustees all his real and personal estate upon trust to allow his wife to receive the rents and dividends for her life, provided she kept his property in repair and insured the same against fire, and provided further that she remained a widow and did not cohabit with any man; and in case she made default in repairing or insuring the property, or married, or cohabited with any man, then in either of those cases upon trusts in favour of his children. The widow died without having committed any of the acts on which her life estate was determinable.

Held, that the gift over took effect on the determination of the prior estate by death as well as on the other events.

Held, also, that, where the answer to a special case stated under order 34 disposes of the action, the proper course is to take a declaration in the terms of the answer, and stay further proceedings in the action, and that it is unnecessary to set down the action for trial on motion for judgment, as suggested in *Harrison* v. *Cornwall Railway Co.*, 16 Ch. D. 66, 80.—*In re Cane, Ruff* v. *Sivers*, CH.D. KAY, J.—60 L. J. Ch. 36; 63 L. T. 746.

18. *Joint tenants—Tenants in common—Words of distribution.*—A testator who died in 1826 by his will devised real estate to trustees upon certain trusts during the lives of his children and the survivor of them, and from and after the decease of the survivor, or during the life or lives of all or any, with their concurrence, upon trust to sell and stand possessed of the proceeds upon trust "for all and every my said sons and daughters who shall be then living, and the issue of any then dead (such issue standing *in loco parentis*), share and share alike." The testator left six children surviving him, the last survivor of whom died in 1877. The property was sold in 1890. Only two of testator's children had issue. Two of testator's grandchildren died before the sale.

Held, that, as the words of distribution, "share and share alike," occurred only once, the issue of each child took as joint tenants *inter se.*—*In re Yates, Bostock* v. *D'Eyncourt*, CH.D. NOR., J. 573—[1891] 3 Ch. 53; 64 L. T. 819.

19. *Name and arms clause—Time for compliance—Fine levied by married woman.*—A will directed each devisee becoming entitled to the actual possession of the devised lands to take the name and arms of the testator, subject to forfeiture on neglect to do so for the space of one year next after becoming entitled to the possession of the estates. A tenant for life died on April 9, 1888, and on April 9, 1889, the next remainderman took the name and arms of the testator.

Held, that the day of the death of the tenant for life was not to be counted, and that, therefore, the condition was duly complied with.

A fine levied by a married woman of lands acquired by descent, even before entry, is valid, though not made with proclamations. The fine need not show the separate examination of the married woman.—*Miller* v. *Wheatley*, Q.B.D. (Ir.)—28 L. R. Ir. 144.

20. *Perpetuity—Bequest of annuity for celebration of masses.*—A bequest to the clergyman for the time being officiating in the parish of A. at the time of the testator's death, and his successors, of an annuity for fifty years upon trust for the celebration of masses for the repose of the soul of the testator and others, is void as being an attempt to create a perpetuity.

legacy from the expiration of a year after the date of the testator's death, but not from the date of his death.—*In re Bignold, Bignold* v. *Bignold*, CH.D. NOR., J. 184—45 Ch. D. 496; 59 L. J. Ch. 737; 63 L. T. 542.

32. *Legacy to wife—Priority.*—Pecuniary legacy to the testator's wife, to be paid to her within three calendar months after the testator's decease, to enable her to provide and furnish a suitable house and to defray any other expenses.

Held, that the legacy to the wife had no priority over the other legacies, but was liable to abate with them on the estate proving insufficient for payment in full.

Blower v. *Morret*, 2 Ves. sen. 420, followed.

In re Hardy, Wells v. *Borwick*, 29 W. R. 834, 17 Ch. D. 798, dissented from.—*In re Schweder's Estate, Oppenheim* v. *Schweder*, CH.D. CHI., J. 588—[1891] 3 Ch. 44; 60 L. J. Ch. 656; 65 L. T. 64.

REPUBLICATION—

33. *Will of married woman during coverture—Death of husband—Subsequent testamentary instrument of widow containing no reference to will—Will and testamentary instrument admitted to probate.*—In order that a will may be republished by a subsequent testamentary instrument, that instrument must contain sufficient reference to the will to raise the inference that the testator had in his mind the republication of his will, though no expression of direct intention is absolutely necessary.

By marriage settlement M. S. had a power of appointment over certain freehold messuages and a sum of £2,000 New £3 per Cents., being property comprised in such settlement. By her will, made in 1878, in her husband's lifetime, she exercised this power, and also purported to dispose of all other property over which she had any power of disposition. After her husband's death M. S. executed a testamentary instrument, subsequently admitted to probate with the will, not referring in any way to the will. M. S. died in 1888, possessed of other estate, including the property mentioned in the testamentary instrument, to which she was absolutely entitled, besides the settled property and certain separate estate.

Held, applying the principle of *Barnes* v. *Crowe*, 1 Ves. jun. 497, that as the testamentary instrument did not contain anything from which it could be, directly or indirectly, inferred that the testatrix had in her mind the republishing of her will, such instrument did not act as a republication.

Rowley v. *Eyton*, 2 Mer. 128, explained.—*In re Smith, Bilke* v. *Roper*, CH.D. STI., J. 93—45 Ch. D. 632; 60 L. J. Ch. 57; 63 L. T. 448.

See also ACCOUNT STATED; ADMINISTRATION; CHARITY; EXECUTOR; POWER OF APPOINTMENT, 2, 3, 5, 6; PROBATE; TRADE UNION; VENDOR AND PURCHASER, 2.

WITNESS.—See BANKRUPTCY, 24, 33; EVIDENCE; PRACTICE, 59, 60; PROBATE, 14.

"WORKMAN."—See MASTER AND SERVANT, 6, 7.

[THE END.]

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